Supreme Court No. S063612
2nd Civil No. B094739

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SHARON P.,

Plaintiff and Appellant,

vs.

ARMAN, LTD.; APCOA, INC., dba
PARKING SERVICES, INC.,

Defendants and Respondents.

Appeal from the Los Angeles County Superior Court
Honorable Richard Neidorf, Judge
LASC Case No. SC029060

RESPONDENT ARMAN, LTD.'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

This case is not about either "paving the road to damnation" or class warfare. (Appellant's Brief on the Merits ["App. Br."] 6, 8). It is about security: whether and to what extent a landowner must provide security against societal crime. It is also about the security that comes when courts do not quickly or whimsically alter established legal principles. And it is about the security that comes when courts formulate sufficiently concrete standards of care so parties may conduct their affairs accordingly.

Less than five years ago in *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666 ("*Ann M.*"), this Court held that rarely if ever could a duty be imposed on landowners to fight societal crime absent "prior similar incidents." This threshold prior-similar-incidents test has proven to be a workable and reasonable approach to a difficult problem. Crime has actually declined since this Court decided *Ann M.* Plaintiff offers no good reason for the Court to abandon this test so soon, or ever.

Unlike the amorphous and discredited "totality of the circumstances" test plaintiff would have this Court revive, the prior-similar-incidents test provides useful guidelines for the future conduct of human affairs. Under the prior-similar-incidents rule, landowners do not have to guess what a judge or jury might decide — in retrospect — was or was not "inherently dangerous" property. Under the prior-similar-incidents rule, landowners know that if crime has occurred on their property, they must take reasonable steps to discourage future similar crime. Absent such knowledge, however, landowners should not be singled out for crime-fighting duties and held to a higher standard of care than anyone else.

Plaintiff suffered an entirely random act of sexual violence. Contrary to plaintiff's unsupported assertions, there had been no prior similar incidents on the defendant's property. Contrary to plaintiff's frenzied exhortations, defendant is not morally responsible for what occurred and should not be legally responsible, either. The trial court properly dismissed plaintiff's case on summary judgment. The Court of Appeal's judgment should be reversed with instructions to affirm that judgment.

LEGAL DISCUSSION

I.
THIS COURT SHOULD NOT OVERTURN SOUND DUTY PRINCIPLES ESTABLISHED IN *ANN M.* JUST FIVE YEARS AGO.

"The rule of laws commands respect only through the orderly adjudication of controversies, and individuals, institutions and society in general are entitled to expect that the law will be as predictable as possible." (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 921 (opn. of Mosk, J.).) This is a fundamental premise of the common law and stare decisis. (See *People v. Stansbury* (1993) 4 Cal.4th 1017, 1073 (conc. opn. of Kennard, J. ["I 'yield to the obligation . . . to live with the law as it has been stated'"]).)

A. Duty Is And Should Remain A Legal Determination For The Court.

At times, plaintiff seems to concede that the existence of duty is a legal issue for the court to determine. (App. Br. 19, 21.) Elsewhere, however, she argues to the contrary, that juries are equally suited to the task and do and should engage in the same sort of policy determinations courts do. (App. Br. 3, 46-48.)

Plaintiff's concession is correct; her contrary argument is not. Duty is and should remain a question of law for the courts. The foreseeability determinations juries make with respect to proximate cause are not the same foreseeability determinations courts make with respect to the existence of a duty. As this Court recently reaffirmed in *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 476:

> "[T]here are numerous circumstances . . . in which a given injury may be 'foreseeable' in the fact-specific sense in which we allow juries to consider that question, but contrary to plaintiff's understanding, the 'foreseeability' examination called for under a duty analysis pursuant to *Rowland v. Christian* [(1968)] 69 Cal.2d 108, 113, is a very different and normative inquiry."

Duty is a legal issue for very good reasons. It gives courts the opportunity to formulate general principles of due care for application in future similar cases. In addition, it prevents inconsistent decisions by juries in similar cases and limits the potential that juries will impose liability based on sympathy for an unfortunate plaintiff rather than on any unreasonable conduct by a deep-pocket defendant. Moreover, when courts lay down clear principles, parties will know in advance what conduct is appropriate and what is not and pursue their affairs accordingly. If litigation nevertheless results, the parties and courts will be better able to predict the outcome and more likely to resolve their disputes without going to trial.

This Court should reject plaintiff's suggestion that in this or any other case the duty determination should be left to the jury in the first instance.

B. The Prior-Similar-Incidents Rule Is And Should Remain The Basic Test For Imposing A Duty On Landowners To Prevent Societal Crime.

Plaintiff reads *Ann M.* as creating a "balancing" test to be applied anew to each particular factual circumstance presented to a court. Plaintiff's inferred case-by-case "balancing" test, however, is indistinguishable from the "totality of circumstances" test that *Ann M.* resoundingly rejected.

1. *Ann M.* Adopts A Workable Bright-Line Rule: Absent Extraordinary Circumstances, A Landowner Owes No Duty To Prevent Crime Unless There Have Been Prior Similar Incidents.

In *Ann M.*, this Court drew a line that provides landowners clear guidance when they are expected to take preventative measures against crime. This Court first took into account the foreseeability of crime in a particular location and the vagueness, efficacy, and burden of potential preventive measures. (6 Cal.4th at p. 679.) This Court then held that

> "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. To hold otherwise would be to impose an unfair burden upon landlords and, in effect, would

> force landlords to become the insurers of public safety, contrary to well-established policy in this state." (6 Cal.4th at p. 679, fn. omitted.)

Justice Mosk in dissent recognized that *Ann M.* "in effect revive(s) the . . . 'prior similar incidents' test." (6 Cal.4th at pp. 680-681.) The *Ann M.* majority rejected the effort in *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112 ("*Isaacs*") to undermine the prior-similar-incidents rule, both because it was unnecessary to abandon the test to achieve the result in *Isaacs* — since prior similar incidents existed in *Isaacs* — and because the totality-of-the-circumstances test had not withstood judicial or scholarly criticism. (6 Cal.4th at pp. 677-678.)

2. *Isaacs*'s Totality-Of-The-Circumstances Test Should Not Be Revived.

Plaintiff urges this Court to erase this bright-line rule and adopt an amorphous totality-of-the-circumstances test for a landowner's duty to do everything possible to fight crime other than to hire security guards. Like the Court of Appeal majority, plaintiff reads *Ann M.*'s prior-similar-incident analysis as applying only to a duty to hire security guards and not to any duty to take other, unspecified measures to deter crime. She argues that the discredited *Isaacs* reasoning and Restatement Second of Torts commentary should potentially impose a duty to take all steps short of hiring security guards to prevent crime based on a case-by-case balancing of the particular circumstances confronting the landowner. (App. Br. 20, quoting Rest.2d Torts, § 344, com. (f).)

That is exactly what *Ann M.* — in revisiting and refining *Isaacs*'s unnecessary language — says California law is not. On the one hand, *Ann M.* recognizes the potentially unlimited sweep of such language since in our society "[i]t is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable." (6 Cal.4th at p. 678.) *Ann M.* also recognizes that what measures are "adequate to deter crime is not well defined" because "'[n]o one really knows why people commit crime, hence no one really knows what is 'adequate' deterrence in any

given situation.'" (*Id.* at p. 679 quoting *7735 Hollywood Blvd. Venture v. Superior Court* (1981) 116 Cal.App.3d 901, 905.)

On the other hand, the burden of requiring landowners to prevent crime in every commercial parking structure in this State is great, regardless whether the measures mandated are security guards or, as plaintiff suggests, maintaining clear sight lines and bright lighting, eliminating all storage areas that (in plaintiff's view) attract transients, and providing "periodic walkthroughs." (App. Br. 12, 27.) In many instances, plaintiff's suggested duties would require expensive structural changes and additional on-premises personnel.

These competing duty considerations apply regardless of the security measure proposed. Nothing in *Ann M.* suggests that the balance should change from case to case or with every conceivable security measure. To the contrary, *Ann M.* properly has been applied in other factual scenarios and without regard to the nature of the landlord's supposed security lapse. (*Pamela W. v. Millsom* (1994) 25 Cal.App.4th 950 [no duty imposed on landlord to afford sufficient physical security for the premises absent prior similar incidents].)

Reading *Ann M.* as creating some new, hybrid case-by-case "balancing" rule as plaintiff suggests would simply reinstate, under another name, the discredited totality-of-the-circumstances rule and all of its evils. Whether determined by a court or a jury, resolving duty only after the fact under an amorphous balancing standard inevitably will lead to inconsistency and uncertainty. Landowners would have no notice as to what, in retrospect, some court might decide was or was not their duty. Unless landowners turn their premises into armed fortresses, there will always be *some* additional measure that a plaintiff can claim should have been taken. A case-by-case or measure-by-measure analysis would transform duty from a prescription as to how landowners should act in the future into an after-the-fact litigation free-for-all.

3. There Is No Basis For A Different, "Inherently Dangerous Property" Rule To Apply To Commercial Parking Structures.

The Court of Appeal majority in this case would have decided that violent crime does not seem improbable in commercial parking garages so that all such garage owners have a duty as a matter of law to prevent third-party crime on their premises. While purporting to limit its holding to commercial parking garages, the majority's reasoning would have led to the conclusion that virtually all property is inherently dangerous — since crime can and does occur almost anywhere in our society — and required all landowners to fight society's battle against crime. That is the result *Isaacs* suggests but *Ann M.* quite properly eschews.

Plaintiff likewise decries the dangers of parking garages, although as part of her totality-of-circumstances/balancing argument rather than as a stand-alone basis for imposing a duty. But plaintiff's self-serving opinions are no substitute for the hard facts necessary to formulate a wide-reaching legal duty. The available statistics do not support plaintiff's colorful characterizations of the evils of office parking garages. In fact, as we have shown, U. S. Department of Justice studies do not single out parking garages as an unusually likely place for crime in general or sexual assaults in particular to occur. (Respondent Arman Ltd.'s Brief on the Merits 20.)

Plaintiff cites other statistics, claiming they show that for other than "date rape," 18.8% of sexual assaults occur in parking lots or garages. (App. Br. 39-40.) Unfortunately, plaintiff misreads the statistical tables. The tables do not mention "date rape." They merely differentiate between crimes committed by strangers and nonstrangers. Moreover, since those statistics are based on a sample of less than ten cases out of a reported 122,090, plaintiff's figures are statistically unreliable. In any event, plaintiff's own statistics show that a much greater percentage of sexual assault crimes by strangers occur on the street and in one's own or a neighbor's home than in parking lots and garages. The statistics undeniably show that parking lots and garages are not inherently different from other places where crime occurs. What matters is not that a person is marginally more or less likely to be assaulted in a parking lot,

but that crime is endemic to all types of property and that parking lots are neither immune from sexual assaults nor unique as a place where they occur. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 404 [declining to impose duty where "(w)e are not directed to any empirical data supporting (plaintiff's) prognostications" as to preventing future harm].)[1/]

Plaintiff also relies on two pre-*Ann M.* Court of Appeal decisions — *Gomez v. Ticor* (1983) 145 Cal.App.3d 622, and *Slapin v. Los Angeles International Airport* (1976) 65 Cal.App.3d 484, as imposing on parking garage owners a duty independent of prior similar incidents to prevent crime. Not so. In *Gomez*, there had been 16 sixteen recent acts of theft and vandalism *in that very garage*. And, *Slapin* reversed the sustaining of a demurrer "plaintiffs may be able to establish a history of crime at the parking lot which rendered the injury foreseeable." (65 Cal.App.3d at p. 489.) *Slapin* distinguished *Sykes v. County of Marin* (1974) 43 Cal.App.3d 158 — which held a governmental landowner not liable for an assault in an unlit parking lot — because the plaintiff there may have been unable to prove prior similar criminal activity in the school parking lot. Both *Gomez* and *Slapin*, thus, are entirely consistent with applying the prior-similar-incidents rule to parking lots. Even if they were not, *Ann M.* now sets the standard.[2/]

1/ The 18.8% of assaults by strangers in parking lots and garages includes not only the commercial parking structures that the Court of Appeal majority found inherently dangerous, but also the open parking lots and residential parking structures the Court of Appeal majority declined to hold inherently dangerous. Rather than the parking structures themselves, the places served by such parking structures — including commercial buildings, restaurants and bars, residences, and schools — account for more than 42% of all assaults by strangers. Likewise, plaintiff's proclamation that over 30% of sexual assaults take place during the day (App. Br. 41) ignores the fact that this means it is less than half as likely a criminal will perpetrate an assault during the day (as happened here) than at night.

2/ In addition, the *Gomez* garage was multi-level and of "labyrinthine nature" and the *Slapin* lot was at a uniquely vulnerable and highly trafficked place — Los Angeles International Airport. (145 Cal.App.3d at p. 628; 65 Cal.App.3d at pp. 486-487.) The garage in this case was one level with line

(continued...)

4. Plaintiff's Out-Of-State Authorities Are Not In Point And Offer No Good Reason To Abandon *Ann M.*

Besides the limited pre-*Ann M.* Court of Appeal cases and the discredited *Isaacs* dictum, plaintiff relies on three out-of-state decisions. None of these cases is in point. If anything, they highlight that *Ann M.*'s prior-similar-incidents rule represents a measured and mainstream solution to a complex problem.

Plaintiff's first case is *Clohesy v. Food Circus Supermarkets, Inc.* (1997) 149 N.J. 496 [694 A.2d 1017]. In *Clohesy*, the plaintiffs' decedent was kidnaped from a supermarket parking lot and later murdered. There had been 60 recent criminal incidents on or near the premises, including thefts, drunk driving, assault, trespass, and possession of drugs, and 13 incidents on the premises in the prior six months alone. (*Id.* at pp. 503-504 [694 A.2d at p. 1021].) The trial court held the market owner had no duty to the decedent and granted summary judgment.

On appeal, the New Jersey Supreme Court acknowledged that different jurisdictions take different approaches to the issue of a landowner's duty to prevent third-party crime. Many jurisdictions, including California, require "prior similar incidents" before imposing landowner liability for third-party crime. Other jurisdictions impose no duty to control third-party crime unless the landowner knows a criminal attack is "imminent." Based on its own prior jurisprudence, however, the New Jersey court chose to adopt the *Isaacs* totality-of-the-circumstances test, and held that in the totality of those circumstances, there was a question of fact whether the market owner breached a duty to the decedent. (*Clohesy*, *supra*, 149 N.J. at pp. 515-516 [694 A.2d at pp. 1027-1028].)

Plaintiff's second out-of-state case is *McClung v. Delta Square Ltd. Partnership* (Tenn. 1996) 937 S.W.2d 891. In *McClung*, the plaintiff's decedent was kidnaped from a shopping mall parking lot and later raped and

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(...continued)
of sight across the entire parking area and served only the tenants in a private office building. (Clerk's Transcript ["CT"] 53.)

murdered. The defendants, owners of the shopping mall and a Wal-Mart, operated in an area where crime was so rampant that one nearby store had posted guards in watchtowers throughout its parking lot. In the 17 months before the McClung kidnaping, on or near the defendants' premises there had been an attempted kidnaping, a bomb threat, 14 burglaries, 12 malicious mischiefs, 10 robberies, 36 auto thefts, and 90 larcenies. The manager of the defendant Wal-Mart store admitted he would not hold sidewalk sales or place merchandise outside the store for fear it would be stolen. (*Id.* at pp. 903-904.) The trial court granted summary judgment to the defendants on the duty issue.

The Tennessee appellate court reversed and remanded for further determination of duty by the trial court under a "balancing test" that the court described as a "flexible" amalgam of the prior-similar-incidents and totality-of-circumstances tests. In the process, however, the court cogently criticized the totality-of-the-circumstances test as

> "too broad a standard, effectively imposing an unqualified duty to protect customers in areas experiencing any significant level of criminal activity. [Citing *Ann M.*] The approach might deem criminal attacks on customers foreseeable as a result of circumstances such as the level of crime in the neighborhood, inadequate lighting, or architectural designs, even if no prior instances of crime had occurred. [Citing *Isaacs*.] As a practical matter, the totality approach arguably requires businesses to implement expensive security measures (with the costs passed on to customers) and makes them the insurers of customer safety, two results which courts seek to avoid. Businesses may react by moving from poorer areas where crime rates are often the highest. Not surprisingly then, the totality of the circumstances test has been described as 'imprecise,' 'unfair,' and 'troublesome' because it makes liability for merchants even less predictable than under the prior incidents rule. [Citations.]" (*Id.* at p. 900.)

Plaintiff's last out-of-state case is *Krier v. Safeway Stores 46, Inc.* (Wyo. 1997) 943 P.2d 405. Krier, a shopping center supermarket employee, was stabbed to death by a burglar he encountered when he entered the market alone to prepare to open the store. The burglar got inside the store through a skylight after climbing to the roof on a ladder-like antenna at the side of the

store. The trial court granted summary judgment to all defendants, including the shopping center owner.

The Wyoming Supreme Court affirmed. The court commented on various possible tests for landowner liability. It spoke favorably of the *McClung* "balancing test" but did not adopt that or any other test. The court criticized the *Isaacs* totality- of-the-circumstances test — the loosest of all tests — as "'too broad a standard, effectively imposing an unqualified duty to protect customers in areas experiencing any significant level of criminal activity.'" (*Id.* at p. 414.) The court held that even under the *Isaacs* test, however, the shopping center owner would not be liable. There had been no crime on the premises during the prior three years, no violent crime there ever, and no one had entered the store through the skylight for twenty years.

These cases do not assist plaintiff's cause. Under the facts of either *McClung* or *Clohesy*, those courts likely would have found a duty under the prior-similar-incidents test as well as under the other duty formulations they adopted. In addition, these cases involved retail store parking lots. Patrons of retail stores tend to be numerous and would likely be carrying merchandise and money. The courts' conclusions about such retail store parking lots do not apply directly to this case, since an office parking lot is used by tenants, not customers. Criminals tend to go where potential victims are likely to be found, not elsewhere.[3/]

Moreover, the case-by-case "balancing" or "totality of the circumstances" tests adopted by Tennessee and New Jersey courts suffer their own infirmities. They offer little guidance for future cases and expose landowners to liability in cases where there is no reasonable foreseeability that crime will be committed on the landowners' particular premises. Plaintiff offers no good reason why those tests are as good as, much less preferable to, the prior-similar-incidents test this Court has adopted in *Ann M.*

3/ As noted above, the Wyoming decision offers plaintiff no comfort at all. The court declined to establish any particular duty rule, found no duty under any potential duty rule on the facts of that case, and likely would have found no duty under the facts of this case, either.

Finally, neither the Tennessee, New Jersey nor Wyoming cases supports adopting the "inherently dangerous" property test espoused by the Court of Appeal majority in this case. Designating whole classes of property as inherently dangerous leads to irrational results. It treats all commercial parking garages the same, whether they are the same or not. In particular, it does not differentiate between retail parking garages and office tenants' parking garages. It totally excludes other types of parking garages, whether they are more likely dangerous or not. Worst of all, all other property owners are left to speculate whether their particular type of property might someday earn some judge's "inherently dangerous" badge of dishonor.

Plaintiff has proffered no persuasive reason for this Court to abandon its carefully-drawn and recently-adopted prior-similar-incidents test. Defendant urges this Court to stay the course and reaffirm *Ann M.*

II.
THIS IS AN *ANN M.* CASE. PLAINTIFF SUGGESTS NO MEASURES SHORT OF THE COSTLY PROCESS OF POSTING SECURITY GUARDS THAT WOULD MAKE A MATERIAL DIFFERENCE IN PREVENTING THE TYPE OF VICIOUS SEXUAL ASSAULT PLAINTIFF SUFFERED HERE.

A. The Parties Here Are In The Same Position As Those In *Ann M.*

Plaintiff first seeks to distinguish *Ann M.* from this case by arguing that in *Ann M.* the plaintiff was a tenant's employee and not the tenant herself, and that the defendant in *Ann M.* did not have direct possession or control over the place where she was actually attacked. (App. Br. at 24-26.) But in *Ann M.*, this Court found these distinctions irrelevant. It explicitly treated the plaintiff there as if she were the tenant and the shopping center as if it the attack took place on premises it controlled. (*Ann M.*, *supra*, 6 Cal.4th at pp. 675-676.)

Plaintiff also claims *Ann M.* differs from this case because the *Ann M.* defendant had no notice of any criminal acts, similar or not, but here the building owner did have notice of bank hold-ups. (App. Br. 28-29.) Again, *Ann M.* discounted any such difference. This Court specifically reached its

result "even assuming [the defendant] had notice of these [non-similar] incidents." (6 Cal.4th at p. 680.)

B. A Security Guard By Any Other Name Is Still A Security Guard.

Plaintiff would distinguish this case from *Ann M.* because, she suggests, there were security measures short of posting security guards that would have effectively warded off her maniacal assailant. (App. Br. 23.) Her suggestions do not withstand scrutiny. They are, for the most part, poorly disguised versions of hiring security guards. *Ann M.* recognizes that only the most pressing need would justify the burden and expense of employing security guards, and neither plaintiff nor the Court of Appeal majority has articulated such a need here.

Plaintiff suggests defendants could have utilized security cameras already installed in the elevator area of the garage. However, a security camera by itself has little if any crime-fighting value unless there are persons on the premises to continuously monitor video transmissions and respond when a crime is in process. Plaintiff might give those persons a different job title, but security guards by any other name are still security guards.

Plaintiff also suggests defendants could have arranged periodic "walk throughs" by personnel already employed on the premises. This erroneously assumes parking garage owners necessarily have employees or independent contractors readily available to undertake such additional duties. Furthermore, unless these employees are trained and prepared to deal with crisis situations, their occasional presence would be of little or no use. Yet again, plaintiff's suggestion is just another version of security guards.

Plaintiff proposes the posting of signs proclaiming the garage is monitored, a sort of "Beware of Dog" scenario. Of course, this warning would require that the garage actually be monitored by someone, i.e., security guards. Legitimate garage users, not just criminals, would be entitled to rely on the warning. If the warning were just the subterfuge plaintiff suggests, the garage

owner could be liable for lulling a tenant into a false sense of security and inducing carelessness.

Finally, plaintiff urges that parking garage owners keep their garages brightly lit and clean. Unable to shift real moral blame from the criminal to the landowner, by similar reasoning plaintiff attempts to switch attention to the landowner's alleged sin of slovenliness. Plaintiff seems to believe that sexual assailants prefer dirty garages to clean ones and that parking garage owners should know of this sociological phenomenon. According to plaintiff, a clean garage gives "the appearance that someone cares about this garage and sends a message to any potential criminal to go elsewhere." (App. Br. 27.) Plaintiff proffers no support for any of this psychobabble. In truth, "'[w]hile bright lights may deter some, they will not deter all. Some persons cannot be deterred by anything short of impenetrable walls and armed guards.'" (*Pamela W. v. Millsom, supra*, 25 Cal.App.4th at p. 957, quoting *7735 Hollywood Blvd. Venture v. Superior Court, supra*, 116 Cal.App.3d at p. 905.)

Further, additional maintenance, like additional security, requires additional personnel and additional costs. Again, plaintiff offers nothing but her own say-so that more frequent replacement of light bulbs or deodorization of the parking garage would make the slightest difference to a sexually-violent criminal. She never explains why she thinks transients would prefer to reside in dirty rather than clean places. In *Ann M.*, the *actual* "presence of transients" did not suffice to impose a duty. (6 Cal.4th at p. 680.) Yet plaintiff argues a landowner should have a duty to maintain a garage appearance that supposedly *might* be less inviting to transients.

In sum, plaintiff can suggest no preventative measures (short of the use of full-time, on-site security guards) likely to adequately ameliorate the threat of the sort of crime that occurred in the office parking garage in this case.

C. There Were No Prior Similar Incidents On The Premises.

Plaintiff's brief says she will explain to this Court why the bank hold-ups on another building level really were similar to the sexual assault she suffered in the building's tenant garage. (App. Br. 4.) But plaintiff never

offers the explanation. In fact, other than the obvious and superficial point that hold-ups and sexual assaults are both crimes, there is no similarity at all.

First, hold-ups are crimes directed at property, not people. They seldom involve physical violence. Indeed, in only one of seven bank hold-ups in defendant's building was a real gun used, and in only one was anyone physically injured. (CT 210-216.) In *Ann M.* itself this Court noted that even had the landowner had notice of prior hold-ups, they were not similar incidents to a violent sexual assault. (*Ann M.*, *supra*, 6 Cal.4th at pp. 671, 679.) Hold-ups simply do not reasonably portend sexual assaults. (*Ibid.*; *Pamela W. v. Millsom*, *supra*, 25 Cal.App.4th at p. 953.)

Second, hold-ups naturally tend to occur where the money is most likely to be found: at banks, not in tenants' parking garages. By plaintiff's logic, defendant should have been posting security guards at the bank on another level of the building, not in the tenants' parking garage. Additional guards in the bank would have been totally ineffective in preventing the incident that sparked this lawsuit.

There were no prior similar incidents in this case. Under *Ann M.*, defendant had no duty to prevent the unfortunate but unforeseeable attack on plaintiff.

D. If Relevant At All, Neighborhood Crime Statistics Did Not Portend A Sexual Assault In This Particular Parking Garage.

Assuming crime in the neighborhood were a material factor in determining the foreseeability of crime at a particular location (it is not, see *Ann M.*, *supra*, 6 Cal.4th at p. 680; *Pamela W. v. Millsom*, *supra*, 25 Cal.App.4th at p. 957),[4/] a sexual assault on plaintiff was still not reasonably foreseeable. Even plaintiff cannot twist these crime statistics. In 50-square-

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4/ Adopting neighborhood crime as a standard for imposing a landowner's duty to fight crime could have serious negative consequences. Among other things, it would discourage landowners from developing property in troubled neighborhoods and increase the cost of doing business for those who can least afford it.

block area around defendant's office building, adjacent to Beverly Hills, there had been no sexual assaults during the three-month period prior to plaintiff's assault and only two sexual assaults reported during the entire previous year. (CT 199-206; App. Br. 14-15.) This was a remarkably crime-free, and in particular sexual-assault free, area.

In short, the record in this case demonstrates no reasonable foreseeability of violent crime, and especially a sexual assault, in the middle of a work day in the tenants' garage of defendant's office building. Defendant had no duty to prevent the crime.

CONCLUSION

Defendant Arman, Ltd., is not asking for "one free violent sexual assault." (App. Br. 6.) Defendant assaulted no one. The moral blame for what happened to plaintiff belongs with the criminal, not with defendant. Defendant submits that absent prior similar incidents on the premises, the decision whether or not to incur the substantial extra cost of security, and how much security to purchase, ought to be left to the garage owner and those who ultimately will pay the cost, the office parking garage tenants. The cost should not be imposed upon defendant and its tenants, and all those similarly situated, by judicial fiat.

Defendant respectfully urges this Court to reverse the Court of Appeal's judgment and direct that Court to sustain the summary judgment in defendant's favor.

Respectfully submitted,

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