CASE NO. S207313

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ROSEMARY VERDUGO, *et al.*,
Plaintiffs/Appellants,

v.

TARGET STORES,
Defendant/Respondent.

Following Certification of a Question of California Law from the U.S. Court of Appeal, Ninth Circuit, in Appeal No. 10-57008

BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, INC. AND CALIFORNIA RETAILERS ASSOCIATION IN SUPPORT OF RESPONDENT TARGET STORES

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The California Legislature has preempted the field regarding the duty to acquire Automatic External Defibrillators ("AEDs") by creating a limited statutory duty and excluding any common law duty. In regulating this area, the Legislature has explicitly addressed and resolved the complicated and difficult policy questions surrounding this issue, including whether the increased expenses that mandatory AED acquisition imposes upon landholders outweigh the real or perceived benefits. Further, the Legislature made clear its understanding that the common law does not regulate this area, and has stated repeatedly that the decision whether to acquire an AED is voluntary. The whole premise of the Legislature's grant of immunity to encourage the voluntary acquisition of AEDs is that the decision whether to acquire an AED is voluntary. This weighing of such policy questions is reserved to the Legislature, not this Court.

But even if the field of AED-related assistance has not been preempted, there is no duty for businesses such as retailers to acquire AEDs under common law principles. Contrary to Petitioners' arguments, the scope of a commercial proprietor's duty to its patrons or invitees is quite circumscribed and must relate to the proprietor's conduct or nature of its business and the control it has to prevent or minimize the risk of harm (here, the ability to prevent a sudden cardiac arrest). Moreover, in order to impose such a duty under the common law, it must be foreseeable that the

risk will occur in a particular establishment (which must be more than random), and that foreseeability must outweigh the burdens of the duty imposed. Here, the risk that sudden cardiac arrest will occur on any given business's premises is quite low and unforeseeable and totally outside its control, while the monetary and logistical costs are much greater than the Petitioners portray. As shown below, the Retail Litigation Center ("RLC") has surveyed its California members in an effort to illustrate this lack of foreseeability as well as these burdens.

II. THE AMICI

The RLC is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. Ninety percent of RLC members have facilities in California and employ Californians. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The California Retailers Association ("CRA") is the only statewide trade association representing all segments of the retail industry including: general merchandise, department stores, mass merchandisers, fast food

restaurants, convenience stores, supermarkets and grocery stores, chain drugstores, and specialty retailers such as auto, vision, jewelry, hardware and home stores. CRA works on behalf of California's retail industry, which currently operates over 164,200 stores with sales in excess of $571 billion annually and employs approximately 2,776,000 people — nearly one fifth of California's total employment.

III. ARGUMENT

A. The California Legislature has occupied the field regarding the acquisition of AEDs precluding any common law duty.

1. The Legislature has expressed its understanding that the common law has no role in regulating the acquisition of AEDs.

This Court has recognized that "[t]he legislature does not...merely enact general policies." (*Justus v. Atchison* (1977) 19 Cal.3d 564, 574, disapproved on other grounds in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171.) "By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect." (*Justus, supra*, 19 Cal.3d at p. 574.) "There are two alternatives: either the Legislature meant to deal with only the narrow issue specifically addressed in the statute, leaving to the courts the task of filling such gaps in the law as may remain; or it intended to regulate the entire question itself—to 'occupy the field'—thus cutting off all future judicial initiative." (*Justus, supra*, 19 Cal.3d at p. 574.) Where the Legislature itself has evidenced an understanding that it is

acting in an area that the common law does not address, this Court has more readily found a corresponding Legislative intent to occupy the field. In *Justus*, for example, this Court held the Legislature intended to occupy the field of recovery for wrongful death when it enacted a statutory cause of action for wrongful death. (*Justus, supra*, 19 Cal.3d at p. 575.) And because the statutory cause of action did not include wrongful death of a stillborn fetus, this Court held there could be no common law cause of action for wrongful death of a stillborn fetus. (*Justus, supra*, 19 Cal.3d at pp. 575-82.) In concluding the Legislature intended to occupy the field, this Court relied on the fact that, when the Legislature first enacted the wrongful death statute, the Legislature understood there was no common law cause of action for wrongful death. (*Justus, supra*, 19 Cal.3d at p. 574.) This Court also relied on the fact that the Legislature had frequently amended the statute, regulating the subject matter in ever greater detail. (*Justus, supra*, 19 Cal.3d at p. 574.) In light of these characteristics, this Court concluded the Legislature intended to leave no room for "judicial initiative," such as by announcement of a common law cause of action for wrongful death of a fetus.

Both these characteristics exist regarding the Legislature's regulation of the duty to acquire AEDs. Even more so than in *Justus*, the Legislature has, in a number of ways, repeatedly expressed its understanding that the

acquisition of AEDs is a subject matter that the common law does not address.

First, the Legislature has stated explicitly that, with certain exceptions not applicable here, its legislation does not require a landholder to acquire an AED. (Health and Safety Code section 1797.196(f).) Its statement in this regard is not due to some inattention to the possibility of lawsuits, such as this one, seeking to impose a common law duty to acquire an AED; to the contrary, the Legislature has explicitly noted this possibility:

> A search of the Lexis Nexis database revealed no news articles, or successful federal or state cases, suing for liability against users of AEDs. The cases found were regarding AEDs and uses by businesses such as airlines and gyms. *Plaintiffs claimed the failure of the businesses to provide AEDs contributed to the deaths of their loved ones from cardiac arrest.*"

(March 21, 2006 Assembly Committee on Judiciary, AB 2083, Proposed Consent, at p. 5 [attached to Appellants' Request for Judicial Notice, Tab 6] [emphasis added].) Accordingly, the Legislature knew exactly what it was doing when it stated explicitly in Section 1797.196(f) that there is no mandatory duty to acquire AEDs—it was preempting the field regarding the acquisition of AEDs, notwithstanding any lawsuits, such as this one, that may seek to impose through the courts a duty to acquire one.

Second, since its initial foray into the field, the Legislature has passed a number of amendments and new statutes regulating the subject

matter in ever greater detail. As Target explained in its Answer Brief at pp. 5-9 and 18-20, this includes legislation regarding the acquisition of AEDs by public buildings (Gov. Code section 8455(a)), public schools (Health & Saf. Code section 1797.196(b)(5)), health clubs (Health & Saf. Code section 104113), golf courses (AB 1312), and amusement parks (same).

Third, the legislative history of the statutes regulating this subject matter are replete with explicit statements that, in the absence of legislation, the acquisition of an AED is *voluntary*. For example, during its consideration of Assembly Bill 2041, which amended Health and Safety Code section 1797.196 in 2002 by broadening the immunity provided to landholders who acquire AEDs, the Assembly Committee on the Judiciary stated the issue addressed by the proposed legislation is whether "building owners or others who *voluntarily* acquire AED's to potentially save the lives of building tenants and members of the public [should] also be immune from negligence suits so long as certain safety standards are met." (Assembly Com. on Judiciary, Analysis of Assem. Bill 2041 (2001-2002 Reg. Sess.) as amended April 16, 2002, p. 1 ["Assembly AB 2041

Analysis"], located in Plaintiff's Request for Judicial Notice, Exhibit 4, p. 1 [emphasis added].)[1]

Fourth, the very purpose of the Legislature's grant of immunity to landholders who voluntarily acquire AEDs is to encourage their voluntary acquisition. As the Assembly Committee on the Judiciary wrote regarding the same bill, AB 2041 "seeks to *encourage* greater availability of these apparently 'fail safe' life-saving devices in public and private buildings across the state by broadening the scope of the current immunity provided." (Assembly AB 2041 Analysis at p. 2 [emphasis added].) The Legislature's

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[1] *See also* Assembly AB 2041 Analysis at p. 2 ["The bill would...grant immunity to building owners or others who *voluntarily* acquire such safety devices to potentially save the lives of building tenants and members of the public, if specified safety standards are met"] [emphasis added]; *id.* at p. 2 ["Also grants immunity to building owners or others who *voluntarily* acquire such safety devices to potentially save the lives of building tenants and members of the public, if specified safety standards are met" [emphasis added]; Assembly AB 2041 Assembly Third Reading, p. 3, located in Plaintiff's Request for Judicial Notice, Exhibit 4, p. 8 ["This bill would...grant immunity to building owners or others who *voluntarily* acquire such safety devices to potentially save the lives of building tenants and members of the public..."] [emphasis added]; Assembly Com. on Judiciary, Analysis of Sen. Bill 1436 (2011-2012) as amended May 8, 2012, p. 4, located in Plaintiff's Request for Judicial Notice, Exhibit 7, p. 3 ["Under current law, in order to be granted immunity from liability, *voluntary* acquirers of AEDs, which include building owners, schools, churches, senior centers and others, must adhere to requirements governing the placement of AEDs"] [emphasis added]; Senate Rules Com., Third Reading, Sen. Bill 1436 as amended May 8, 2012, at p. 2, located in Plaintiff's Request for Judicial Notice, Exhibit 7, p. 5 [same]; Sen. Judicial Com., analysis of Sen. Bill 1436 (2011-2012 Reg. Sess.) as amended May 1, 2012, p. 4, located in Plaintiff's Request for Judicial Notice, Exhibit 7, p. 10 ["The author write that the bill will: retain important provisions of current law regarding *voluntary* placement of AEDs by removing a sunset date"] [emphasis added]; *id.* ["Removing the sunset creates more certainty related to requirements that building owners and other *voluntary* acquirers of AEDs must meet in order to be immune from civil liability, likely resulting in more AED installations and greater Good Samaritan access"] [emphasis added].

decision to encourage landholders to acquire AEDs by providing immunity from liability for their negligent use would become completely pointless if this Court were now to declare that there is a common law duty to acquire them anyway. As Target properly put it in its Answer Brief, "[t]he entire legislative scheme is premised on the idea that businesses are at liberty to decline to have AEDs." (Answer Brief at p. 16.)

Accordingly, under *Justus*, the Legislature evidenced its intent to occupy the field regarding the acquisition of AEDs.

2. The Legislature demonstrated its intent to occupy the field by explicitly addressing the difficult and complicated policy questions regarding the compulsory acquisition of AEDs, thereby precluding any role for the Judicial Branch on this issue.

This Court has also found a Legislative intent to occupy the field where judicial action would require the courts to confront "intractable policy questions intimately bound up with the provisions and objective of the existing statutory scheme" that the Legislature has already confronted. (*Pacific Scene, Inc. v. Penasquitos, Inc.* (1988) 46 Cal.3d 407, 413.) In *Pacific Scene*, this Court held the Legislature's comprehensive statutory scheme occupied the field concerning the rights and remedies attending corporate dissolution, thus preempting antecedent common law remedies against the former shareholders of dissolved corporations. (*Pacific Scene, supra*, 46 Cal.3d at pp. 413-14.) This Court noted that, to determine

whether non-statutory remedies existed "would inevitably entail[] the weighing of conflicting policies, that of corporate repose and certainty and that of compensating the injured," a balance that this Court is "ill equipped to strike." (*Pacific Scene, supra*, 46 Cal.3d at pp. 413-14 and fn.2 [alteration in original].)

Here, as in *Pacific Scene*, determining whether and under what circumstances there should be a common law duty to acquire AEDs would require this Court to reweigh a number of public policy issues that the Legislature, and the Governor in his law-making capacity, have explicitly addressed, including whether the increased expenses that mandatory AED acquisition would impose upon landholders outweigh its benefits, real or perceived.

The Legislature and Governor have on numerous occasions explicitly weighed the burdens and benefits of mandatory AED acquisition and made policy choices for this State that this Court should not now disturb. The following four examples illustrate the point. First, on July 14, 2009, the Senate Judiciary Committee published a Bill Analysis of AB 1312, which would have required golf courses and amusement parks to obtain AEDs. The Committee noted that "[e]xperts who have studied 'public access defibrillation' suggest that placing AEDs in public places with the highest incidence of cardiac arrest will help to maximize their usefulness and potentially increase survival rates from cardiac arrest."

(Sen. Com. On Judiciary, Analysis of Assemb. Bill 1312 (2009-2010 Reg. Sess.) as amended June 17, 2009, p. 6.)[2] The Committee noted further the existence of "[a] study published in 1998 for the American Heart Association" that "attempted to determine the optimal placement in public places of AEDs." (*Id.* at pp. 6-7 [citing Becker et al., "Public locations of Cardiac Arrest: Implications for Public Access Defibrillation," Circulation, 1998 ("Becker study")].) The Committee recognized that the Becker study "found the higher incidence location categories to include 'large shopping mall' and 'golf course,'" among others. (*Id.* at p. 7.) Based in part on the Becker study, the Legislature chose to enact AB 1312 and thereby require golf courses, as well as amusement parks, to acquire AEDs. However, notwithstanding the Becker study, the Legislature has to this day declined to require large shopping malls to acquire AEDs. As this Court recognized in *Pacific Scene*, it would be inappropriate for this Court now to second-guess the Legislature's policy judgment by enacting a common law duty for large retailers such as Target to acquire AEDs.

Second, as Target noted in its Answer Brief, AB 1312 did not become law because, on October 12, 2009, the Governor vetoed the measure on the policy ground that the expense imposed on golf course owners outweighed any benefits the law may provide:

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[2] Attached to this Brief as Tab A.

> This bill would increase costs for operators of golf courses and permanent amusement parks by requiring them to provide, maintain and train employees to use automatic external defibrillators with no clear evidence that the availability of these devices would save lives. Due to the size and layout of a course or park, AEDs may be ineffective unless it can be applied to the patient within 4 minutes of cardiac arrest.

(Cal. Health and Human Services Agency, Enrolled Bill Rep on Assem. Bill No. 1312 (2009-2010 Reg. Sess.) prepared for Governor Schwarzenegger (Sept. 29, 2009), p. 8 [Target RJN, Ex. 2].) According to the Complete Bill History[3], although consideration of the Governor's veto by the Legislature was pending on October 26, 2009, on January 14, 2010 any consideration of the Governor's veto was stricken from the file.

Further, although the ensuing four years have seen the election of a new Governor and re-composition of the Legislature, the Legislature has not re-enacted this measure or any similar measure. In light of the Governor's policy decision not to require golf courses and amusement parks to acquire AEDs, and the Legislature's ensuing silence in response to the Governor's decision, it would be imprudent for this Court to now re-weigh these two elective Branches' policy choices and impose a requirement upon stores such as Target to acquire AEDs.

Third, when the Legislature has imposed a duty upon certain landholders to acquire AEDs, it has explicitly recognized the important

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[3] Attached to this Brief as Tab B.

policy choices it is making and has built into the legislation the requirement to provide empirical data, presumably so the Legislature may continually evaluate the effect its policy choice has had upon society. For example, in Health and Safety Code section 104113, the Legislature required health studios to acquire an AED and train a certain number of employees in their use who "should be available to respond to an emergency." (Health and Safety Code section 104113(e)(2)(D).) However, health clubs whose trained employees are not "on the premises" when members are allowed access to the facility must provide detailed data to the Legislature every year, including:

> (I) The average number of hours per week that the health studio is staffed.
>
> (II) The average number of hours per week that the health studio was staffed prior to the adoption of this section.
>
> (III) The total number of reported cardiac incidents that have occurred during unstaffed hours; and whether any of these incidents resulted in death.

(H&S Code section 104113(e)(3)(D).) In light of *Pacific Scene*, it is the province of the Legislature, not this Court, to evaluate and make policy choices based on such empirical data.

Fourth, the Legislature has acted very cautiously in this area by repeatedly enacting sunsets to its legislation. (*See, e.g.*, Health and Safety Code section 1797.196, 2002 Amendment [adding sunset date of January 1, 2008]; 2006 Amendment [extending sunset date to January 1, 2013]; 2012

Amendment [deleting sunset date].) This Legislative caution, for the evident purpose of facilitating regular Legislative re-evaluation of the efficacy of its policy decisions, would be totally at odds with a one-time judicial fiat enacting permanent and mandatory acquisition of AEDs.

For these reasons, the Legislature has preempted the field regarding the acquisition of AEDs.

B. Even in the absence of field preemption, there is no common law duty that requires retailers such as Target to acquire AEDs.

This Court has long recognized that "[a]s a rule, one has no duty to come to the aid of another. A person [or here, entity] who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act." (*Williams v. State of California* (1983) 34 Cal.3d 18, 23; *see also* Civ. Code § 1714(a).) This rule is derived from "the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter." (*Rotolo v. San Jose Sports*

and Entertainment, LLC (2007) 151 Cal.App.4th 307, 325.)[4] It is undisputed that there was a special relationship between Ms. Verdugo and Target as she was Target's patron. Commercial proprietors, such as Target, owe a duty of care to "their tenants, patrons, or invitees." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 237.) However, Petitioners greatly overstate the scope of that duty in their Opening Brief on the Merits. The duty actually is quite circumscribed. Under common law principles, a proprietor has a duty to respond to harm unfolding on its premises by calling 911. It has a duty to go beyond that and take measures to prevent harm *only* where that harm is foreseeable and arises out of the business or property itself. By contending that businesses have a duty to go above and beyond even that, and be prepared to treat medical conditions which occur randomly, Petitioners ask this court to create a duty in a manner that does not comport with the common law. This should be left to the Legislature, which already has spoken on the issue, as discussed above. As shown below, because Target could not have foreseen and did not cause or

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[4] Because Target did not cause or contribute to the risk of danger here through its conduct (*i.e.*, it did not cause Ms. Verdugo's cardiac arrest—nonfeasance is alleged, not misfeasance), Petitioners misstate the issue as being whether an exception to a duty should be recognized rather than whether an exception to the general rule that there is no duty should be recognized. (*See* Op. Br. at 13-14.) Accordingly, the case they rely on, *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, is inapposite as the issue in that case was whether a truck driver for Ralphs owed a duty of care in determining where to park his vehicle. Misfeasance was alleged in that case, not nonfeasance.

contribute to Ms. Verdugo's sudden cardiac arrest, it discharged its duty to her by calling 911. (9th Cir. Excerpts of Record ("ER") at 121.)

1. Businesses such as retailers owe only limited duties to their patrons in a medical emergency the business did not cause and cannot prevent.

The special relationship between a business and its patrons or invitees gives rise only to limited duties. The reason for this limitation is that the special relationship doctrine, which is an exception to the general rule that "no one is required to save another from a danger which is not of his making" (*Andrews v. Wells* (1988) 204 Cal.App.3d 533, 539), is based in part on the notion that the defendant has "some control over the plaintiff's welfare." (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 499.) Thus, a business has a duty to maintain its premises in a "'reasonably safe condition'" (*Rotolo*, *supra*, 151 Cal.App.4th at 326, *quoting Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 826, 865, fn. 19), may have a duty to prevent foreseeable harm to those using the premises, and may have a duty to come to the aid of a patron or invitee "in the face of ongoing or imminent harm or danger." (*Rotolo*, *supra*, 151 Cal.App.4th at 326, *citing Delgado*, *supra*, 36 Cal.4th at 235-238.) In each of these situations where courts have imposed a duty on a business owner, the defendant had some degree of control in creating or contributing to the risk of harm by virtue of the special relationship—the ability to maintain the premises or knowledge of prior or ongoing risks of harm inherent to the property or business. Only under

these circumstances does it make sense to shift the cost of preventing or minimizing that risk to the defendant. Otherwise, where the proprietor lacks such control, the duty is simply to call 911.

Applying these principles here, there is nothing a retailer can do to prevent a customer from suffering sudden cardiac arrest, and when a customer does suffer from one on the premises, a proprietor's duty is limited to calling emergency medical services. The Sixth Appellate District recognized this in *Rotolo*. In that case, a teenager died as a result of sudden cardiac arrest while participating in an ice hockey game. (*Rotolo*, *supra*, 151 Cal.App.4th at 313.) The teenager's parents sued the operators of the ice hockey facility, alleging they had a duty to notify users of the facility of the existence and location of an AED which was on the premises. (*Id.*) They further alleged that this duty was a minimal burden that could have prevented the foreseeable harm. (*Id.* at 328.) In rejecting these arguments for numerous reasons, the court noted:

> [A]lthough cardiac arrest among athletes may be foreseeable, the occurrence of such an injury cannot be prevented or protected against by any precautionary measures taken by the operators of the premises. Rather, an injury of this nature is a risk inherent in playing the sport .... Unlike ... other premises liability cases, nothing respondents did or did not do in this case invited or led to the cardiac arrest suffered by Nicholas Rotolo.

(*Id.* at 328-329.) Sudden cardiac arrest is an unfortunate risk as a part of life which can occur anywhere, as is the case with many other diseases and

medical afflictions. As such, there is no reason to shift the cost of that risk to business proprietors who have nothing to do with creating or contributing to that risk and lack the control to prevent it.

Petitioners argue that imposing a duty to acquire AEDs will minimize the risk of death from sudden cardiac arrest occurring on a business's premises. (Op. Br. at 19.) While that may or may not be true (*see*, *e.g.*, Ans. Br. at 45-46 [discussing fact that only 60% of cardiac arrests are potentially responsive to AEDs] and 47 [citing statistic that only 30% of those immediately treated with an AED survive]), Petitioners focus on the wrong inquiry. Consistent with the above-cited authorities, the proper focus is on the *cause* of the risk itself and whether the defendant did something to invite or lead to that cause, increase the risk of it, or gain special knowledge of it through the management and operation of its business. That is what drives the policy in determining whether to shift the cost of that risk to a defendant.

Petitioners suggest that retailers with large stores, such as Target, increase the risk of harm, contending they provide an "isolated environment" and make it "impossible" for emergency crews to reach a victim. (*See* Op. Br. at 16-18.) This suggestion does not support Petitioners for two reasons. First, apparently this was not what happened in this case as first responders arrived within minutes of a 911 call. (ER at 121.) Second, Petitioners again focus on the wrong inquiry. The size of a

retail establishment does not cause or contribute to a patron's risk of suffering sudden cardiac arrest. Sudden cardiac arrest can occur anywhere.

Based on this supposed "isolated environment" theory, Petitioners also attempt to draw comparisons between retailers with large stores and common carriers such as the operators of airplanes, ships, or moving buses, arguing that the heightened duty of providing "the utmost care and diligence for [passengers'] safe carriage" imposed on them should apply to large retailers as well. (Op. Br. at 16-19; *see* Civ. Code § 2100.) Such an extension of the common law finds no legal or factual support. First, even if the common law duty of care toward passengers ascribed to common carriers, now-codified in Civil Code section 2100, should apply to "Big Box" retailers, the Legislature has addressed the scope of that duty vis-à-vis AEDs when it enacted and amended Health and Safety Code section 1797.196 providing that the acquisition of AEDs is strictly voluntary. Second, the factual comparison also falls short. While it is questionable how "safe carriage" would translate to a shopping experience or the services and products other businesses provide, the large nature of a business does not make it "isolated" or restrict the movement of its customers like the passengers on a ship, plane or bus. Under this unrecognized "isolated environment" theory, businesses in remote parts of a town could have heightened duties imposed upon them regardless of their size. Petitioners' requested expansion of premises liability—based upon

nothing but the size of a business—is unfounded and not supported by any statutory, regulatory or case law authority. Of course, the Court's adoption of this novel theory would create other policy-related questions such as how big a business establishment would need to be in order to apply a heightened duty. Again, such public policy considerations and whether they are warranted at all are best left to the Legislature, which has spoken on the specific duty requested here.

In their reply on the merits, Petitioners cite to a string of cases for the proposition that "there is nothing unusual about expecting proprietors to anticipate hazards, especially when there is a special relationship." (Pet. Reply Br. at 7-8.) However, none of the cases cited stand for this proposition. And more importantly, none of them involve a fact pattern in which the plaintiff brought to the property his or her own hazard, *i.e.*, a medical condition. They are wholly inapposite.

Indeed, three of the five cited cases do not even involve proprietors or the special relationship doctrine. (*See Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703 [plaintiffs were injured when the vehicle in which they were riding was pulled over into the highway median strip by a California Highway patrol officer and was struck by a truck that drifted out of its lane of traffic; court held that a law enforcement officer has a duty to exercise reasonable care for the safety of persons whom the officer stops]; *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358 [court rejected

traditional common law rule that a possessor of land is immune from liability for harm caused by the natural condition of his land to persons outside his premises and adopted a rule that a possessor's exposure to liability is to be determined by ordinary principles of negligence]; *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749 [reversing summary judgment of claim against a town for a dangerous condition of public property as set forth in Gov. Code section 835].)

While Petitioners cite to the case, *Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, which involved a proprietor—an operator of a motocross track—the court did not address the special relationship doctrine or alleged nonfeasance. Instead, the court analyzed the assumption of the risk doctrine and the enforceability of a release, holding the release ineffective with respect to future gross negligence, and further holding that triable issues of fact existed as to whether the defendant was grossly negligent in failing to provide adequate "caution flaggers" (employees who were to alert patrons of potential danger on the track).

Finally, Petitioners also cite to *Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal.2d 114, 119, 123-124. In that case, this Court held that the operator of a bowling alley, who was on notice that the police had been called to its property over 273 times in the preceding six months for such things as assault, failed to discharge its duty to a female patron who later was assaulted in the parking lot when its bouncer warned her not to go to

the parking lot because "that goofball" was there. The evidence demonstrated that the bouncer knew the "goofball" had been harassing the female patron inside the establishment prior to her departure and that the patron had to leave the establishment at that time to go home.

Both the *Rosencrans* and *Taylor* cases support the principle that proprietors owe a duty to their customers when they possess a certain degree of control over or notice of the particular hazard, such as notifying motocross race track patrons of danger on the track, or walking a female customer to her car knowing that another customer who had been harassing her was in the parking lot and that the parking lot had been a hotbed of recent criminal activity. Petitioners, on the other hand, seek to impose an open-ended duty on proprietors to anticipate and treat the medical conditions of their customers they did not cause and cannot know about in advance.

2. The factors for imposing a common law duty of care have not been met as the burdens of requiring AEDs in retail establishments outweigh the foreseeability of harm.

Determining the existence and scope of a common law duty "is a policy decision involving the balancing of a number of considerations," which include the foreseeability of harm, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to

the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty, including the resulting liability for a breach, and the availability, cost, and prevalence of insurance for the risk involved. (*Rotolo*, *supra*, 151 Cal.App.4th at 336, *citing Rowland v. Christian* (1968) 69 Cal.2d 108, 113.) These are known as the "*Rowland* factors." And particularly with respect to taking precautionary measures to prevent foreseeable harm, the scope of the duty is determined in large part by balancing the foreseeability against the burden of the duty to be imposed. (*Rotolo*, *supra*, 151 Cal.App.4th at 327, *citing Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674, 678-679.) Here, the burdens of requiring retailers to purchase and maintain AEDs outweigh the foreseeability of the harm.

a. Sudden cardiac arrest at a retail establishment is not a foreseeable harm under common law principles.

"[F]oreseeability is a 'crucial factor' in determining the existence and scope of a legal duty." (*Delgado*, *supra*, 36 Cal.4th at 237, *quoting Ann M.*, 6 Cal.4th 676.) Where the burden of preventing future harm is great, a high degree of foreseeability is required. Conversely, "where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required." (*Delgado*, *supra*, 36 Cal.4th at 237-238.)

For example, in *Delgado*, the defendant bar owner hired a security guard who was put on notice that hostilities were arising between its customer, the plaintiff, and a group of other patrons. The security guard decided to separate them by asking the plaintiff to leave. (*Id.* at 231.) However, he took no further action when he saw the group follow the plaintiff outside. The group attacked the plaintiff in the parking lot. (*Id.*) This Court found that the bar had a duty to take minimally burdensome steps to avert that danger because it was on actual notice of the impending assault. (*Id.* at 250.) That is, foreseeability was great—the security guard was personally involved in handling the altercation among the patrons (the risk-creating event), the potential for future harm was easily anticipated, and the security guard declined to take action to eliminate or minimize the risk of future assault.

Similarly, in *Morris v. De La Torre* (2005) 36 Cal.4th 260, the plaintiff was attacked in a parking lot outside a restaurant in full view of the restaurant's employees. The attacker ran into the restaurant, took a knife from the kitchen, and used it to stab the plaintiff. The restaurant employees watched, failing to call 911. (*Id.* at 266-267.) While this Court held that the restaurant owner had *no duty* to anticipate this harm and hire security guards or take similar precautionary measures, it did have a duty to take reasonable steps to aid the plaintiff in an ongoing criminal attack on its premises, such as calling 911. (*Id.* at 264.) The harm was not foreseeable

(and thus, there was no duty to undertake precautionary measures), however once the employees saw the harm take place, they had the minimally burdensome duty to respond by calling 911.

Along the same lines, where a customer becomes ill or has a medical emergency on a business's premises, courts have recognized that the proprietor has a special-relationship-based duty to undertake relatively simple measures in response. (*See, e.g., Breaux v. Gino's, Inc.* (1984) 153 Cal.App.3d 379, 381 [restaurant discharged duty to choking patron by calling an ambulance].) However, courts have not required more than calling 911. (*Rotolo, supra*, 151 Cal.App.4th at 331, *citing Breaux*, 153 Cal.App.3d 379.)

In the case most similar to this one, *Rotolo*, which addressed the scope of a proprietor's duty with respect to AEDs, the court distinguished *Delgado* and *Morris* on the basis that the analysis in those cases focused on the scope of the proprietor's duty to respond to unfolding events on the property involving ongoing or imminent harm. (*Rotolo, supra*, 151 Cal.App.4th at 331.) But like the plaintiffs in *Rotolo*, Petitioners here seek to impose a duty on businesses to take anticipatory action prior to any ongoing or imminent harm—there to provide advance notice of the location of AEDs, and here to acquire AEDs. (*See id.*) The court held that there was *no duty* to undertake such anticipatory measures. And although the reasoning primarily was based on the fact that the Legislature limited the

duties of a building owner with respect to providing AED-related assistance (*see id.* at 332-333, 338-339), the court rejected the plaintiffs' arguments, that the foreseeability of the occurrence of a cardiac arrest on its premises (given that it was a sports facility) or the potential for an AED to increase the chance of survival, warranted imposition of a duty on a business to notify customers of the existence and location of an AED.

Here, Petitioners are dismissive of the importance of foreseeability of risk to the analysis of whether a duty arises, merely quoting the statistic that 300,000 Americans suffer from this condition each year. (*See* Op. Br. at 19, 21-24.) While this number may seem significant at first, it is not considering that this comprises only about .09 percent of the population.[5] Moreover, Petitioners cite to no authority suggesting that general statistics alone could satisfy the foreseeability requirement for the imposition of a common law duty. That .09 percent of the population suffers from a medical condition, while potentially tragic for the individuals involved, does not mean that it is foreseeable that a business's customer will suffer from it while on the business's premises, particularly where the condition occurs at random. If foreseeability were to depend solely on statistical prevalence, proprietors would be required to inform themselves of the most

---

[5] The population of the United States was 308,745,538 in 2010. (http://quickfacts.census.gov/qfd/states/00000.html.) In 2000, it was 281,421,906. (http://www.census.gov/main/www/cen2000.html.)

common conditions and be prepared to treat them all. This in and of itself would pose a significant burden.

Nonetheless, the statistics demonstrate that incidents of sudden cardiac arrest occurring on a business's premises are random and unforeseeable. An informal survey conducted of 15 RLC members supports such a finding. Only two members reported having an incident of sudden cardiac arrest within the last year and most (78-86%) reported no incidents within the last 10 years. During a five-year period from 2008-2012, 12 of 15 RLC members had no incidents of cardiac arrest suffered by customers in their California stores. The remaining three companies had a combined total of 10 incidents of customers suffering from cardiac arrest during the five-year period. The requirement of foreseeability of risk as a prerequisite to imposition of a common law duty of care has not been met given the large number of retail stores in California and the limited number of incidents of California customers suffering from cardiac arrest.

b. The burdens of acquiring and maintaining AEDs are much greater than Petitioners would have this Court believe.

In assessing the burden associated with acquiring AEDs, Petitioners and the Ninth Circuit's order solely focus on the initial monetary cost of purchasing *one* AED, as well as the notion that an untrained layperson may effectively operate one. However, if commercial proprietors are going to be required to acquire AEDs under a common law duty, it makes little

practical or legal sense to willfully fail to comply with the immunity statute, Health and Safety Code section 1797.196. In order to qualify for immunity, there are significant logistical and monetary burdens.

Health and Safety Code section 1797.196(b) provides immunity if an entity does the following, in pertinent part:

> (1) Complies with all regulations governing the placement of an AED.
>
> (2) Ensures all of the following:
>
> (A) That the AED is maintained and regularly tested according to the operation and maintenance guidelines set forth by the manufacturer, the American Heart Association, and the American Red Cross, and according to any applicable rules and regulations set forth by the governmental authority under the federal Food and Drug Administration and any other applicable state and federal authority.
>
> (B) That the AED is checked for readiness after each use and at least once every 30 days if the AED has not been used in the preceding 30 days. Records of these checks shall be maintained.
>
> (C) That any person who renders emergency care or treatment on a person in cardiac arrest by using an AED activates the emergency medical services system as soon as possible, and reports any use of the AED to the licensed physician and to the local EMS agency.
>
> (D) For every AED unit acquired up to five units, no less than one employee per AED unit shall complete a training course in cardiopulmonary resuscitation and AED use that complies with the regulations adopted by the Emergency Medical Service Authority and the standards of the American Heart Association or the American Red Cross. After the first five AED units are acquired, for each additional five AED units acquired, one employee shall be trained beginning with the first AED unit acquired. Acquirers of

> AED units shall have trained employees who should be available to respond to an emergency that may involve the use of an AED unit during normal operating hours.
>
> (E) That there is a written plan that describes the procedures to be followed in the event of an emergency that may involve the use of an AED, to ensure compliance with the requirements of this section. The written plan shall include, but not be limited to, immediate notification of 911 and trained office personnel at the start of AED procedures.

(*See also* Civ. Code § 1714.21(d).)

Thus, in order to qualify for immunity, businesses must purchase at least one AED per location, test each device monthly and maintain records of those tests, train at least two employees per every five AEDs in AED use *and* in CPR (unless there are more than five AEDs at one location, then more employees are required), and have on staff at least two of these employees per every five AEDs during operational hours.[6] Some may argue that large or multi-level establishments (such as some Target stores or department stores) should be required to have more than one AED or at least one per level. Indeed, the Occupational Health and Safety Administration recommends that if AEDs are acquired, they should be placed throughout a location to ensure a response time within three to five minutes. (https://www.osha.gov/Publications/3185.html.) This will require a study to determine effective AED placement, and multiple AEDs

[6] The minimum number of trained employees is not one, but two, so that there will always be at least one AED/CPR-trained employee on-duty while the other takes his or her legally-required meal and rest periods.

necessarily will increase maintenance, employee training, and staffing costs. According to the National Center for Early Defibrillation, manufacturers estimate that AEDs last approximately five years. (*See* http://www.early-defib.org/03_06_09.html.) Thus, equipment costs are recurring. Additionally, AEDs require accessories such as extra batteries, electrode pads and cables, which cost $500 per device. (*Id.*) It is recommended to have two sets of batteries and two sets of pads per device. (*Id.*) Some models require battery rechargers as well. (*Id.*)

The employee training costs include CPR instructor fees, AED trainers which cost $400-1,000 including accessories, computer cards that are inserted into the AED to allow it to function as a training simulator, which costs about $200 each, and educational materials (*e.g.*, videos, educational booklets). (*Id.*) These costs also necessarily include the employee wages or overtime for the time spent in training. As noted below, given high employee turnover rates in the retail industry, most retailers would need to hold additional training sessions on a regular basis (in some cases several times per year).

Of course, if the duty is imposed, there also will be the cost of acquiring insurance for this risk and any associated liability that could result. (*See Rowland*, 69 Cal.2d at 113 [regarding availability, cost, and prevalence of insurance for the risk involved].)

Petitioners emphasize that for large enterprises such as Target, these monetary costs are relatively minimal compared to sales. This ignores not only the burdens placed on smaller establishments but also the logistical costs. In order for a business to qualify for statutory immunity, it must staff during operational hours at least two employees per 8 hour shift trained in AED operation per five devices. Using Target as an example, which has about 250 locations in California and is open from 7:00 a.m. to 11:00 p.m. during the week (or 16 hours per day), it would have to have at least four employees who are AED/CPR-trained working per store each day, which amounts to a total of 1,000 employees in the state. This does not account for turnover, scheduling logistics, the prevalence of part-time employees in the retail industry, sick and vacation days, etc. As a practical matter, most businesses would have to train substantially higher number of employees per location. In addition, many smaller businesses would have to train all of their employees to ensure compliance due to these concerns.

The RLC surveyed its members to estimate the impact of these burdens on them. The impact of employee turnover on training costs is most significant. Of the responding members, annual turnover ranges the full gamut of 0-100%, but many reported turnover as being as high as 33-75%. Most of the responding members are larger enterprises with 50 to

over 200 locations in California,[7] daily foot traffic ranging from 545 to 8,000 persons, and more than 500 employees in the state. In fact, 66.7% of responding members have between 1,001 and 10,000 employees.[8] 66.7% of responding members are open 12 hours per day, 14.3% are open 16 hours per day, and 9.5% of them are open 24 hours per day. Thus, all of these responding members will be required to have more than two AED/CPR-trained employees on staff each day per location. And for those businesses which are open all the time, they will be required to have at least six to eight AED/CPR-trained employees on staff each day per location without incurring overtime expenses. The informal survey of 15 RLC members revealed that 50% of the companies would have to train between six and twenty employees per store to be compliant. Of course, this is assuming that they are required to acquire only one AED per location. These AED-related costs, including equipment, employee training and maintenance, will be new to a majority of these members as 64.7% of them do not currently have AEDs in their California stores.

Finally, Petitioners state they do not advocate for a duty to be imposed on all businesses, just on the large ones, on the theory that they are

---

[7] 38.1% of responding members have 1-50 locations in California, 9.5% have 51-100 locations, 33.3% have 101-200 locations, and 19% have over 200 locations.

[8] 9.5% of responding members have 1-500 employees in California, 9.5% have 501-1,000, 66.7% have 1,001-10,000, and 14.3% have over 10,000.

better able to absorb the burden and costs. They contend that it is appropriate for a jury to decide which businesses should hold this duty on a case-by-case basis. Notwithstanding the fact that the existence of a duty is an issue for the court to decide (*Delgado*, 36 Cal.4th at 237 [the existence of a legal duty is a question of law for the court to determine]; *see also Ann M.*, 6 Cal.4th at 678 [foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court]), as Target Stores notes in its Answer Brief, such an *ad hoc* determination of a duty will have the practical effect of imposing a common law duty to acquire AEDs on all businesses. In order to avoid the prospect of expensive litigation and potentially significant liability, all businesses will be forced to assume the duty regardless of size.

In sum, the burdens are much greater than Petitioners would have this Court believe, and they certainly are outweighed by the relatively infrequent occurrence of sudden cardiac arrest and the mere random foreseeability that one of the .09 percent of Americans who suffer from this condition may patronize a business at any given time.

c. The *Rowland* factors do not tip the balance in favor of imposing a duty.

The *Rowland* factors of foreseeability, the connection (or lack thereof) between the defendant's conduct and the injury, and the policy of preventing future harm weighed against the burdens imposed by the duty

are encompassed within the discussion above. Like these factors, the remaining *Rowland* factor of moral blame also weighs against imposing the duty requested here. (*See Rowland*, 69 Cal.2d at 113.)

"To avoid redundancy with the other *Rowland* factors, the moral blame that attends ordinary negligence is generally not sufficient to tip the balance of the *Rowland* factors in favor of liability." (*Rotolo*, *supra*, 151 Cal.App.4th at 337.) Instead, a high degree of moral culpability is required such as where the defendant (1) intended or planned the harmful result; (2) had actual or constructive knowledge of the harmful consequences of its behavior; (3) acted in bad faith or a reckless indifference as to the results of its conduct; or (4) engaged in inherently harmful acts. (*Id.* at 337-338.) None of these factors are present in deciding not to acquire an AED. Indeed, the fact that the Legislature merely encouraged rather than required the acquisition of them in enacting Health and Safety Code section 1797.196 and Civil Code section 1714.21 forecloses any argument that it is immoral not to acquire an AED.

II. CONCLUSION

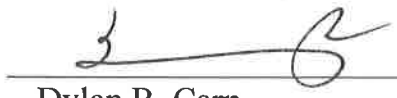
In sum, the Legislature has spoken regarding the duties of a business with respect to providing AED-related assistance. It imposed no duty whatsoever to acquire an AED and instead chose to provide immunity under certain circumstances to those who do acquire them. Even if this legislation does not occupy the field of AED-related assistance and

foreclose the imposition of a common law duty to acquire an AED, no such duty should be imposed under common law principles. In addition to the lack of foreseeability and the burdens placed on business owners in acquiring and properly maintaining AEDs, an extension of the common law as Petitioners request here would only lead to further litigation and invite further extensions of the common law duty of proprietors. For instance, why stop at treating this one medical condition and not treat others? Why stop at AED and CPR-trained employees and not require employment of fully-trained first responders? The limit would become more and more difficult to draw. It should be drawn here.

Respectfully submitted,

Dated: October 30, 2013

JACKSON LEWIS LLP

By: 

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CERTIFICATE OF WORD COUNT

(California Rule of Court, Rule 8.204(c))

The text of this brief, including the footnotes but excluding the cover page, tables, this certificate, and the attached proof of service, consists of 8,383 words as counted by the word processing program, Word 2010, used to generate this brief.

Dated: October 30, 2013

JACKSON LEWIS LLP

By: _____

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Tab A

SENATE JUDICIARY COMMITTEE
Senator Ellen M. Corbett, Chair
2009-2010 Regular Session

AB 1312
Assemblymember Swanson
As Amended June 17, 2009
Hearing Date: July 14, 2009
Health and Safety Code
SK:jd

SUBJECT

Defibrillators

DESCRIPTION

This bill would make the current requirements for health studios to purchase, maintain, and train staff in the use of automatic external defibrillators (AEDs) applicable to amusement parks and golf courses. This bill would revise the sunset date on this requirement from July 1, 2012 to July 1, 2014.

BACKGROUND

An AED is a medical device which is used to administer an electric shock through the chest wall to the heart after someone suffers cardiac arrest. Built-in computers assess the patient's heart rhythm, determine whether the person is in cardiac arrest, and signal whether to administer the shock. Audible cues guide the user through the process.

In 1999, the Legislature passed and the Governor signed SB 911 (Figueroa, Ch. 163, Stats. 1999) which created a qualified immunity from civil liability for trained persons who use AEDs in good faith and without compensation when rendering emergency care or treatment at the scene of an emergency. The immunity does not apply in cases of personal injury or wrongful death resulting from gross negligence or willful or wanton misconduct. AB 2041 (Vargas, Ch. 718, Stats. 2002) expanded this immunity by repealing the training requirements and also relaxing the requirement that building owners must ensure that expected AED users complete training as a condition of immunity. AB 2041 was enacted with a five-year sunset which was extended another five

(more)

years to January 1, 2013 by AB 2083 (Vargas, Ch. 65, Stats. 2006).

In 2005, AB 1507 (Pavley, Ch. 431, Stats. 2005) was enacted to require health studios, beginning July 1, 2007, to acquire, maintain, and train personnel in the use of AEDs. AB 1507 specifically applied most of the AB 2041 provisions to health studios but made the acquisition of AEDs mandatory rather than voluntary until July 1, 2012.
This bill would extend the sunset date on the current requirement that health studios purchase, maintain, and train staff in the use of AEDs until July 1, 2014. The bill would also add amusement parks and golf courses to the statute, thereby requiring those entities to acquire and maintain AEDs and to train staff in how to use the devices.

CHANGES TO EXISTING LAW

Existing law requires health studios, beginning July 1, 2007, to acquire an AED and to maintain, and train personnel in the use of that AED. These requirements sunset on July 1, 2012. (Health & Saf. Code Secs. 104113(a)(1), (2).)

Existing law provides that on or after July 1, 2012 a health studio that elects to continue the installation of an AED shall maintain and train personnel in the use of an AED and shall not be liable for civil damages resulting from the use, attempted use, or nonuse of an AED. (Health & Saf. Code Sec. 104113(a)(3).)

Existing law requires a health studio to do all of the following:

a. Comply with all regulations governing the placement of an AED.
b. Ensure that the AED is maintained and regularly tested, as specified.
c. Ensure that the AED is checked for readiness after each

use and at least once every 30 days if the AED has not been used in the preceding 30 days. Records of these checks must be maintained.

d. Ensure that any person who renders emergency care or treatment on a person in cardiac arrest by using an AED activates the emergency services system as soon as possible and reports any use of the AED to the licensed physician and local EMS agency.

e. For every AED acquired, up to five units, no less than one employee per AED shall complete a training course in AED use. After the first five AEDs are acquired, for each additional five AEDs acquired a minimum of one employee shall be trained.

f. Acquirers of AEDs shall have trained employees who should be available to respond to an emergency that may involve the use of an AED during normal operating hours. Acquirers of AEDs may need to train additional employees to assure that a trained employee is available at all times.

g. Have a written plan that describes the procedures to be followed in the event of an emergency that may involve the use of an AED. (Health & Saf. Code Sec. 104113(e).)

Existing law provides for immunity from liability as follows:

a. An employee of a health studio who renders emergency care or treatment is not liable for civil damages resulting from the use, attempted use, or nonuse of an AED.

b. When an employee uses, does not use, or attempts to use an AED to render emergency care or treatment, the members of the board of directors of a facility are not liable for civil damages resulting from any act or omission in rendering the care or treatment, including the use or nonuse of the AED.

c. When an employee of a health studio renders emergency care or treatment using an AED, the owners, managers, employees, or otherwise responsible authorities of the facility are not liable for civil damages resulting from any act or omission in the course of rendering that care or treatment, provided the facility has fully complied with existing law requiring testing and staffing, as described above.

d. These provisions of immunity from liability do not apply in the case of personal injury or wrongful death that results from gross negligence or willful or wanton misconduct on the part of the person who uses, attempts to use, or maliciously fails to use an AED to render emergency care or treatment. (Health & Saf. Code Secs. 104113(b), (c), (d), (f).)

This bill would add amusement parks and golf courses to the above statute, making those two entities subject to all of the above-described provisions.

This bill would impose a requirement for health studios to

install AEDs until January 1, 2014, and, as of that date, would repeal the requirement for installation of AEDs and the associated immunity for their use or non-use.

This bill would require that records be maintained for two years after the AED is checked for readiness.

This bill would extend the sunset date on the above statute to July 1, 2014.

This bill would define "amusement parks" to mean any area where amusement park rides are inspected pursuant to the Labor Code, as specified.

COMMENT

1. Stated need for the bill

The author writes that this bill addresses the following two deficiencies in current law: "Provisions governing AEDs at health clubs are set to expire. 2) Provisions regarding placement of AEDs ought to be broadened to include other high-incidence locations of heart attacks."

2. The importance of getting help fast

In the case of sudden cardiac arrest (SCA), every second counts: there is a ten percent reduction in survival for every minute

delay in response. It has been said "few life threatening emergencies are as time sensitive as SCA," and the American Heart Association recommends that the optimal response time from collapse of the victim to on-scene arrival of the AED with a trained rescuer is three minutes.

According to the Sudden Cardiac Arrest Association, "[i]t is essential that defibrillation be administered immediately following the cardiac arrest. If the heart does not return to a regular rhythm within 5-7 minutes, this fibrillation could be fatal. If defibrillated within the first minute of collapse, the victim's chances for survival are close to 90 percent. . . . If [defibrillation] is delayed by more than 10 minutes, the chance of survival in adults is less than 5 percent."

Under this bill, both golf courses and amusement parks would be required to install and maintain an AED and train personnel in the use of that AED. Because both sites cover large areas the

issue of AED placement is critical. Although the statute does not require that a specified number of AEDs be installed, experts such as the American Heart Association recommend that organizations "[c]onsider placing more than one AED at a location that covers a large area . . . while there's no research that indicates a recommended coverage area for an AED, . . . achieving a 3-minute response time should be the primary guide to making placement decisions." In addition, it should be noted that the three-minute response time must take into account the time to get to the AED and the time to get back to the victim. As a result, golf courses and amusement parks should consider installing AEDs in multiple locations, as it may not be sufficient to install an AED in the clubhouse alone.

3. The importance of having trained responders on hand

The American Heart Association emphasizes that it is important that the person who is responsible for using the AED be trained in CPR and in how to use the AED, explaining:

> If AEDs are so easy to use, why do people need formal training in how to use them? An AED operator must know how to recognize the signs of a sudden cardiac arrest, when to activate the EMS system, and how to do CPR. It's also important for operators to receive formal training on the AED model they will use so that they become familiar with the device and are able to successfully operate it in an emergency. Training also teaches the operator how to avoid potentially hazardous situations.

The National Center for Early Defibrillation also indicates that simply installing AEDs is not enough, stating "[i]t is important to identify a medical director, develop an on-site AED response plan, train designated responders and conduct periodic AED response drills." (Emphasis added.)

This bill would require golf courses and amusement parks to train personnel in the use of installed AEDs. Existing law, currently applicable only to health clubs, requires acquirers of AEDs to have trained employees who should be available to respond to an emergency that may involve the use of an AED during normal operating hours. The statute also provides that acquirers of AEDs may need to train additional employees to assure that a trained employee is available at all times. Under this bill, golf courses and amusement parks would be subject to these requirements.

4. AEDs are not foolproof

AEDs are said to be "foolproof," but manufacturers have recalled some AEDs recently. In April 2009 the maker of the Zoll AED Plus issued a Class 1 recall, the most serious type of recall that involves situations in which there is a reasonable probability that use of the product will cause serious injury or death. In the case of the Zoll AED Plus, at least two patients died following incidents when the device failed to deliver a shock. Subsequent tests determined that faulty battery test software failed to detect defective batteries, and it was later found that additional malfunctions had occurred, resulting in one more death.

Over 14,000 AED 10 and MRL Jumpstart defibrillators were recalled in March 2009 after 39 reports of incidents, including two deaths. In this case, the company alerted consumers to the

following potential problems with the defective AED: low-energy shock, electromagnetic noise interference, unexpected shutdown during use, blown fuse, loss of voice prompts, and shutdown in cold temperatures.

Another Class 1 recall was issued on September 11, 2008 for LifePak CR Plus AEDs made by Physio Control, Inc. The AED was determined to be defective because the shock button was covered and not visible so that responders were unable to administer the shock.

5. AED placement in golf courses and amusement parks

Sudden cardiac arrest often occurs in active, outwardly healthy people. Indeed, strenuous exercise has been shown to be a trigger for sudden cardiac arrest. The National Center for Early Defibrillation asserts that the risk of sudden cardiac arrest during exercise is significantly higher than at times of no exertion.

Experts who have studied "public access defibrillation" suggest that placing AEDs in public places with the highest incidence of cardiac arrest will help to maximize their usefulness and potentially increase survival rates from cardiac arrest. A study published in 1998 for the American Heart Association attempted to determine the optimal placement in public places of AEDs. That study, which focused on certain cardiac arrests in Seattle and King County, found the higher incidence location

categories to be: (1) international airport (Seattle-Tacoma International Airport); (2) county jail; (3) large shopping mall; (4) public sports venue; (5) industrial site; (6) golf course; (7) shelter; (8) ferries/train terminal; (9) health club/gym; and (10) community/senior center. (Becker et al, "Public Locations of Cardiac Arrest: Implications for Public Access Defibrillation," Circulation, 1998.)
Although golf courses had an average, for the group, incidence per site, they were second only to the airport for actual number of cardiac arrests (23 over five years; the airport had 35 in the same period). An October 2009 article in Golf Digest entitled "Saving lives on the golf course: Join the battle against golf's deadliest enemy: sudden cardiac arrest" explains why golf courses have a higher-incidence of cardiac arrests:

> Why are golfers at such high risk? Dr. Edward A. Palank, a cardiologist in Naples, Fla., cites three reasons:
>
> * The age of the average golfer correlates with the population most at risk. (The average age of a sudden-cardiac- arrest victim is 65, though many who are stricken are in their 30s and 40s.)
>
> * Heart attacks are most likely to occur between 6 and 11 a.m., precisely when most golfers are out on the course.
>
> * Golfers spend from four to six hours a day on the course, often several times a week, which simply means, says Palank, "Things are going to happen."

In the case of amusement parks, an often-cited 2007 study in Germany found that modern roller coasters "can make the heart race up to 155 beats a minute and spur dangerous changes to heart rhythm in some people." (Los Angeles Times, "Modern coasters carry risky thrills for hearts," August 15, 2007.) In some cases, the roller coasters gave riders "a stomach plummeting 6 g's of gravity force, equivalent to that experienced by astronauts." (Daily Herald, "Roller coasters may be too much for heart to handle," June 25, 2007.) As a result, experts recommend that people with heart conditions and high blood pressure should not ride roller coasters. In several cases, there have been tragic consequences for riders. In 2005, a four-year old boy died after a ride on "Mission Space" and in another case a 73-year old man was unresponsive after riding "Space Mountain." In both cases, the riders suffered from heart conditions.

In November 2007, Disneyland Resort and Walt Disney World Resort announced the installation of 250 AEDs (50 at Disneyland and 200 at Walt Disney World) which followed the 2003 installation of 600 AEDs at the resorts. A press release announcing the installation stated that more than 5,000 staff had been trained in the use of AEDs and an additional 500 would be trained in the upcoming year. At the time, Disney also indicated that AEDs

installed at its resorts might have already saved as many as 40 lives. (Orlando Sentinel, "Bad heart, lack of AED blamed in death at Disney," December 21, 2007.)

6. Immunity provisions

Under existing law, employees of health studios are not liable for civil damages resulting from the use, attempted use, or nonuse of an AED when they are rendering emergency care or treatment. Similarly, when that employee renders emergency care or treatment the owners, managers, employees, or otherwise responsible authorities of the facility are not liable for civil damages that result from any act or omission in the course of rendering that care or treatment. This protection is available to the facility as long as it has fully complied with existing conditions concerning testing and staffing.

Those conditions require that the entity maintain and regularly test the AED and check it for readiness after each use and at least once every 30 days if the device has not been used in the previous 30 days. Existing law also sets a minimum level of trained employees by providing that for up to five installed AEDs, the entity shall have no less than one employee who is trained in the use of the AEDs. If more than five AEDs are installed, the entity is required to train a minimum of one additional employee for each five additional AEDs installed. Finally, the entity must have trained employees who are capable of responding to an emergency during normal business hours and may need to train additional employees to assure that a trained employee is available at all times. All of these requirements are conditions for the immunity from liability under existing law and under this bill.

However, none of the protections from liability apply in the case of personal injury or wrongful death that results from gross negligence or willful or wanton misconduct on the part of the person who uses, attempts to use, or maliciously fails to use the AED to provide emergency care or treatment.

Under this bill, golf course and amusement park employees, owners, managers, or otherwise responsible authorities would receive these protections from liability provided that any ensuing harm did not result from gross negligence or willful or wanton misconduct.

7. Sunset date; effect on immunity; necessary amendments

Existing law requires health studios to install an AED on their premises and grants them a qualified immunity for the use, or nonuse, of those devices. While that requirement sunsets on July 1, 2012, existing law provides that studios may continue to install AEDs and enjoy the same qualified immunity after that date.

This bill would revise those provisions by removing the July 1, 2012 sunset, and, instead, sunset the entire section on AEDs on January 1, 2014. As a result, this bill would impose a requirement for health studios to install AEDs until January 1, 2014, and, as of that date, repeal not only the requirement for installation of AEDs, but also the associated immunity for their use or non-use.

The author has indicated that this is not his intent. As a result, the bill should be amended to provide that the qualified immunity would continue after January 1, 2014.

Support : American Red Cross; California Professional Firefighters; City of Sacramento

Opposition : None Known

HISTORY

Source : Author

Related Pending Legislation : AB 142 (Hayashi) would address staffing issues related to health studios that are available for use 24 hours per day, but are not staffed during that entire time. This bill is pending in this committee.

Prior Legislation : See Background.

Prior Vote :

Assembly Judiciary Committee (Ayes 10, Noes 0)
Assembly Floor (Ayes 77, Noes 0)

Tab B

COMPLETE BILL HISTORY

BILL NUMBER : A.B. No. 1312
AUTHOR : Swanson
TOPIC : Defibrillators.

TYPE OF BILL :
Inactive
Non-Urgency
Non-Appropriations
Majority Vote Required
Non-State-Mandated Local Program
Non-Fiscal
Non-Tax Levy

BILL HISTORY
2010
Jan. 14 Consideration of Governor's veto stricken from file.
2009
Oct. 26 Consideration of Governor's veto pending.
Oct. 11 Vetoed by Governor.
Sept. 29 Enrolled and to the Governor at 11:30 a.m.
Sept. 9 Assembly Rule 77 suspended. (Page 3152.) Senate amendments concurred in. To enrollment. (Ayes 76. Noes 2. Page 3172.)
Sept. 8 In Assembly. Concurrence in Senate amendments pending. May be considered on or after September 10 pursuant to Assembly Rule 77.
Sept. 2 Read third time, passed, and to Assembly. (Ayes 24. Noes 9. Page 2107.)
Aug. 17 Read second time and amended. Ordered to third reading.
July 23 From committee: Amend, and do pass as amended. (Ayes 4. Noes 0.) (July 14).
July 6 In committee: Hearing postponed by committee.
June 22 Withdrawn from committee. Re-referred to Com. on JUD.
June 17 From committee chair, with author's amendments: Amend, and re-refer to committee. Read second time, amended, and re-referred to Com. on B., P. & E.D.
June 4 Referred to Coms. on B., P. & E.D. and JUD.
May 18 In Senate. Read first time. To Com. on RLS. for assignment.
May 18 Read third time, passed, and to Senate. (Ayes 77. Noes 0. Page 1556.)
May 13 Read second time. To Consent Calendar.
May 12 Read second time and amended. Ordered returned to second reading.
May 11 From committee: Amend, and do pass as amended. To Consent Calendar. (May 5).
Apr. 21 In committee: Hearing postponed by committee.
Mar. 31 Referred to Com. on JUD.
Mar. 2 Read first time.
Mar. 1 From printer. May be heard in committee March 30.
Feb. 27 Introduced. To print.

PROOF OF SERVICE

I, Bryana Schroder, declare that I am employed with the law firm of Jackson Lewis LLP, whose address is 50 California Street, 9th Floor, San Francisco, California, 94111; I am over the age of eighteen (18) years and am not a party to this action.

On October 30, 2013, I served the attached **BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, INC. AND CALIFORNIA RETAILERS ASSOCIATION IN SUPPORT OF RESPONDENT TARGET STORES** in this action by placing a true and correct copy thereof, enclosed in a sealed envelope addressed as follows:

Richard Caldarone (*admission pro hace vice pending*)
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Clerk's Office
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

[X] BY MAIL: United States Postal Service by placing sealed envelopes with the postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California. [( ) ***Courtesy copy by fax.***]

[ ] BY HAND DELIVERY: I caused such envelope to be delivered by hand to the above address.

[ ] BY OVERNIGHT DELIVERY: I caused such envelope to be delivered to the above address within 24 hours by overnight delivery service.

[ ] BY FACSIMILE: I caused such document to be transmitted by facsimile from our fax number (415) 394-9401 to the fax number indicated above (by written agreement, confirming letter dated and signed MM/DD/YY).

[ ] BY EMAIL: I caused such documents to be emailed to the above email address (per court order)

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 30, 2013, at San Francisco, California.

Bryana Schroder

4828-5015-5030, v. 1