The liability for a pedestrian's injuries when a vehicle jumps a curb

If the injured pedestrian was a business patron, then foreseeability by that business is a question for a jury

By Dan Pleasant

Almost thirty years ago, President Ronald Reagan delighted the American Tort Reform Association with this anecdote:

> *In California, a man was using a public telephone booth to place a call. An alleged drunk driver careened down the street, lost control of her car, and crashed into the phone booth. Now, it's no surprise that the injured man sued. But you might be startled to hear whom he sued: the telephone company and associated firms.*

It does sound a little far-fetched when you put it that way. But of course, there's a lot more to the story.

The case Reagan was referring to, as many of you are aware, was *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49. (See Ruth Kwon, *Bigbee v. Pacific Telephone and Telegraph*: Cramming Politics into a Phone Booth, at http://www.law.berkeley.edu/sugarman/Bigbee_42306_web_version.pdf.)

Here are some salient facts Reagan chose not to share with his audience:

- The plaintiff had suffered serious injury – a traumatic amputation of his leg.
- Bigbee not only sued the telephone company, but the drunk driver as well.
- The telephone company selected the site of the telephone booth, which was 15 feet from traffic.
- A telephone booth located in the exact same spot had been hit by a car previously.
- Bigbee testified he saw the approaching car, but could not get out of the way because the telephone booth door malfunctioned.

Despite these facts, the trial court ruled the accident unforeseeable as a matter of law, and granted summary judgment to the telephone company. The Court of Appeal concurred.

But the California Supreme Court disagreed in a 6-1 decision. It stated that the issue was "a relatively simple one. Is there room for a reasonable difference of opinion as to whether the risk that a car might crash into the phone booth and injure an individual inside was reasonably foreseeable under the circumstances [of the case]?" (*Bigbee*, *supra*, at p. 57.)

The court determined that it could not conclude as a matter of law that injuries to users of telephone booths adjacent to thoroughfares inflicted by negligent or reckless drivers were unforeseeable. "'[J]ust as we may not rely upon our private judgment on this issue, so the trial court may not impose its private judgment upon a situation, such as this, in which reasonable minds may differ.'" (*Id.* at p. 59, quoting *Schwartz v. Helms Bakery Limited* (1967) 67 Cal.2d 232, 244.)

History rarely repeats, but it sure does rhyme

Flash forward twenty years. The attorneys I'm working for – Cynthia McGuinn and Miles Cooper – are telling me about a case they want my help on. Two men were transacting business at a bank ATM on a San Francisco street. A taxicab went out of control, careened onto the sidewalk, and crushed the men against the building. One lost a leg; the other, our client, suffered serious injuries. We had sued the cab company – and the bank.

My initial reaction was probably similar to the tort reform audience Reagan regaled with tales of *Bigbee*: "We're suing the bank? That's ridiculous!"

Despite my initial skepticism, I started my research to oppose the bank's motion for summary judgment. The bank was arguing that the incident was an unforeseeable freak accident, and that a decision allowing the plaintiffs to sue would lead to a dystopian vision of San Francisco sidewalks dotted with concrete bollards and barriers.

That's when I found – or more likely was pointed to – *Bigbee*. At the time, I didn't recall its role in the tort-reform wars. But I noted the striking similarities with our ATM case. The similarity was really brought home when I pulled the case off the shelf and saw the diagram of the *Bigbee* accident that was appended to the printed decision. It was a mirror image of the diagram in the traffic collision report in our case.

I knew the bank would argue that the prior-accident evidence in *Bigbee* would support its contention that the accident here was unforeseeable because we lacked any evidence of prior similar incidents. But the prior similar accident in *Bigbee* only added to the weight of plaintiff's evidence – it did not turn the case. Other California cases, known collectively as the curb-jumping cases, had held that prior similar accidents were not required to establish foreseeability in negligence

actions involving cars unexpectedly leaving the roadway, especially when a customer must stand in a fixed location to use the business or service.

The first curb-jumping case: No prior incidents required

In *Barker v. Wah Low* (1971) 19 Cal.App.3d 710, a case decided before and undergirding *Bigbee*, a customer standing at a drive-in restaurant's walk-up window was awaiting service when he was hit by a car that jumped a wooden bumper stop. (*Barker, supra,* at p. 712.) The Court of Appeals reversed the trial court's entry of summary judgment for the restaurant, stating that the accident was foreseeable.

The plaintiffs contended that restaurant had "invited customers to stand awaiting service at a fixed location adjacent to space provided for the operation and parking of motor vehicles, without providing adequate protection from what is generally acknowledged to be a recognized, although seldom occurring, risk." (*Id*., at p. 718.) The court agreed with the plaintiffs, concluding that "[t]he chance that a vehicle would strike a patron at the service counter, unless precautions were taken, was foreseeable. Whether the precautions taken were adequate, and the extent of the hazards from which it was reasonable to require the possessors of the land to furnish protection, are questions of fact." (*Id*., at p. 723.)

In our case, the bank had located and installed its ATM on a busy San Francisco corner without any barrier protection, and invited ATM users to stand at that location to conduct business with their backs to traffic, separated from the vehicular traffic only by the curb. We argued that a reasonable jury could conclude that:

- The curb, with a wheelchair access ramp cut-out, was an inadequate barrier.
- The ATMs needed a simple barrier or bollards between customers and the vehicular traffic.
- The possibility of a vehicle jumping the curb because of mechanical failure or negligence of the driver, although not a common occurrence, was foreseeable.
- The potential risk of harm to ATM users versus the low-cost benefit of a simple barrier or bollards warranted protecting the ATMs from errant vehicles.

Foreseeability is a jury question if customer is near traffic

In *Jefferson v. Qwik Korner Market* (1994) 28 Cal.App.4th 990, a convenience store customer was standing on a sidewalk adjacent to the store when he was struck by a car. Qwik Korner created the typical design parking lot and installed both a concrete wheelstop and a curb. The car went over both of the barriers. Nothing about Qwik Korner's business required a customer to await service in a fixed location – such as a walk-up window adjacent to the parking lot.

The Court of Appeal sustained an entry of summary judgment in favor of the defendant after determining that the nature of the convenience store's business did not require customers to await service by standing in a fixed location adjacent to vehicle traffic areas. The convenience store customer was not required to stand in a fixed location, unlike the pay telephone user in *Bigbee*, the patron using the walk-up restaurant service window adjacent to the parking lot in *Barker* (discussed below), or the ATM users in our case.

In making its determination, the *Jefferson* court reviewed 28 cases from other states in addition to California law. The court found that there were three types of cases where foreseeability was a fact question to be determined by the jury:

- The business had provided no barrier to protect customers from errant traffic.
- The location had a barrier but the business knew of similar incidents.
- Barrier or no, the nature of the business required customers to await service by standing adjacent to vehicle traffic areas.

As to this third category, the court noted: "In effect, if a car jumped the curb, there was a high likelihood that a pedestrian would be at the location." (*Id*., at p. 995.) In our case, there was not only a high likelihood but a virtual certainty that an ATM patron would be engaged in a transaction, his back to traffic, regardless of when a car left the roadway.

Landowners must protect against first injury if dangerous condition exists

Robison v. Six Flags Theme Parks, Inc. (1998) 64 Cal.App.4th 1294, falls into the third category of curb-jumping cases articulated by in *Jefferson*. As in our case, no prior similar accidents had occurred in *Robison*. Business invitees using a picnic table at Magic Mountain, sitting with their backs to the parking lot, were injured when a negligently driven car failed to stop or turn at the parking lot intersection, and, instead, continued across 40 feet of grass and into the table. The Court of Appeal reversed the trial court's entry of summary judgment for Magic Mountain.

The court determined that although no prior similar incident had occurred, the danger was apparent in view of the parking lot and picnic area configuration. Magic Mountain had a duty to take reasonable measures to protect patrons even though there had been no prior incidents. "The record could support a finding that Magic Mountain failed to take reasonable protective measures." (*Robison*, *supra*, at 1296.)

In reaching its determination, the *Robison* court conducted a detailed review of *Ann M.*, a case that held that a landowner's duty of care to protect invitees from the deliberate criminal acts of third persons does not extend to providing security guards, absent prior similar incidents. (See *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666.) As the *Robison* court explained, "crime can occur anywhere" and therefore "the common law instead looks for a higher level of foreseeability of crime in a particular location, such as might be provided by prior similar incidents at that location." (*Robison*, *supra*, 64 Cal.App.4th at p. 1301.) In contrast, cars cannot crash into

picnic tables just anywhere – the tables must be placed in harm's way first. Where an observable hazard ripens into an accident, the accident is foreseeable.

Equally instructive was the *Robison* court's statement that a landowner must protect against the first injury, not await a second, when an unreasonable risk of danger exists. (*Id.*, at p. 1305.) Similarly, we argued that an unreasonable risk of danger existed when ATM users were put in harm's way at one of the bank's busiest ATMs locations, standing in a fixed position, their backs to heavy vehicle traffic, without any barrier or bollard protection between them and errant traffic.

Facts are stubborn things

Using these arguments and authorities, we prevailed at summary judgment. But that was only half the battle. No case, including *Bigbee*, held that a defendant in a curb-jumping case was liable as a matter of law; the curb-jumping cases only say that in certain circumstances, a jury question is presented. So the attorneys still faced the task of convincing a jury that the taxicab's crash into the ATMs was foreseeable and that the bank could and should have protected their customers.

To test our theories and arguments, the attorneys arranged for a mock jury panel. We prepared presentations to present the strongest evidence for both sides. The mock jurors' reactions were eye-opening.

The jurors were divided into two panels for deliberation, meeting in separate rooms. We could go back and forth between observation areas where we could monitor the deliberations unseen. Both panels, generally focusing on the physical layout of the location, believed the bank bore some responsibility for the accident. Some even thought the bank was 100 percent at fault!

Armed with this information, we were able to settle the case.

Lessons learned

First, you need to keep an open mind when evaluating the facts of a potential case. First impressions can be misleading. Keep digging, and be willing to revise your opinion.

Second, there's always more than one way to look at a problem, whether it be an issue requiring legal analysis or the application of law to a set of facts. Rarely is there only one "right" answer. Seek out other opinions, other viewpoints. We may not always have the luxury of having a formal focus group, but we always have colleagues, family, and friends.

Finally, I gained a renewed respect for those plaintiffs' attorneys that have come before. We were lucky: there was a line of curb-jumping cases to refer to and rely on. But once upon a time, there were no such cases. Someone had the vision to see the possibility, and the courage and tenacity to make it a reality.

And so I return to Bigbee – the man, not the case. He and his attorney – Tom Cacciatore, for the record – lost at the trial court, lost at the Court of Appeal. But they kept going. Eleven long years after Charles Bigbee lost his leg in that phone booth, he was granted the right to a jury trial by our Supreme Court. He was finally able to obtain some measure of justice, settling his case against the telephone company. That's the best answer to the tort reformers' ridicule.


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