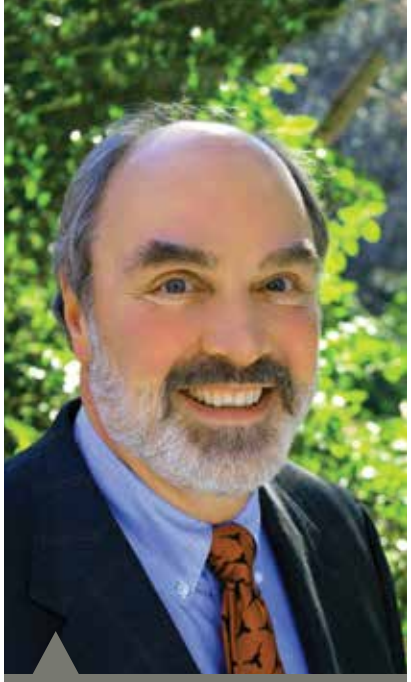
LAW IN ORDER
The Warren Report

HEALTHIER LIVING THE SUPREME COURT WAY



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In 2018 new year, Texas Supreme Court precedents help us to assess whether our past conduct should continue or whether some changes may be in order.

With each new year, we assess whether our past conduct should continue or whether some changes may be in order. Now that 2018 is upon us, that assessment is likely underway once again.

Step one is to try to determine what the likely outcome will be after we act in a particular manner. There is quite a bit of crystal ball or perhaps even Magic 8 Ball logic in play during this analysis. What we seek to discover through this exercise, in legal terminology, may be *foreseeability*. Is the likely outcome, if we engage in certain conduct during the new year, foreseeable?

Is what we have to do, or sacrifice in order to reach the foreseeable outcome, reasonable or unreasonable?

Our analysis won't stop after step one, however, if we are serious about our new year analysis. We recognize that our ability to foresee the future may be flawed. So we add another element to the equation. We add *reasonableness*. Is what we have to do, or sacrifice in order to reach the foreseeable outcome, reasonable or unreasonable?

The two elements of our analysis are certainly related. Yet they also are distinct and independent. Even if we know what we should do to achieve our foreseeable goal, we must weigh the cost to us and determine whether that cost is unreasonable. If it is, chances are we will pursue a less costly goal. If we do, we will hope that the foreseeable outcome of our new pursuit is as favorable to us as the one we dismissed as unreasonably costly.

Throughout the 2018 new year, we can call upon Texas Supreme Court precedent to assist us. In its opinion delivered nearly a year ago, on January 27, 2017, the Texas Supreme Court reversed a Houston 14th Court of Appeals decision, and thoughtfully told Texans how our courts will apply Texas law to analyze the potential liability of apartment owners for the criminal acts of third parties. The case is entitled *UDR Texas Properties LP d/b/a The Gallery Apartments vs. Alan Petrie*, 517 S.W.3d 98 (Tex. 2017) (Petrie v. Gallery).

As Justice Don R. Willett stated in his concurring opinion in Petrie v. Gallery, "I read the Court's opinion as holding that a duty is imposed on property owners to use ordinary care to protect invitees from an unreasonable and foreseeable risk of harm from third-party crimes."

The 2017 opinion from Petrie v. Gallery was not the first time the Supreme Court of Texas determined that it made sense to look at foreseeability and reasonableness together. In 1997, the Texas Supreme Court held in *Lefmark Management Co. v. Old*, 946 S.W. 2d 52, that a person is "...to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee."

In fact, the 1997 Texas Supreme Court stated that unreasonableness turns on the risk and likelihood of injury to [a person] as well as the magnitude and consequences of placing a duty on [another person]. Here the first person is the one who gets injured, while the second person is the one who owns the property on which the injury occurred.

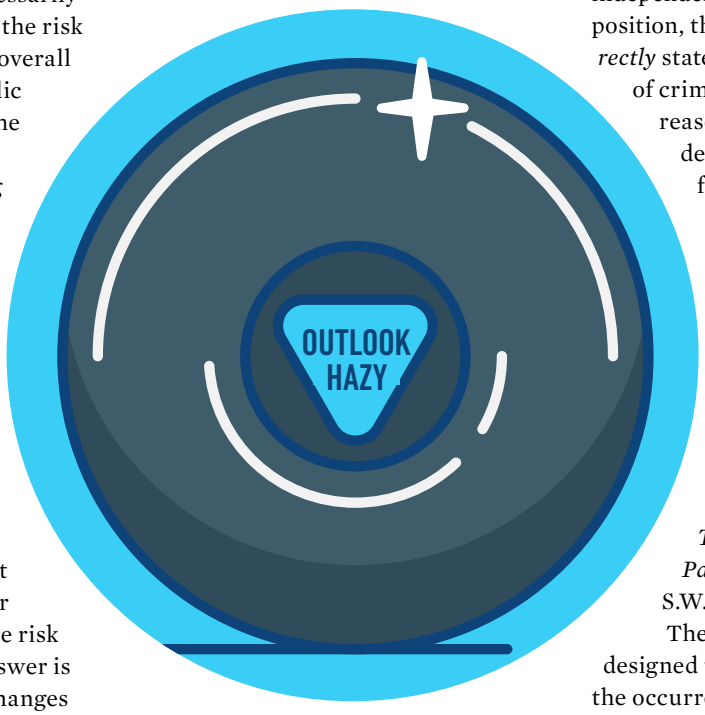
Should our personal new year's development of the plan of action we will adopt in 2018 follow a similar analysis? Should we distinctly consider foreseeability and reasonableness? How likely is it that if we do or refrain from doing certain things (e.g. eat too much and exercise too little), the foreseeable outcome will be overall poorer health?

When we examine the second factor, reasonableness, in our analysis we begin to see the magnitude and consequences of reasonable conduct. What burdens will we necessarily incur to prevent or reduce the risk of weight gain and poorer overall health? As a matter of public policy, should one prefer the burdens that accompany being less fit and weighing more, burdens created by eating too much comfort food and being a couch potato? Or should we find those burdens too costly to our overall health? Does the burden of the unpopular changes (e.g. eating better and exercising more) we would be compelled to make in order to prevent a foreseeable decline in our overall health outweigh the risk of poorer health? If the answer is NO, we should make the changes or else accept responsibility for any negative health consequences.

We could continue along this non-legal road and end up with a self-help book entitled "*Healthy Living the Supreme Court Way*." Then again, we would need a majority to decide upon the content of our book, and that may be challenging. For a more informative and enlightening alternative to enhance our legal knowledge, let us take the foregoing concepts of foreseeability and reasonableness and explore the outcome of the Petrie v. Gallery case.

Alan Petrie was assaulted and robbed in the visitors parking lot of Gallery Apartments. The Court's opinion describes the incident like this: Mr. Petrie arrived at Gallery Apartments one morning around 2:00 a.m. to attend a party hosted by a co-worker. Upon his arrival he parked in the visitor lot. Although the complex was gated, the visitor parking lot, which spanned most of the property's street frontage, was outside the gate and accessible to the public.

While Petrie made a phone call from inside his car, a vehicle pulled up behind his, blocking him in. Two men exited the vehicle and approached Petrie's car. One man pointed a shotgun at Petrie and



ordered him to exit the car. Petrie complied and when requested, he surrendered his wallet and keys. But when ordered to lie down, he hesitated. So one of the men shot him in the knee and Petrie fell to the ground. The shooter then placed the shotgun barrel to Petrie's head and pulled the trigger, but the weapon did not fire. Petrie quickly crawled under the vehicle next to him while the assailants fled.

Petrie sued the Gallery Apartments alleging it knew or should have known about the high crime rate on its premises and in the surrounding area, yet failed to use ordinary care to make the complex safe. After a jury trial, Petrie lost and recovered nothing after the trial court concluded Gallery owed no duty to Petrie.

There was an appeal and the Houston Court of Appeals saw it differently. They concluded "There is evidence of the foreseeability of an unreasonable risk of harm that a person on the premises would be the victim of violent criminal conduct."

The Houston Court of Appeals *erroneously* held that "[t]he potential unreasonableness and foreseeability of harm is considered as a whole, not as separate elements requiring independent proof." To support its position, the court of appeals *incorrectly* stated that "[w]hether the risk of criminal conduct is both unreasonable and foreseeable is determined by assessing the five *Timberwalk Factors*."

What are those, and what is *Timberwalk*? *Timberwalk* is another Texas Supreme Court opinion from 1998 - often discussed in seminars - that address apartment liability for crimnal acts on its property. The case is entitled *Timberwalk Apartments Partners, Inc. v. Cain*, 972 S.W. 2d 749 (Tex. 1998).

The *Timberwalk Factors* are designed to determine whether the occurrence of certain criminal conduct on a landowner's property should have been foreseen. The Texas Supreme Court presented the five *Timberwalk Factors*, and in so doing, instructed lower courts to consider: (1) whether any criminal conduct previously occurred on or near the property; (2) how recently it occurred; (3) how often it occurred; (4) how similar the conduct was to the conduct on the property; and (5) what publicity was given to the occurrences to indicate that the landowner knew or should have known about them.

These factors are still valid when considering whether and to what extent an apartment owner may be liable for third party criminal acts on their property. But the Petrie v. Gallery case points out that *the Timber-*

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walk Factors address only foreseeability. A second analysis to determine *reasonableness* must also be done, and it must be done separately.

The Texas Supreme Court stated in the Petrie v. Gallery opinion that it designed the *Timberwalk Factors* to measure foreseeability; [and] their application cannot, without more, determine the reasonableness of the risk of harm." The majority opinion in the Petrie v. Gallery case went on to conclude that "unreasonableness turns on the risk and likelihood of injury to the plaintiff [i.e. injured party] as well as the magnitude and consequences of placing a duty on the defendant [i.e. apartment owner]."

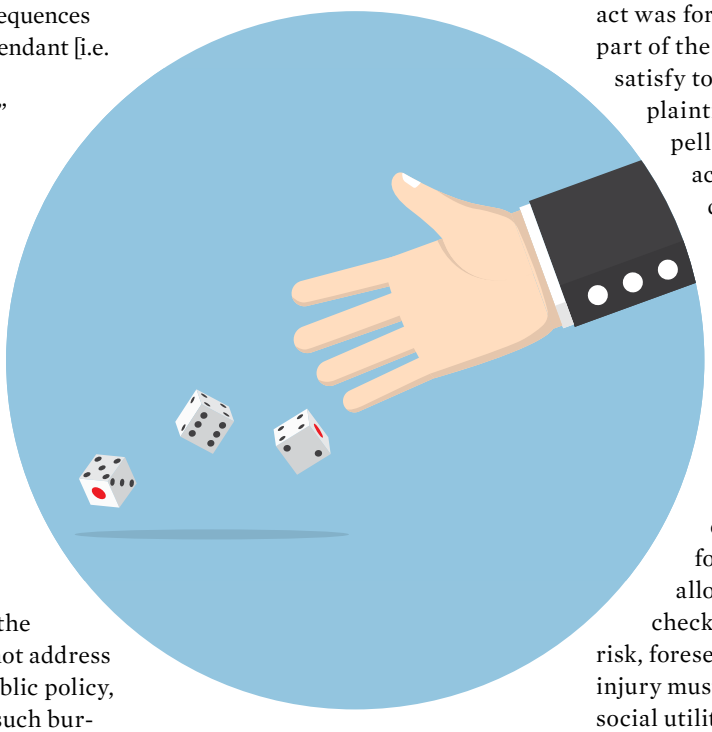
"A risk is unreasonable," states the Texas Supreme Court, "when the risk of a foreseeable crime outweighs the burden placed on property owners – and society at large – to prevent the risk." The court noted that none of the *Timberwalk Factors* compels any consideration of what burdens a property owner would necessarily incur to prevent or reduce the risk of a crime. Likewise, the [Timberwalk] factors do not address whether, as a matter of public policy, it is preferable to impose such burdens or, instead, accept the risk that a crime will occur.

Establishing only the *foreseeability* of a particular type of conduct or outcome is insufficient.

The Petrie v. Gallery opinion, therefore, has clarified that there must be two separate, although related, inquiries when someone seeks monetary relief against an apartment owner for damages caused by a third party criminal act on the property. The Petrie v. Gallery opinion has instructed us that the five *Timberwalk Factors* do not cover both the foreseeability and unreasonableness analyses.

If there is a trial, the victim must offer compelling evidence establishing the things the owner could have done to prevent crime were not so oppressive and expensive as to be unreasonable.

In the Petrie v. Gallery case, the lawyers for Mr. Petrie were asked during oral argument before the Supreme Court of Texas what evidence had been admitted at trial to show the burden Gallery Apartments should bear to prevent crimes like those that injured Petrie. The lawyers identified four; but they acknowledged that there was only one of the four for which there was evidence in the record of the trial. The four mentioned to the justices were: (1) having improved lighting in the visitor parking lot; (2) having courtesy officers who would patrol from 10:00 p.m. to 2:00 a.m. on Friday and Saturday nights; (3) having off duty police monitor the parking lot; and (4) trimming a row of hedges that run between the visitor parking lot and the sidewalk. Only the better lighting proposal, however, was supported by any actual evidence.



The Texas Supreme Court justices also asked Petrie's appellate lawyers what it would cost Gallery Apartments to implement a police presence in its parking lot. Petrie's lawyers again had to admit there was no such evidence in the trial record.

The Texas Supreme Court has now made it clear that even if a plaintiff, namely a third-party crime victim, establishes that the criminal act was foreseeaable, that is only part of the total burden they must satisfy to prevail. In addition, the plaintiff must introduce compelling evidence on what the actual burden on the defendant, (that is an apartment complex owner), would be to prevent or reduce violent crime on their premises.

Establishing only the *foreseeability* of a particular type of conduct or outcome is insufficient. The evidence must also call for the conclusion that allowing the risk to exist unchecked is unreasonable. The risk, foreseeability and likelihood of injury must be weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the property owner. There must be a balancing of the risk to the victim and the burden on the property owner to prevent the commission of crime at its apartment community.

In 2008, in the case of *Trammell Crow Central Texas, Ltd. v. Gutierrez*, a concurring opinion by Supreme Court of Texas Justice Wallace Jefferson commented how the *unrea-*

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sonableness inquiry includes whether crime prevention measures required conspicuous security at every point of potential contact between a patron and a criminal, or requires extraordinary measures to prevent a similar occurrence in the future.

Justice Jefferson went on to comment, in the same opinion, as follows: "[t]he question is the extent to which we should require premises owners – even those who have experienced crime in the past – to provide the same level of security that airports enlist to prevent terrorism. Life in a free society carries a degree of risk. That risk can be virtually eliminated by a pervasive military presence, but the burdens – both in terms of the economic cost to premises owners and in the oppressive climate a police state spawns – would be prohibitive."

A key takeaway from the Petrie v. Gallery case is that there is a lot to prove at a trial involving a claim based upon third party crime. The *Timberwalk Factors* remain. But to them, we can now add the *Petrie Factors*. What are they? If a risk posed by foreseeable criminal activity is established, that risk must be weighed against the consequences of placing a too high a burden on the owner of the apartments, and on society, to reduce or eliminate that risk. If the risk is still unreasonable in light of the requisite burden, liability on the apartment owner may result.

When you are weighing both the existence of risk and the burden of preventing that risk, separate evidence of both is needed. The inquiries are uniquely distinct. While they are related issues, they are also separate elements requiring independent proof. The scales tipped in favor of Gallery Apartments, to at least a large extent, because Petrie offered no evidence of and did not argue that he faced an unreasonable risk of harm.

Stated another way, Petrie's case failed because the opinion suggests he relied exclusively on a foreseabilty evaluation. He correctly argued the *Timberwalk Factors* were determinative of the foreseeability the crime would occur. But he incorrectly argued that those same five factors were determinative of both the burden on Gallery Apartments to make the property safe from foreseeable crime, and whether that burden was reasonable.

The record from the Petrie v. Gallery case was neither obtained nor reviewed to write this article. As such, many questions – the rest of the story one might say – remain unanswered. There are certainly a lot of answers to who, what, where, when, why and how questions that the judge and jury took into account. No matter what those answers may have been, they may not have helped Petrie to prevail.

When the trial court judgment stated that Gallery Apartments owed no duty to protect Petrie from the criminal acts of third persons, did it make that determination based on foreseeability or unreasonableness or both? All we know is that the trial court judge concluded that by failing to address unreasonableness, Petrie failed to challenge a potential independent basis for the trial court's ruling.

We also know that the Houston 14th Court of Appeals disagreed with the trial court. It concluded that there was evidence Gallery Apartments knew or should have known of a foreseeable risk of harm that a person on the premises would be the victim of violent criminal conduct. The court of appeals went on to *erroneously hold* that "[t]he potential unreasonableness and foreseeability of harm is considered as a whole, not as separate elements requiring independent proof." In fact, the court of appeals expressly and again *erroneously determined* that "[w]hether the risk of criminal conduct is both unreasonable and foreseeable is determined by assessing the five *Timberwalk Factors*."

The Texas Supreme Court ultimately agreed with the trial court. The Petrie v. Gallery opinion concluded as follows: "We reverse the court of appeals because it failed to properly consider whether the risk of harm was unreasonable. We render judgment in Gallery's favor because Petrie failed to offer evidence of the burden that would be imposed on Gallery to prevent or reduce the risk of a crime like this one."

Whether your personal assessment of your new year's conduct will take the form of a resolution or a commitment, realize that its success depends upon a two-part (at least) analysis. First, can you foresee the consequences of your questionable conduct (e.g. over-eating and under-exercising)? Yes. Second, will you independently and candidly weigh the costs to you to eliminate the questionable conduct? After reading this, you most likely will. Will you achieve your resolution of better health in 2018? The Magic 8 Ball says "Signs Point to Yes."

Will you achieve your resolution of better health in 2018?