Absent a special relationship between plaintiff and defendant, was there a "negligent undertaking"?

Negligent undertakings can establish a duty of care and avoid critical affirmative defenses

By Nadine Khedry

A "negligent undertaking" theory of recovery can be used to avoid dispositive affirmative defenses, like social-host immunities and the Good Samaritan doctrine. Proving a negligent undertaking requires specific facts, but in many cases it can be a successful path to liability. This article discusses how liability can be established through a negligent-undertaking theory and its applicability in personal-injury and wrongful-death litigation.

Negligent undertaking, generally

The premise of a negligent undertaking is that someone who takes action affecting the safety of another must do so reasonably. If performed unreasonably and it is the cause of harm, liability follows. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612-615 ("*Artiglio*"); *O'Malley v. Hospitality Staffing Solutions* (2018) 20 Cal.App.5th 21, 26-27 (*O'Malley*); CACI No. 450C. "[I]f the defendant enters upon an affirmative course of conduct affecting the interests of another, he is regarded as assuming a duty to act, and will thereafter be liable for negligent acts or omissions… :" *Valdez v. Taylor Automobile Co.* (1954) 129 Cal.App.2d 810, 817.)

California adopted the Restatement (Second) Torts, section 324A as its standard for negligent undertakings. (*Artiglio, supra.*) In order to establish liability against a third party, the following elements must be met:

(1) The actor undertook, gratuitously or for consideration, to render services to another;

(2) The services rendered were of a kind the actor should have recognized as necessary for the protection of third person;

(3) The actor failed to exercise reasonable care in the performance of its undertaking;

(4) The failure to exercise reasonable care resulted in physical harm to the third persons; and

(5) Either (a) the actor's carelessness increased the risk of such harm, or (b) the undertaking was to perform a duty owed by the other to the third persons, or (c) the harm was suffered because of the reliance of the other or the third persons upon the undertaking. (See *Artiglio, supra,* 18 Cal.4th at pp. 613-614.)

When determining whether a case is a good candidate for a negligent-undertaking theory, counsel should examine whether the defendant already owed plaintiff a duty of care. These are everyday cases many of us work on, like automobile cases when a driver unreasonably fails to maintain distance and causes a collision, or a company makes or sells a defective product. In these circumstances, the defendant already has a duty to act reasonably. If the defendant owes plaintiff a duty of care, a negligent undertaking theory is implied or redundant but may be pleaded as an alternative theory.

Duties of care are determined as a matter of law based on *relationships*. Chances are, if there is some form of existing relationship, a duty can be found to exist without an undertaking. In instances where there is no pre-existing relationship, an undertaking may be the only way to establish a duty of care. When it cannot be determined, in fact, plaintiffs will often plead negligent undertaking and special relationship in the alternative. (See, 4B. Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 356, p. 411 (pleading inconsistent counts).)

A defendant may have a duty to plaintiff based on an undertaking and a special relationship

A negligent-undertaking theory of liability is intended for cases where an actor, with no recognized duty to plaintiff, has undertaken to render specific services for the aid or protection of a third person (plaintiff). Examples of cases where courts have found an undertaking include the following:

- Where a restaurant undertook a duty to protect a patron from drinking and driving (discussed below) (*Williams v. Saga Enterprises*, Inc. (1990) 225 Cal.App.3d 142.)
- A security company contractually undertook a duty to protect a cashier from assault by other customers at a 7-11 store (*Mukthar v. Latin American Security Service* (2006) 139 Cal.App.4th 284 (*Mukthar*).)
- Where a swimming pool operator undertook a duty to provide lifeguards

(*Blankenship v. Peoria Park Dist.* (1994) 269 Ill.App.3d 416, 207 Ill.Dec. 325, 647 N.E.2d 287.)

- Where an apartment complex landlord undertook duty to provide security guards

(*Feld v. Merriam* (1984) 506 Pa. 383, 485 A.2d 742.)

- Where a park district undertook to provide siren warning of impending flood

(*Wilson v. Texas Parks and Wildlife Dept.* (Tex.1999) 8 S.W.3d 634).)

- Where a state undertook to erect and maintain fence between park and nearby river

(*Nelson by and Through Stuckman v. Salt Lake City* (Utah 1996) 919 P.2d 568.)

Although some of these cases are from out of state, they provide persuasive authority on fact patterns where a negligent undertaking may be a convincing theory. The key is presenting facts that demonstrate the defendant took affirmative action that changed the plaintiff's circumstances in a material way, to her detriment, that would make them responsible for her safety.

For example in the *Mukthar* case, the security company was contracted to provide armed, uniformed security guards daily between 9:00 p.m. and 5:00 a.m. However, the guard was not present when this incident occurred and the security company did not have a good explanation for his absence. (*Mukthar*, *supra*, 139 Cal.App.4th at p. 290.) "[O]nce [the] Service had assumed the duty of providing a security guard, it was required to do so." (*Ibid*.) The DCA ruled that actual notice of the imminent assault was irrelevant to the undertaking doctrine which is, "not predicated on notice of actual, impending harm." (*Ibid*.)

Negligent undertaking and drinking and driving cases

Negligent undertaking may also be a helpful theory in drinking and driving cases – specifically in cases involving a bar/restaurant or hosts distributing alcohol to patrons or guests.

Williams v. Saga Enterprises, Inc. (1990) 225 Cal.App.3d 142, illustrates the use of a negligent-undertaking theory in drinking and driving cases that involved a host or restaurant/bar. In *Williams* the defendant injured the plaintiff after leaving a bar in an intoxicated state. The defendant was a regular patron of the bar and would give his car keys to the bartender every time he came to the bar. (*Id*. at p. 150.) The plaintiff successfully established that the defendant and the bar manager had an "arrangement or agreement" whereby the manager "would . . . determine whether [the patron] was able to safely drive his car" and "would not" return the car keys "if [the patron] were under the influence." (*Ibid*.)

The defense brought a motion for summary judgment and the trial court granted the defense motion based on California's "social host immunity" pursuant to Civil Code section 1714, subdivision (c), which immunizes a social host from liability for damages resulting from a guest's alcohol consumption. However, the Court of Appeal reversed summary judgment and determined there was a triable issue of fact whether the social host voluntarily undertook the duty to protect others by preventing his guest from driving drunk. (*Id.*, 225 Cal.App.3d at p. 152.) Accordingly, in cases regarding hospitality purveyors or social hosts undertaking to ensure their guests do not drink and drive, a negligent-undertaking theory may be viable.

Undertaking medical care

A negligent-undertaking theory may be a helpful in the context of medical examinations. *Coffee v. McDonnell Douglas Corp*. (1972) 8 Cal.3d 551 (*Coffee*) remains the seminal case regarding negligent undertaking and medical care. In *Coffee*, the employee applied for a pilot's position with the employer (an aircraft manufacturer), and the employer required the employee to submit to a pre-employment physical examination. The employee was hired after he passed the examination. Several months later he began to suffer symptoms which led to a diagnosis of multiple myeloma (cancer of the bone marrow). The evidence at trial showed that during the pre-employment physical a blood sample was sent to a laboratory and returned to the employer's medical clinic, but per corporate policy, it was filed without review by the physicians. The blood test showed an abnormal sedimentation rate which would have prompted further inquiry and the discovery of the pilot's cancer months ahead of time. (*Id*. at p. 561.)

The *Coffee* Court concluded that when an employer undertakes to have a prospective employee physically examined to determine his ability to perform the work, it is negligent not to conduct the physical examination (and laboratory work) in a reasonable manner. When that causes harm, a delayed diagnosis, liability is established.

When initially reading this many attorneys may be thinking, but what about medical malpractice? In *Coffee*, the jury held in favor of the physicians, but not the corporation. This was not inconsistent because the corporate employer had a duty to establish and abide a procedure and protocol for the review of lab studies that were part of the pre-employment physical. Having undertaken to perform the laboratory study, it was important to have a physician make the review. Therefore, the employer's liability in *Coffee* was independent of any malpractice liability of the employers' physicians.

The undertaking doctrine requires reliance by the plaintiff, and *Coffee* demonstrates with circumstantial evidence the employee relied on the pre-employment physical to determine not only his candidacy to fly aircraft but assurances about his overall condition. Significantly, the employee's condition deteriorated while he was employed and he was noted to have suffered greatly with the delayed diagnosis and treatment. This detrimental reliance was crucial and remains critical in missed diagnoses medical cases.

Good Samaritan immunity and negligent undertaking

Plaintiffs who allege negligent undertakings to establish a duty will often see the defense use Good Samaritan laws to shield the defendant from liability. The phrase "Good Samaritan" is derived from a biblical parable, which tells the story of a traveler, later described as a Good Samaritan, who provides kindness and care provided to a beaten and robbed man he finds lying along a road. (Luke 10:25-37). The traveler had no affiliation, owed no duty, and had no expectation of personal gain through his assistance, but operated out of pure altruism when helping the other man.

The Good Samaritan parable has maintained its popularity for centuries, largely for its moral message to not ignore the plight of others. Today, under California law, a Good Samaritan is recognized as a volunteer who acts without any pre-existing duty or expectation of compensation to aid another in extremis. (*Williams v. State of California* (1983) 34 Cal.3d 18, 23.) In general terms, a Good Samaritan is insulated from any tort liability if she acts in good faith. (See, e.g., *Reynoso v. Newman* (2005) 126 Cal.App.4th 494 (physician Good Samaritan; Bus. & Prof. Code, §§ 2395 and 2396; see also, Civ. Code, § 1714.21, Gov. Code, § 50086, and Health & Saf. Code, §§ 1797.196 and 1799.104.)

Good Samaritan immunity does not apply to those with a special relationship

In cases where the defense alleges the Good Samaritan immunity applies to the facts of the case, one avenue to avoid the immunity is alleging the defendant had a *special relationship* with the plaintiff. The "Good Samaritan doctrine" does not apply when there is a special relationship between plaintiff and defendant. That relationship gives rise to a duty to act and prevent harm from occurring. (*Williams v. State of California*, *supra*, 34 Cal.3d at p. 23; see also, *Street v. Superior Court* (1989) 224 Cal.App.3d 1397, 1403 [Good Samaritan defense not available to owner of clinic].) Thus, plaintiffs are often well served to plead a negligent undertaking and special relationship in the alternative.

Business proprietors, such as shopping centers, restaurants, and bars, are apt examples of entities having a special relationship with their patrons, thereby imposing a duty on them to maintain their premises in a reasonably safe condition. In other instances, there is a duty to undertake "minimally burdensome" security measures. This impels a duty to provide assistance to patrons who become threatened or ill or need attention for other reasons. (See, *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 229; *Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal.2d 114,121; *Breaux v. Gino's, Inc.* (1984) 153 Cal.App.3d 472 379, 382.)

Overcoming a motion for summary judgment for negligent undertaking cases

Motions for summary judgment in negligent-undertaking cases usually posit the defendant did not possess a duty to the plaintiff or do anything that would impel recognition of a duty of care in a particular circumstance. To the extent he or she *acted*, a Good Samaritan defense would apply. Generally there are enough competing facts and inferences from those facts regarding what the defendant did in the course of events to overcome a motion for summary judgment.

O'Malley, *supra*, 20 Cal.App.5th 21, provides a great example of competing inferences and factual disputes necessary to overcome a motion for summary judgment. *O'Malley* involved a hotel employee who voluntarily undertook to check on the welfare of a hotel guest at the request of a guest's husband. The hotel sent up a maintenance worker who quickly peeked into the dark room and didn't see anything, and then told the husband that there was no one there. The husband later drove to the hotel and found his wife on the floor; she had fallen after suffering a brain aneurysm.

The Court of Appeal reversed a summary judgment in favor of the hotel on a negligent undertaking claim because the record supported "competing inferences" about "precisely what the [defendant] may have undertaken to do." (*O'Malley*, *supra*, 20 Cal App.5th at pp. 27-28.) As the court explained, "[I]f the record can support competing inferences, or if the facts are not yet sufficiently developed, an ultimate finding on the existence of a duty cannot be made prior to a hearing on the merits, and summary judgment is precluded." (*Citations omitted in the original*; *int. quot. omitted*.) (*Id.* at p. 27, relying on *Artiglio*, *supra*; see also, CACI No. 450C.)

The *O'Malley* court noted that under a negligent-undertaking theory of liability, the scope of a defendant's duty presents a jury issue when there is a factual dispute as to the nature and scope of the undertaking. In *O'Malley* there was a factual dispute whether the worker actually opened the door and peered inside the hotel room, whether the lights were off or on, and if the worker actually opened the door, whether he could have heard plaintiff's labored breathing. For these reasons, the motion for summary judgment was denied. (*O'Malley*, *supra*, 20 Cal.App.5th at p. 29.)

It is important to note what the difference between an issue of law for the existence of a duty and a question of fact for its scope. As one Court of Appeal explained, it is a legal question for the court whether the defendant's alleged actions, if proven, would constitute an "undertaking" sufficient to give rise to a duty. Although the nature and extent of an alleged duty is a question of law, the courts must ascertain if factual issues exist about precisely what it was that the defendant undertook to do. (See, *Jabo v. YMCA of San Diego County* (2018) 27 Cal.App.5th 853, 878.) However, once duty is decided, the trier of fact

determines the scope of that duty, not the Court. (*O'Malley, supra*, 20 Cal.App.5th at pp. 27-28.)

Conclusion

Negligent-undertaking theories of liability can be helpful in pressing a case against a defendant without a recognized or established duty of care. Illuminating facts showing the defendant undertook a course of conduct to assist or protect the plaintiff may establish this duty of care when it leads to injury or harm because of reliance by the plaintiff/victim. Ultimately, this theory can help maximize a victim's recovery in cases that may seem, at first blush, to have a small probability of success.


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