SUBJECT: Limiting landowners' liability for criminal acts of third parties

COMMITTEE: Civil Practices — committee substitute recommended

VOTE: 6 ayes — Gray, Hilbert, Bosse, Goodman, Roman, Zbranek

2 nays — Alvarado, Dutton

1 absent — Nixon

WITNESSES: (*On original version*):
For —Jim Grace, Michael Graham and Randy Fritz, Texans for Lawsuit Reform; Richard Trabulsi, Richard's Liquors; Sheryl Bittick, Weingarten Realty; Jack Boyd, Simon DeBartolo Group; Gary Lohrke, Minyard Food Stores; Robert Rowling, Omni Hotels; Charlie Tyner, Kroger Foods; A.L. Bradley; Dale Walters; George Allen and Stacy Hunt, Texas Apartment Association; Richard Bennett, Texas Council of Forest Products Manufacturers; Gary Blumberg, DMC Management; Marilyn Childress, Texas Community Association Institute; Richard Daly, Texas Catholic Conference; Barbara Douglas, Lumbermen's Association of Texas; Rich Ellmer, Texas Mini Storage; Randy Erben and John Krueger, National Federation of Independent Business; Andrew Erben, Texas Association of Builders; Scott Fisher, Texas Petroleum Marketers and Convenience Store Association; Glen Garey, Texas Restaurant Association; Dianna Harms, The Dinerstein Companies; Mark Hutcheson, South Texas College of Law; Robert Kamm, Texas Association of Business and Chambers of Commerce; Carol McDonald, Independent Colleges and Universities of Texas; Karen Neely, Independent Bankers Association of Texas; Michael Peairson, Texas Building Owners and Managers Association; David Pinkus, Small Business United of Texas; James Ross, International Council of Shopping Centers; Bill Stinson, Texas Association of Realtors; Andrew Teas, Houston Apartment Association; Bill Tyron and Ralph Wayne, Texas Civil Justice League; Dinah Welsh, Texas Hospital Association; Michael White, Greater Houston Partnership and Greater Dallas Chamber of Commerce; Karen Wood, Baylor University; Joshua Allen; Mike McDougal; Tim Myers; Marc Ross; Richard Weekley

Against — Hartley Hampton, Mike Slack and Donald Bowen, Texas Trial Lawyers Association; Ken Bailey and Mike Higgins, Texas State Association of Firefighters; Dan Lambe, Texas Citizen Action; Hannah Riddering, National Organization for Women; Barbara Suraci, Will Not Forget; Sarah Jane Wheat, Campus C.O.P.S.; Lana Dillon; Vicki Goodnight; C.W. Matteck; Ron Aaron, The Rape Crisis Center; Sterlene Donahue; Maria Luisa Flores, Texas Women's Political Caucus; Tommy Gillaspie; Reggie James, Consumers' Union; Gregory James; Rick Levy, Texas AFL-CIO; Carvel McNeil, Houston Police Patrolmen's Union; Brad Parker; Zella Pearcy; Matthew Porter, Transportation Workers Union; Tom Smith, Public Citizen; Paula Sweeney

BACKGROUND:

Landowners have a duty to protect certain persons from harm when they come on to their land. The scope of the landowner's duty depends on whether the person is a trespasser, a licensee (invited for social purposes), or an invitee (invited for a commercial purpose). Commercial premises owners have a duty to use ordinary care to protect invitees from the criminal acts of third parties if they know or should have reason to know of an unreasonable risk of harm. The duty falls to the landowner because "the party with the 'power of control or expulsion' is in the best position to protect against the harm." *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex. 1993). The premises owner is held responsible for crimes that are reasonably foreseeable based upon the "totality of the circumstances." *Garner v. McGinty*, 771 S.W.2d 242, 248 (Tex. App.— Austin 1989, no writ).

The liability of landowners who allow persons on to their land for recreational purposes is limited by statute under chapter 75 of the Civil Practices and Remedies Code. In order for the limit to apply, the total amount the owner may receive for allowing people onto the land can be no more than twice the total amount of property taxes imposed on the land for the previous year. The landowner must also carry $1 million of liability insurance for each occurrence of bodily injury or death, $500,000 per person for bodily injury or death, and $100,000 for property damage. If the landowner was not grossly negligent or did not act with malicious intent or in bad faith and meets all other requirements, the landowner cannot be held liable for more than the required insurance amounts.

DIGEST:

CSHB 1202 would separate the landowner liability limits of chapter 75 of the Civil Practices and Remedies Code into four areas:

- liability for recreational use of agricultural land;
- liability for recreational use of nonagricultural land;
- liability for landowners generally; and
- liability for criminal acts of third parties.

Liability for criminal acts of third parties. Under CSHB 1202, landowners generally would have no duty to prevent the criminal acts of third parties or protect a person from the criminal acts of a third party.

A landowner could be held liable for property damage, personal injury, or death of a person, other than a trespasser, caused by a reasonably foreseeable criminal act if:

- the landowner knew or should have known that a condition on the premises posed a significant and unreasonable risk of harm from a criminal act;
- the landowner failed to exercise ordinary care to protect the person from the risk of harm from the criminal act; and
- that failure was a proximate cause of the harm.

The liability of a landowner would not be limited under CSHB 1202 if:

- the criminal act was committed by a person subject to control or supervision of the landowner;
- the landowner was criminally responsible for the criminal act;
- the criminal act was at a location where the landowner was maintaining a nuisance;
- the criminal act resulted from the landowner's violation of a statutory duty relating to security devices in rental housing;
- the cause of action was considered a toxic tort (related to hazardous chemicals, waste or other substances);
- the claimant was a resident of a convalescent or nursing home;

- the landowner was liable for breach of a written warranty, or
- the landowner made an affirmative statement to a prospective employee concerning the safety of the premises that was given to the employee in writing within seven days of employment.

Liability of landowners generally. CSHB 1202 would codify standards for landowners' liability for injuries caused to persons by conditions on the land. Persons on the land would be divided into three categories, and the landowner's duty to them would vary depending on how the person was classified. Classification would be a question of law that the judge would determine.

Trespassers - landowners would not be liable for injuries to trespassers unless the injury was caused by the wilful or wanton acts or the gross negligence of the landowner.

Licensees (guests invited for a non-commercial purpose) - landowners could be held liable if the landowner had actual knowledge of a dangerous condition on the land that the licensee was unaware of and the landowner either failed to make the condition safe or to warn the licensee of the condition.

Invitees (guests invited for a commercial purpose) - landowners could be held liable if the landowner knew or should have known of a dangerous condition and failed to exercise ordinary care to correct the condition or to warn the invitee of an unreasonable risk of harm caused by the condition.

Landowners could also be held liable to licensees and invitees if the injury was proximately caused by the wilful or wanton acts or gross negligence of the landowner.

Liability for recreational use of nonagricultural land. CSHB 1202 would not modify the standards for limiting liability for owners of nonagricultural land used for recreational purposes but would separate these standards from those applied to owners of agricultural land. The single substantive modification would be to reduce the amount that could be collected for use of the land from twice the annual ad valorem tax

assessment on the land to the same amount as the annual ad valorem assessment.

CSHB 1202 would take effect September 1, 1997 and apply to cases filed on or after that date.

SUPPORTERS SAY:

CSHB 1202 would restore a sense of order and stability to the complicated area of premises liability law. The current law is a confusing mixture of statutory and case law that makes it very difficult for a landowner to determine, without the advice of legal counsel, what duties that landowner owes to persons who come on to the land. CSHB 1202 would also make minor changes to the standards of liability for criminal acts of third parties and to the profit allowed for recreational uses of nonagricultural land to restore a sense of balance to these two areas of the law.

Liability for criminal acts of third parties. Texas landowners are regularly forced to defend themselves in lawsuits brought by persons who have been injured by criminals when the landowner's only connection to the crime is that it was committed on the landowner's property. The vague standards given and applied by the courts governing landowners' duties in such situations allow such suits to nearly always go to trial unless settled. At trial, crime victims are sympathetic plaintiffs, and innocent landowners can be unfairly forced to pay for society's desire to punish criminal acts. Without clear standards defining landowner duties to such persons, juries can often be swayed by attorneys to find liability against the landowner. Even in cases where a landowner is determined not to fight any liability, legal expenses alone can cost landowners tens of thousands of dollars for each incident. However, most landowners often settle a claim before it reaches trial simply to avoid the possibility of a multi-million dollar verdict for the plaintiff. Such settlements, however, can often cost non-negligent landowners hundreds of thousands of dollars.

In order for landowners to be held liable for criminal acts of third parties under CSHB 1202, the plaintiff would be required to prove that the landowner knew or should have known of a *substantial and unreasonable* risk of harm from a *reasonably foreseeable* criminal act. This standard is very similar to what is currently embodied in premises liability law, which requires landowners to be held liable for *foreseeable* criminal acts that

present an *unreasonable* risk of harm, but would raise the threshold requirement of the duty owed by landowners to invitees. This change is necessary to return some balance to premises liability cases, as the current standards give plaintiffs a significant advantage because they can almost always prove that crime was foreseeable at a location.

While it would increase the threshold standard for premises liability claims, CSHB 1202 would not be a significant departure from current law. Landowners would still be held liable for reasonably foreseeable criminal acts that posed a substantial and unreasonable risk of harm if the landowner failed to use ordinary care to protect invitees. Adding the requirement that the risk be substantial would ensure that landowners would not be held responsible when the risk of harm is the same as it would be at any other property in the area. The current standards can force landowners to abandon property in high-crime, low-income areas because of the foreseeability of crime and the risk of harm. If the risk of harm is no greater at the landowners property than at any other property in the area, the landowner should not be forced to ensure the safety of all persons coming onto the property.

CSHB 1202 would specifically exclude a number of circumstances from the liability limitations applied to other criminal acts. Among these exceptions would be matters over which a landowner had control, such as employees under the landowners supervision or control, the landowner's own actions, and security devices the landowner was responsible for under the Property Code. Additionally, liability would not be limited in two high-risk situations: where the landowner maintained a nuisance and where the premises was a convalescent or nursing home. Landowner liability would also not be limited if they made warranties or promises to potential employees about the safety or lack of criminal activity at a location. These exceptions to the limitations on liability are designed to ensure landowners do not escape liability in cases in which they would have liability under current law, regardless of the standard of risk applied to the case.

Among the most important of these exceptions are two that were added in the committee substitute: liability for statements made to prospective employees and liability for actions at nursing homes. Without these two exceptions to the liability limits, these two innocent and virtually defenseless

groups of potential victims could receive little or no compensation for crimes done to them. The exception for nursing home residents would simply require the landowner to ensure that the persons employed by the facility did not pose an unreasonable risk of harm to the patients. Several cases have been litigated in which nursing homes have employed known criminals who posed a risk to the virtually defenseless residents of such homes.

The exception to liability for statements made to potential employees is included to ensure that when persons, especially teenagers, were employed at high risk jobs such as convenience stores or other late-night stores, they would be warned of the risk of harm by being told whether there had been criminal acts on that premises. In many cases, potential employees are assured that no such incidents have occurred in order to get them to work there. Only after the employee is the victim of a criminal act does the victim, or the family of a deceased victim, discover that prior criminal acts had been committed on the premises and the landowner had failed to use ordinary care to protect employees.

The argument that just bringing the criminal into the case would reduce the landowner's share of liability is flawed for two reasons. First, in order to bring a criminal into a case, the landowner must be able to find the criminal. In many of the most publicized premises liability cases, such as the Austin yogurt shop murders, no one has ever been charged or convicted of the crime. Second, even if the criminal were found, the jury would still likely assess a significant portion of the liability to the landowner because the criminal would, in nearly all cases, be unable to pay any damage award. Juries are sophisticated enough to know that unless they placed a significant amount of liability on the landowner, the plaintiff would receive little or no compensation.

Liability of landowners generally. CSHB 1202 would restate current law regarding premises liability. The purpose of placing these standards in statute would be to allow the Legislature, rather than the courts, to decide such standards. The Legislature, not the courts, should have the responsibility for determining duties owed to others. The restatement of these standards would not alter their application in any way. Without the inclusion of the standards, chapter 75 of the Civil Practices and Remedies

Code would only cover a portion of liability standards for landowners. Stating such standards plainly in statute would allow landowners to clearly know their duties to persons on their land without having to read and interpret long, and often contradictory, court decisions.

Liability for recreational use of nonagricultural land. The standards of liability for recreational use of nonagricultural land would be exactly the same as they are under current law. The only changes that CSHB 1202 would make would be to move these standards into a separate subchapter and to lower the amount that the landowner could charge other for entry on the land in order to receive the liability limits. Under current tax law, agricultural land is valued differently than other lands resulting in a lower appraisal value and thus a lower tax. Lowering the total amount that landowners could charge to the total of the property tax assessment for nonagricultural land, rather than twice the total as for agricultural land, would put this provision more in line with the agricultural land liability limits.

OPPONENTS SAY:

CSHB 1202 would change the standards for liability of landowners and make it more difficult for persons injured on another's land to receive compensation for the landowner's failure to correct a dangerous condition on the land or warn the person entering the land of the condition.

Liability for criminal acts of third parties. CSHB 1202 would limit the right of persons injured by criminal acts on another's land to recover damages when the criminal act was foreseeable and the landowner did not use ordinary care to prevent that act. The standards set out in CSHB 1202 would mirror the general standards for recovery in current law except for one important difference. Under current case law, a crime victim can recover if there was an *unreasonable* risk of harm from a foreseeable criminal act, *Butcher v. Scott*, 906 S.W.2d 14, 15 (Tex. 1995). Under CSHB 1202, the risk of harm from a criminal act would have to be "*substantial and unreasonable*" in order for there to be the possibility of liability on the landowner.

While the change may seem small, the term "substantial and unreasonable" has not been defined by Texas courts. It clearly is meant to be a higher standard that the current law, but CSHB 1202 would create uncertainty

about exactly how the change would be applied. One option would be to require the harm to be substantial, which would force a court to determine whether theft, rape, assault or murder are "substantial" enough crimes for liability to apply. A different interpretation would require the jury to determine if the risk was substantial as well as unreasonable. There is no way to tell how a court or a jury might interpret such a requirement, and thus, no way to know whether crime victims would be able to receive compensation that they rightly deserve for the unreasonable negligence of landowners.

CSHB 1202, by raising the standard for liability, would make it less likely for apartment residents, hotel occupants, shopping center patrons, and restaurant patrons to recover for criminal acts done to them when a landowner failed to use ordinary care to protect them from the unreasonable risk of a foreseeable criminal act. In most cases, the only thing a landowner would have to do to escape liability would be to warn persons coming on to the land of the risk of criminal activity. If the landowner maintained a piece of property that invited criminal acts, the landowner would only be required to use *ordinary care* to protect others on the land. While landowners should not be made insurers of the safety of everyone that comes on to their land, they should be required to protect against most risks of criminal activity.

Legislation enacted in 1995 will have a significant impact on premises liability cases once litigation subject to those standards makes its way to the courthouse. The most significant changes will be in the standards of joint and several liability and the right of defendants to bring other responsible third parties into a case, both of which change were added by SB 28 by Sibley, enacted by the 74th Legislature. Under that legislation, which applied to all cases filed after September 1, 1996, if a landowner is sued for the criminal act of a third party, the landowner can ask the jury to consider the liability of the criminal. If the criminal is judged by the jury to be more than 50 percent liable for the harm done to the plaintiff, the landowner could not be held jointly and severally liable and would, therefore, not be required to compensate the plaintiff for any more than the percentage of liability attributed to the landowner.

Liability of landowners generally. While the stated purpose of setting these standards in statute would be to freeze them in their current state,

reducing these standards to simple statutory language would ignore some of the nuances and eliminate some of the flexibility of case law. Premises liability cases are almost always fact-intensive. In most cases, juries must decide what risks are unreasonable and what acts are foreseeable. While clear statutory language may be helpful to some non-lawyers, the current state of the law on premises liability depends on fine, fact-based distinctions that cannot be translated into simple statutory language.

Liability for recreational use of nonagricultural land. The limits on liability of recreational use of nonagricultural land were added in the 74th Legislature by HB 2085 by B. Turner. The amount allowed to be charged should be equal for both agricultural and nonagricultural land. Otherwise, owners of agricultural land would be able to charge more than others for recreational activities and still enjoy the liability limits under chapter 75.

OTHER OPPONENTS SAY:

CSHB 1202 would not go far enough in ensuring that landowner would not have to face costly and undeserved lawsuits from persons who have been injured on another's property.

Liability for criminal acts of third parties. Simply raising the standard for liability from *unreasonable* risk of harm from *foreseeable* criminal acts to *substantial and unreasonable* risk from *reasonably foreseeable* criminal acts would not protect landowners from the flood of suits filed by persons who are victims of crime. Persons who are not landowners bear no responsibility to protect or prevent the criminal acts of third parties. Landowners, however, have a significant burden as they must attempt to determine if crime is foreseeable on their property in order to determine if they could be held liable for not instituting more stringent and costly security measures. Such a standard requires landowners to be able to see into the future while courts and juries have the benefit of hindsight. In order to make the burden on landowners fair and reasonable, they should be held liable for criminal acts of third parties only when the landowner is grossly negligent, as proposed in the original version of HB 1202.

Certain exceptions granted to the liability limits under CSHB 1202 should be removed because they are not found elsewhere in Texas law. The most unusual exception is for breach of an affirmative statement made to a prospective employee. Under current law, the breach of such a statement is

not grounds for liability, but merely evidence of the lack of ordinary care applied by the owner under the circumstances. Allowing such a statement to be grounds for unlimited liability would make it very easy for a jury to determine that just making such a statement alone would be grounds for liability, regardless of whether there was an unreasonable risk of harm or a failure of the landowner to use ordinary care, as is required for liability to attach under current law.

Liability of landowners generally. Landowner liability to business invitees should be limited to circumstances where the landowner had actual knowledge of the dangerous condition. This would be the same standard that is applied to licensees. Changing this standard would ensure that commercial landowners could only be liable for dangerous conditions they know of rather than the speculative standard of what they should have known.

NOTES:

The original version of HB 1202 would have limited the liability of owners of agricultural and nonagricultural land used for any nonbusiness purpose so long as the landowner did not charge more than twice the ad valorem tax assessment for the prior year and maintained the insurance coverage currently required by law. Landowners could not have been held liable under the doctrine of attractive nuisance, which allows liability if the landowner has a condition, the risk of which would not be obvious to a child. Landowners would not have been held liable for the criminal acts of third parties unless the landowner was grossly negligent and that gross negligence was a proximate cause of the harm. Exceptions to that rule would have been granted if the criminal act was committed by the landowner or an employee of the landowner, the landowner was maintaining a nuisance on the premises, or the criminal act resulted from a violation of the landowner's duty relating to security devices to tenants.

The original version of the bill also would have prohibited a person who was convicted a crime from recovering for injuries sustained during the commission of the crime. It would have reinstated the affirmative defense of assumption of the risk, requiring a verdict for the defendant if the plaintiff had been proven to have known of an open and obvious dangerous condition and voluntarily accepted the risk of that condition.