

SUPREME COURT OF LOUISIANA

NO. 99-C-1222

SHIRLEY POSECAI

versus

WAL-MART STORES, INC. d/b/a SAM'S WHOLESALE CLUB AND JOE DOE

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT,
PARISH OF JEFFERSON, STATE OF LOUISIANA**

JOHNSON, J., Concurring.

The Court has used this vehicle to set out a rule lower courts must follow when deciding whether business owners owe a duty to their patrons to protect them from injuries caused by third persons.

The majority discusses four approaches to determine the duty owed by a business owner to an invitee, then selects the more narrow balancing test because of the economic and social impact of requiring business owners to provide security in high crime areas. Only California and Tennessee have adopted the balancing test. But as the majority of states¹ have recognized, this type of balancing ignores the many variables of any incident which the totality of circumstances test acknowledges. In my opinion, the totality of circumstances test is the more appropriate test for determining a duty between a business owner and an invitee.

The totality of circumstances test is best suited for resolving this question. The totality of the circumstances test takes all factors of an incident into account when evaluating the issue of duty. See Delta Tau Delta v. Johnson, 712 N.E. 2d 968 (Ind. 1999); Seibert v. Vic Regnier Builders, Inc., 856 P.2d 1332 (Kan. 1993). It incorporates the specific harm and prior similar incidents tests as factors to consider when determining whether a business owes a duty to an invitee without arbitrarily limiting the inquiry to a limited set of factors. Delta Tau Delta, 712 N.E.2d at 973. It additionally takes into account the physical characteristics of the premises (i.e. lighting, fencing), other security measures, the location of the premises, the nature of the operation of business, and the owner's observations regarding criminal activity. Id. While this approach does not require a business to ensure an

¹The majority of states utilize the totality of circumstances test in determining foreseeability of criminal acts while only two states have chosen to adopt the more restrictive test. See Maguire v. Hilton Hotels Corp., 899 P.2d 393(Hawaii 1995); Sharp v. W.H. Moore, Inc., 796 P.2d 506 (Idaho 1990); Seibert, supra, Whittaker v. Saraceno, 635 N.E.2d 1185 (Mass. 1994); Gans v. Parkview Plaza Partnership, 571 N.W. 2d 261 (Neb. 1997); Doud v. Las Vegas Hilton Corp., 864 P.2d 261 (Nev. 1993); Clohesy Food Circus Supermarkets, Inc., 694 A.2d 1017 (N.J. 1997); Small v. McKennan Hosp., 437 N.W.2d 194 (S.D. 1989); Compare McClung v. Delta Square Ltd. Partnership, 937 S.W. 2d 891(Tenn. 1996), Delta Tau Delta, 712 N.E.2d 956.

invitee's safety, it does require that reasonable measures be taken to prevent foreseeable criminal acts against an invitee.

While I agree with the majority's conclusion that the defendant, Sam's Wholesale Club, did not have a duty to provide security patrols in its parking lot under the facts of this case, the majority's analysis, using the balancing test to arrive at this conclusion, is flawed. I would adopt the totality of circumstances test to determine defendant's duty.