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- PERSPECTIVE -

Ruling clarifies legal duty to protect others from harm

By Hailyn J. Chen and Paul E. Martin

s there a legal duty to protect others from harm caused entirely by third parties? "It depends," goes the standard refrain. And while the characteristically fact-dependent nature of negligence law persists after the California Supreme Court's recent holding in Brown v. USA Taekwondo, 2021 DJDAR 3037 (Cal., Apr. 1, 2021), the unandecision importantly imous clarifies what tests courts must apply to determine whether a legal duty exists.

The case originated under tragic — and, to borrow the words of concurring Justice Mariano-Florentino Cuéllar. "tragically all-too common" - facts. Three women taekwondo athletes sued over sexual abuse they suffered as minors by former Olympics taekwondo coach Marc Gitelman, who ultimately was criminally convicted. While the three prevailed against Gitelman in a \$60 million judgment, the trial court dismissed claims against USA Taekwondo (USAT). the governing body for the Olympic sport, and the United States Olympic & Paralympic Committee (USOPC). The claims against those organizations turned on whether each had a duty to protect the plaintiffs from Gitelman. An appellate court held that USAT did have such a duty and therefore could be liable if a factfinder found it to have breached that duty, but that the USOPC's oversight role was too attenuated to impose liability.

Over the years, the California Supreme Court has made clear that two inquiries bear on whether a duty to protect exists. The special relationship inquiry asks whether a defendant had a special relationship with either the plaintiff or the third-party faced uncertainty about whether

tortfeasor that would justify imposing a duty to prevent harm. This special relationship depends on control over the tortfeasor or a reasonable expectation of protection from the plaintiff. The second doctrine, the so-called Rowland factors, originates from an eponymous case where the Supreme Court analyzed a variety of factors to determine whether public policy supported limiting a duty of care.

But lower courts have applied these tests inconsistently. Some considered them two separate routes to duty, while others structured the inquiry as a twostep test. Still others noted the public-policy rationales common doing so could expose them to liability, and confusion about the exact nature of the third-party duty inquiry has not helped.

In USA Taekwondo, the California Supreme Court clarified that the two-step approach is the right one. Both the special relationship test and the Rowland factors must be satisfied before imposing duty to protect a plaintiff from third-party harm. The special relationship test can be satisfied by either of two types of relationships: a relationship between defendant and victim that "gives the victim the right to expect protection," or a relationship between the defendant and the *dangerous third party* that

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to each test and conflated the two. Confusion over the proper structure of the duty inquiry has serious ramifications; while many of the elements in a negligence action involve questions of fact, the existence of a duty of care is essentially a threshold question of law for the judge. The wrong analysis might result in an unnecessary trial or the premature dismissal of a case that should have gone to the jury.

In the context of a growing awareness of sexual abuse in amateur sports, clarity regarding the allocation of responsibility for devastating harm among the many entities that govern, sponsor, or play any role in athletics is important. Organizations that offer training, guidelines and education in the realm of sports have "entails an ability to control" the third party's conduct.

A 2018 decision by the Supreme Court offers an example of the first sort of relationship: In Regents of University of California v. Superior Court, 4 Cal. 5th 607 (2018), the court held that a university has a special relationship with its students while in the classroom or other curricular settings. And the lower court's application of the test in USA Taekwondo - which the Supreme Court affirmed — illustrates the other type of special relationship; that is, the relationship between a defendant and party that directly caused the harm. The Court of Appeal found that USAT's relationship to Gitelman entailed an ability to control his behavior because the USAT registered Gitelman did not reach the Rowland factors

as a coach and had the authority to impose discipline. By contrast, the USOPC, which oversees and issues guidance for dozens of separate governing bodies, was not in a position to control Gitelman's actions, and therefore was not in a special relationship with Gitelman.

But the special relationship test is only half the equation. For claims and defendants adjudged to satisfy the special relationship test, the Supreme Court explained that courts must separately determine whether policy considerations enshrined in the Rowland factors "justify limiting" the duty of protection that results from the special relationship. By clarifying that the Rowland public policy factors apply as a second step, the court made clear that these considerations are important in establishing the contours of third-party liability.

A particularly interesting application of Rowland's attention to social consequences is Castaneda v. Olsher, 41 Cal. 4th 1205 (2007), which the USA Taekwondo court cited in elaborating the two-part test. In Castaneda, even though a landlord was in a special relationship to his tenants, he had no duty to avoid renting units to gang members, because to impose that duty would invite "arbitrary discrimination on the basis of race, ethnicity, family composition, dress and appearance, reputation," and other factors. Castaneda represents a clear-cut case of negative social outcomes. But courts may wrestle with challenging issues in cases where the public policy ramifications are less clear, such as the facts in Barenborg v. Sigma Alpha Epsilon Fraternity, 33 Cal. App. 5th 70 (2019), where a national fraternity's liability for injuries at a local chapter's party was at issue.

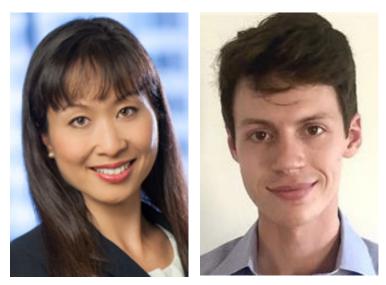
While the USA Taekwondo court

in the context of the USOPC (because it found no special relationship), an examination into the social consequences of imposing a duty might include the problem of disincentivizing the issuance of guidance — an important function of the USPOC.

USA Taekwondo will have meaningful ramifications for them up to liability for the actions courts, litigants and the gener- of third parties. Some landmark al public; in California, the care decisions reshape the legal landeach person and entity owes to scape; USA Taekwondo plants another has been made some- a needed signpost in famously what clearer by the decision. But uneven terrain.

the consequences for organizations like the USOPC may be the most direct and immediate. Organizations that set highlevel rules for their membership should be less concerned that merely issuing guidance and best practices - including policies meant to curb abuse — will open

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