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Negligence Liability of Landowners and Occupiers for the Criminal Conduct of Another: On a Clear Day in California One Can Foresee Forever

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INTRODUCTION

Over the past several years, a disturbing phenomenon has been gaining momentum in the tort liability arena. In this era of victims' rights awareness,¹ the judiciary has increasingly given recognition to potential civil liability of third persons for negligently failing to protect a victim from the criminal conduct of another. This trend entails the use of traditional negligence standards² in alleging that the omissions of a third party caused the injury.³

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1. See generally Carrington, *Victims' Rights Litigation: A Wave of the Future?*, 11 U. RICH. L. REV. 447 (1977).

2. The negligence cause of action has traditionally been divided into four basic elements. Briefly stated, they are:

1. A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.

2. A failure on the person's part to conform to the standard required: a breach of the duty

3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.

4. Actual loss or damage resulting to the interests of another

W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984).

3. See Note, *California Approach to Third Party Liability for Criminal Violence*, 13 LOY. L.A.L. REV. 535 (1980); Comment, *Negligence Liability for the Criminal Acts of Another*, 15 J. MARSHALL L. REV. 459 (1982); Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886 (1934); Annotation, *Comment Note—Private Person's Duty and Liability for Failure to Protect Another against Criminal Attack by Third Person*, 10 A.L.R. 3D 619 (1966). Typically, the victim elects to sue a more financially stable third party rather than seek recovery from the perpetrator who is often indigent.

Compensation in these "third party" suits is contingent on the victim's establishing a legal duty on the part of the third party to protect the victim and proving that breach of the duty brought about the victim's injuries. The task of determining whether an affirmative duty of protection exists frequently involves identifying a special relationship between the victim and the third party.⁴ Another approach adopted by courts is to balance competing policy considerations.⁵

As this Article will illustrate, however, the decisions of the California courts in this area of the law, as specifically applied to landowners and occupiers, are poorly reasoned. Addressing the problem more generally, one author has summarized the situation as follows:

The problem with victims' litigation lies in the judiciary's inconsistent recognition of the duty to protect. The irregular application of the special relationship rule, the failure of courts to announce exactly what makes a relationship special, and the role of policy considerations in the judicial analysis of negligence have led to inconsistent and sometimes unjust results. Consequently, a strain has been placed on the traditional notion of duty in suits against third parties for the failure to protect against the criminal acts of another.⁶

An examination of the most recent cases reveals a slim prospect for improvement unless the legislature acts to provide statutory

4.

As a general principle, a "defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." . . . [H]owever, when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim.

Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 434-35, 551 P.2d 334, 342-43, 131 Cal. Rptr. 14, 22-23 (1976) (quoting *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 399, 525 P.2d 669, 680, 115 Cal. Rptr. 765, 776 (1974)). See also *Davidson v. City of Westminster*, 32 Cal. 3d 197, 203, 649 P.2d 894, 897, 185 Cal. Rptr. 252, 255 (1982): "A person 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." See also *Peterson v. San Francisco Community College Dist.*, 36 Cal. 3d 799, 806, 685 P.2d 1193, 1196, 205 Cal. Rptr. 842, 845 (1984); *Lopez v. Southern Cal. Rapid Transit Dist.*, 40 Cal. 3d 780, 789, 710 P.2d 907, 912, 221 Cal. Rptr. 840, 845 (1985); *W. KEETON, supra* note 2, § 56, at 373-85; *RESTATEMENT (SECOND) OF TORTS* § 315, at 122 (1965). The question of the existence of a legal duty of care in a given factual situation presents a question of law which must be determined only by the court. *W. KEETON, supra* note 2, § 37, at 236. See also 4 *WITKIN, SUMMARY OF CALIFORNIA LAW Torts* § 493, at 2756 (8th ed. 1974).

5. See, e.g., *Isaacs v. Huntington Memorial Hosp.*, 38 Cal. 3d 112, 124-25, 695 P.2d 653, 657-58, 211 Cal. Rptr. 356, 360-61 (1985), and cases cited therein; *Cohen v. Southland Corp.*, 157 Cal. App. 3d 130, 138-39, 203 Cal. Rptr. 572, 576 (1984); *Gomez v. Tigor*, 145 Cal. App. 3d 622, 627, 193 Cal. Rptr. 600, 603 (1983).

6. Comment, *supra* note 3, at 463.

guidance to the courts in establishing this legal responsibility. This Article will expose the anomaly created when the courts define the protective duty primarily in terms of "foreseeability" and allow the jury to be the principal arbiters of that *legal*, not factual, determination. Furthermore, this Article will make suggestions as to the content of legislation needed to remedy this practice.

I. THE ROLE OF DUTY IN NEGLIGENCE ANALYSIS

In a negligence analysis, "duty" may be defined as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."⁷ Duty is a question "of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty."⁸

According to Professor Fleming, the functional importance of this concept

lies in the fact that it gives the court a powerful control over the handling of negligence actions before a jury. For, even if there is sufficient evidence for a finding of negligence against the defendant, the court may still keep the case from the jury on the ground that, as a matter of law, there was no duty incumbent on the defendant to exercise care. Accordingly, the question whether a duty exists in the particular situation involves a determination of law for the court. This control device is an important factor in assuring consistency in the common law and serves as a brake upon the proclivity of juries to indulge their sympathy for accident victims without due regard for the wider implications of their findings in restricting freedom of action.⁹

At this point, two significant California Supreme Court decisions bear mentioning: *Dillon v. Legg*¹⁰ and *Rowland v. Christian*.¹¹ In *Dillon*, the California Supreme Court overruled its earlier ruling in *Amaya v. Home Ice, Fuel and Supply Co.*¹² and established a broader rule of liability which permitted a plaintiff to recover damages for fear and shock suffered as a result of dangerous conduct directed at someone other than the plaintiff. The case involved a mother who had witnessed her child killed by a

7. W. KEETON, *supra* note 2, § 53, at 356.

8. *Id.*

9. J. FLEMING, *THE LAW OF TORTS* 135 (5th ed. 1977).

10. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

11. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

12. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

negligent automobile driver. That the driver was liable for the wrongful death of the son was not disputed. The central question involved the basis for the plaintiff's request for additional compensation for the emotional damage she suffered because she witnessed the event. In ruling in the plaintiff's favor, the court first held that the conventional approach to legal duty no longer was acceptable.¹³ The court then adopted an approach which focused on the foreseeability of the risk of harm created by the defendant's conduct.¹⁴

The *Dillon* court described duty as

a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . But it should be recognized that "duty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.¹⁵

The court further found that absent "overriding policy considerations . . . foreseeability of risk [is] of primary importance in establishing the element of duty."¹⁶ Applying this test, the *Dillon* court held that a motorist should be able to foresee the emotional damage that may be caused to a close relative of the person injured by his negligent action. Consequently, the tortfeasor should be held liable for compensation for these damages as well as the damages he directly caused.

Two months later, the court again reexamined California negligence law, this time in the context of premises liability.¹⁷ Prior to the California Supreme Court's decision in *Rowland v. Christian*, California courts traditionally labelled a plaintiff either an invitee, a licensee or a trespasser as a means of ascertaining the nature of the duty owed by the occupant.¹⁸ In 1968, the California Supreme Court repudiated that traditional duty classification scheme and replaced it with the ordinary negligence principles of foreseeable risk and reasonable care.¹⁹

13. *Dillon*, 68 Cal. 2d at 733-36, 441 P.2d at 916-18, 69 Cal. Rptr. at 76-78. The former rule denied recovery where the fear or shock resulted from danger to someone other than the plaintiff. This policy was articulated in *Reed v. Moore*, 156 Cal. App. 2d 43, 45, 319 P.2d 80, 81 (1957), and subsequently affirmed in *Amaya v. Home Ice, Fuel and Supply Co.*, 59 Cal. 2d 295, 299, 379 P.2d 513, 515, 29 Cal. Rptr. 33, 35 (1963).

14. *Dillon*, 68 Cal. 2d at 739-40, 441 P.2d at 919-20, 69 Cal. Rptr. at 79-80.

15. *Id.* at 734, 441 P.2d at 916, 69 Cal. Rptr. at 76.

16. *Id.* at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79.

17. *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

18. See generally W. KEETON, *supra* note 2, §§ 57-62.

19.

The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status

In *Rowland*, the plaintiff was injured when the handle of a porcelain water faucet in the bathroom broke in his hand while he was turning it. The plaintiff, a guest in the defendant's apartment at the time of the injury, had informed her of his intention to use the bathroom. The defendant knew that the handle was cracked but failed to warn him of this condition. The trial court granted the defendant's motion for summary judgment, applying the general rule that a social guest is only a licensee and that the possessor owes no duty to warn him of a dangerous condition.

In reversing this decision, the supreme court examined the common law in regard to liability of an occupier of land as applied in California and concluded that section 1714 of the California Civil Code²⁰ served as the foundation of the state's negligence law. The proper test, according to the court, was not the status of the plaintiff, but whether the injury was a foreseeable result of the host's negligence.²¹ The *Rowland* opinion set forth broad criteria that would be weighed in each set of factual circumstances to determine whether the duty of care should be expanded beyond traditional limits:

A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, 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 consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.²²

The *Rowland* court's statement is a comprehensive and authoritative exposition of the elements to be taken into account in determining whether a given relationship between parties comes within the sphere of relationships on which a tort suit can be based.²³ Unfortunately, this methodology, bolstered by the principles enun-

have some bearing on the question of liability, the status is not determinative. *Rowland*, 69 Cal. 2d. at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

20. The 1978 amendment to CAL. CIV. CODE § 1714 designated the statutory language applied in *Rowland* to be subdivision (a) and added subdivisions (b) and (c). Section 1714(a) now provides:

Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. . . .

21. See *supra* note 20.

22. *Rowland*, 69 Cal. 2d at 112-13, 443 P.2d at 564, 70 Cal. Rptr. at 100.

23. REPORT OF THE CALIFORNIA CITIZEN'S COMMISSION ON TORT REFORM, RIGHTING THE LIABILITY BALANCE, 58 (1977) [hereinafter REPORT].

ciated in *Dillon v. Legg*, has been repeatedly adopted, with considerable confusion, in the context of "third party" premises liability for criminal violence. Consistent with the current legal trend of increasing the likelihood of liability of owners and occupiers of land, the California decisions²⁴ all too frequently emphasize policy—particularly the foreseeability factor—in considering the duty to protect.²⁵ A more analytically sound approach, however, would focus on the nature of the relationship between the victim and the landowner.²⁶ To appreciate the import of this proposition, a brief historical review of the special relationship doctrine is necessary.

II. THE SPECIAL RELATIONSHIP DOCTRINE

Ordinarily, a person who has not created a peril is not liable for failure to take affirmative action to assist or protect another, no matter how great the danger or how easily the endangered party could be rescued. An exception to this general rule occurs when there is some *special relationship* between the parties which gives rise to a duty to act.²⁷ Similarly,

[t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.²⁸

This principle is based on the notion that an individual should not be liable for failing to act as a "good Samaritan."²⁹ "Morally

24. See *supra* note 5.

25. Comment, *supra* note 3, at 463. See also *infra* notes 106-17 and accompanying text.

26. See Harper & Kime, *supra* note 3.

27. B. WITKIN, *supra* note 4, § 554, at 2821; Lopez v. Southern Cal. Rapid Transit Dist., 40 Cal. 3d 780, 788-89, 710 P.2d 907, 911-12, 221 Cal. Rptr. 840, 844-85 (1985); Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 806, 685 P.2d 1193, 1196, 205 Cal. Rptr. 842, 845 (1984); Williams v. State of Cal., 34 Cal. 3d 18, 23, 664 P.2d 137, 139, 192 Cal. Rptr. 233, 235 (1983); Davidson v. City of Westminster, 32 Cal. 3d 197, 203, 649 P.2d 894, 897, 185 Cal. Rptr. 252, 255 (1982); Thompson v. County of Alameda, 27 Cal. 3d 741, 751-52, 614 P.2d 728, 733-34, 167 Cal. Rptr. 70, 75-76 (1980); Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 435, 551 P.2d 334, 342-43, 131 Cal. Rptr. 14, 22-23 (1976); Richards v. Stanley, 43 Cal. 2d 60, 65, 271 P.2d 23, 26-27 (1954). An affirmative duty based on a special relationship should not be confused with one arising by virtue of statute or contract. In this respect, see generally B. WITKIN, *supra*, §§ 562 and 566.

28. RESTATEMENT (SECOND) OF TORTS § 315 (1965) (quoted in *Tarasoff*, 17 Cal. 3d at 435, 551 P.2d at 342-43, 131 Cal. Rptr. at 22-23; *Thompson*, 27 Cal. 3d at 751-52, 614 P.2d at 732-33, 167 Cal. Rptr. at 74-75).

29. Weirum v. RKO General, Inc., 15 Cal. 3d 40, 49, 539 P.2d 36, 41, 123 Cal. Rptr. 468, 472 (1975).

questionable, the rule owes its survival to 'the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue. . . .'³⁰ The rule has its roots in the common law distinction between action and inaction, or misfeasance and nonfeasance.³¹

Liability for nonfeasance . . . first appear[ed] in the case of those engaged in "public" callings, who, by holding themselves out to the public, were regarded as having undertaken a duty to give service for the breach of which they were liable. With the development of the action of assumpsit,^[32] this principle was extended to anyone who, for a consideration has undertaken to perform a promise—or what we now call a contract. During the last century, liability for "nonfeasance" has been extended still further to a limited group of relations, in which custom, public sentiment and views of social policy have led the courts to find a duty of affirmative action.³³

A *special relationship*, which gives rise to an initial duty to provide protection, has been found to exist, for example, between an innkeeper and a guest,³⁴ a landlord and a tenant,³⁵ an employer and an employee,³⁶ and a carrier and a passenger.³⁷

30. *Tarasoff*, 17 Cal. 3d at 435 n.5, 551 P.2d at 343 n.5, 131 Cal. Rptr. at 23 n.5 (quoting W. PROSSER, TORTS § 56, at 341 (4th ed. 1971)). See also, W. KEETON, *supra* note 2, § 56, at 375-77; and J. FLEMING, *supra* note 10, at 143.

31.

Misfeasance exists when the defendant is responsible for making the plaintiff's position worse, i.e., defendant has created a risk. Conversely, nonfeasance is found when the defendant has failed to aid plaintiff through beneficial intervention. . . . [L]iability for nonfeasance is largely limited to those circumstances in which some special relationship can be established. If, on the other hand, the act complained of is one of misfeasance, the question of duty is governed by the standards of ordinary care

Weirum, 15 Cal. 3d at 49, 539 P.2d at 41, 123 Cal. Rptr. at 473.

32. Assumpsit is a "common law form of action which lies for the recovery of damages for the non-performance of a parol or simple contract" BLACK'S LAW DICTIONARY 112 (5th ed. 1979).

33. W. KEETON, *supra* note 2, § 56, at 373-74 (footnote omitted).

34. See generally Annotation, *Liability of Hotel or Motel Operator for Injury to Guest Resulting from Assault by Third Party*, 28 A.L.R. 4TH 80 (1984); Annotation, *Liability of Hotel or Motel for Guest's Loss of Money from Room by Theft or Robbery Committed by Person Other Than Defendant's Servant*, 28 A.L.R. 4TH 120 (1984).

35. See generally Annotation, *Landlords's Obligation to Protect Tenant Against Criminal Activities of Third Person*, 43 A.L.R. 3D 331 (1972). See also *O'Hare v. Western Seven Trees Corp.*, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977). Similarly, see *Frances T. v. Village Green Owners Ass'n*, 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986) (Mosk, J., dissenting), where the court held that a condominium association and its individual directors may be held to a landlord's standard of care as to the common areas under their control and thus may be liable for injuries caused by third party criminal conduct.

36. See generally Annotation, *Employers Liability to Employee or Agent for Physical Injury Received as a Result of Assault by Third Party*, 9 A.L.R. 3D 517 (1966). See also *Lillie v. Thompson*, 332 U.S. 459 (1947).

Some relationships are so tenuous, however, that no protective duty will be deemed to exist despite a high degree of foreseeability of harm. One example of such a relationship was found in *Davidson v. City of Westminster*.³⁸ There, the plaintiff-victim was stabbed while in a public laundromat that was under police surveillance. On three prior occasions, women had been similarly assaulted at the same location. The investigating officers were aware of the victim's presence throughout the surveillance but did not warn her or intervene until the stabbing occurred. Seeking to recover from the city and the policemen, the victim's complaint alleged that special relationships existed between her and the policeman as well as between the assailant and the officers, each of which imposed a duty of care on the officers.

The California Supreme Court held that there were no relationships sufficient to impose a duty of care on the policemen. As between the officers and the assailant, the court wrote: "[A] person's mere proximity to an assailant, even with knowledge of his assaultive tendencies or status as a felon, does not establish a relation imposing a duty to control the assailant's conduct."³⁹ Similarly, the court held that no special relationship existed even between the victim and the officers because the officers did not create the peril, because the victim was unaware of the officers' presence and did not rely on them for protection and because the officers' conduct did not change the risk which would have existed even in their absence.⁴⁰ Moreover, the court rejected the victim's argument that mere knowledge of her danger imposed a duty on the officers to warn or protect her.⁴¹

Some relationships by their very nature are thus "special" ones which give rise to an initial duty to come to the aid of others,⁴² while others are not special and do not give rise to such a duty. Accordingly, in determining whether one owes an obligation to protect another, the starting point of a "duty" analysis should nec-

37. See, e.g., *Lopez v. Southern Cal. Rapid Transit Dist.*, 40 Cal. 3d 780, 788-89, 710 P.2d 907, 911-12, 221 Cal. Rptr. 840, 844-45 (1985).

38. 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982).

39. *Id.* at 205, 649 P.2d at 898, 185 Cal. Rptr. at 256.

40. *Id.* at 208, 649 P.2d at 900, 185 Cal. Rptr. at 258.

41. *Id.* at 209, 649 P.2d at 900, 185 Cal. Rptr. at 258.

42. *Lopez*, 40 Cal. 3d at 789, 710 P.2d at 912, 221 Cal. Rptr. at 845. This notion of "initial duty" is to be differentiated from a duty arising as a result of a particularized application of the "good Samaritan" doctrine which provides that a volunteer who, *having no initial* duty to do so, undertakes to come to the aid of another . . . is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Williams v. State of Cal., 34 Cal. 3d 18, 23, 664 P.2d 137, 139, 192 Cal. Rptr. 233, 235 (1983) (emphasis added).

essarily begin with the question of the nature and character of the particular relationship involved.⁴³ *Davidson v. City of Westminster*⁴⁴ clarified that while harm to a plaintiff may be foreseeable, that fact does not automatically create a protective duty. Once a preexisting duty to protect is found by virtue of the particular relationship, the concept of foreseeability should be used as an analytical tool in defining and limiting its scope.⁴⁵

Unfortunately, neither the California judiciary nor legislature have articulated a working definition of "special relationship." In *Tarasoff v. Regents of the University of California*,⁴⁶ the California Supreme Court suggested that the proper approach in establishing a duty to protect another from criminal violence is to expand the list of special relationship exceptions rather than to directly reject the general common law rule of non-liability.⁴⁷ This approach has been criticized, however, for failing to distinguish various relationships from one another and for overlooking the possibility that a central principle may be applicable to all "third party" situations.⁴⁸

Typically, where a special relationship exists, the plaintiff is in some respect particularly vulnerable and dependent on the defendant who, correspondingly, holds considerable power over the plaintiff's welfare.⁴⁹ In the context of private duties, as opposed to governmental duties, Marshall Shapo examined a series of continuing relationships such as those stemming from employment, commercial relations, educational environments and emergency situations.⁵⁰ According to his thesis, affirmative duties are based pri-

43.

Duty arises out of a relation between the particular parties that in . . . right reason and essential justice enjoins the protection of one by the other against what the law by common consent deems an unreasonable risk of harm, such as is reasonably foreseeable Duty is largely grounded in the natural responsibilities of social living and human relations such as have the recognition of reasonable men

Mayer v. Housing Auth., 84 N.J. Super. 411, 420-21, 202 A.2d 439, 444 (Super. Ct. App. Div. 1964), *aff'd* 210 A.2d 617 (N.J. 1965), (quoting *Wytupeck v. Camden*, 25 N.J. 450, 461, 136 A.2d 887, 893 (1957)).

44. 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982).

45. Note, *Landlord's Duty to Protect Tenants from Criminal Acts of Third Parties: The View from 1500 Massachusetts Avenue*, 59 GEO. L.J. 1153, 1178 (1971). See also *Frances T. v. Village Green Owners Ass'n*, 42 Cal. 3d 490, 523-24, 723 P.2d 573, 594, 229 Cal. Rptr. 456, 477 (1986) (Mosk, J., dissenting).

46. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

47. *Id.* at 435 n.5, 551 P.2d at 343 n.5, 131 Cal. Rptr. at 23 n.5.

48. Note, *supra* note 3, at 552.

49. W. KEETON, *supra* note 2, § 56, at 374. See also J. FLEMING, *supra* note 10, at 147: Given a special relationship, "the law has long come to attach exceptional obligations of protective care, because of the peculiar vantage by one party to such a relation in preventing accidents and a corresponding dependence by the other on such help."

50. M. SHAPO, *THE DUTY TO ACT: TORT LAW, POWER AND PUBLIC POLICY* (1977).

marily on a concept of power. "Power," as used in his text, includes physical force and the ability to use various forms of energy in ways that exercise effective control of people's destinies in particular transactions or circumstances. . . . The principal hypothesis is that power relationships provide meaningful explanations of desirable results in these cases—not an exclusive analytical vehicle, but one that enables us to understand the goals of the legal system more clearly, particularly with references to the relation of this area of law to considerations of public policy.⁵¹

Therefore, power, control, submission and dependence should be the criteria for labeling a relationship "special."⁵²

Illustrative of this concept is the case of *Kline v. 1500 Massachusetts Avenue Apartment Corp.*⁵³ There, the plaintiff was assaulted and robbed in the common hallway of an apartment building. The court held that the landlord of a large urban multiple dwelling house owes a duty to take steps to protect tenants from foreseeable criminal acts committed by third parties. The significance of the decision lies in Judge Wilkey's analytical approach in ruling that the landlord owed a protective duty to the tenant. According to the opinion, this initial duty arises

from the logic of the situation itself. . . . As between tenant and landlord, the landlord is the only one in the position to take the necessary acts of protection required. . . . Not only as between landlord and tenant is the landlord best equipped to guard against the predictable risk of intruders, but even as between landlord and the police power of government, the landlord is in the best position to take the necessary protective measures. Municipal police cannot patrol the entryways and the hallways, the garages and the basement of private multiple unit apartment dwellings. They are neither equipped, manned, nor empowered to do so.⁵⁴

In short, "[a] tenant in a typical multidwelling apartment surrenders his capacity for self-protection and almost entirely relies upon the power and control of the landlord to assure his security."⁵⁵

51. *Id.* at xiii-xiv.

52.

[L]iability for failure to provide protection from criminal behavior should not be confined to [the] narrow margins of accepted relationships, but rather should include any social relationship where the capacity of one party to provide for his own protection has been restricted by his submission to the control of another party. From such a relationship a duty arises in the one possessing the control to employ reasonable measures to protect the other party from criminal acts of third persons which, in light of the circumstances, reasonably can be anticipated.

Note, *supra* note 45, at 1162.

53. 439 F.2d 477 (D.C. Cir. 1970)

54. *Id.* at 483-84.

55. Note, *supra* note 45, at 1164.

Similarly, in holding that the common carrier-passenger relationship is "special," the California Supreme Court in *Lopez v. Southern California Rapid Transit District*⁵⁶ recognized that:

[B]us passengers are "sealed into a moving steel cocoon." Large numbers of strangers are forced into very close physical contact with one another under conditions that often are crowded, noisy, and overheated. At the same time, the means of entering and exiting the bus are limited and under the exclusive control of the bus driver. Thus, passengers have no control over who is admitted on the bus and, if trouble arises, are wholly dependent upon the bus driver to summon help or provide a means of escape. These characteristics of buses are, at the very least, conducive to outbreaks of violence between passengers and at the same time significantly limit the means by which passengers can protect themselves from assaults by fellow passengers.⁵⁷

By far the largest single group on which the duty of affirmative conduct has been imposed is owners and occupiers of land.⁵⁸ As previously noted, a private landowner's liability can be based on the landowner's negligent conduct.⁵⁹ It has also been recognized that in the absence of a special relationship, the landowner is under no duty to protect against the wrongful conduct of third parties.⁶⁰

56. 40 Cal. 3d 780, 710 P.2d 907, 221 Cal. Rptr. 840 (1985).

57. *Id.* at 789, 710 P.2d at 912, 221 Cal. Rptr. at 845. See also M. SHAPO, *supra* note 50, at 18-19:

Particularly in the case of a common carrier, an entrustment factor intrudes into the psychological background. The passenger is practically in the driver's care, and the law should respond to the reality of the relationship. . . . The question . . . lies . . . in a community sense of what is fair in the psychological context of trust and dependence.

As Shapo further explained,

[i]t is true that in the immediate situation the driver is a victim of circumstance in a world that he, like his passengers, did not make. But circumstance has thrust power upon him, and if he does not respond to the demands of danger and dependence, his employer must pay for injuries caused thereby.

Id. at 44.

Shapo noted similar analytical threads running through the relationship of innkeeper-guest:

In such cases liability rests not simply on bargain or even on risk-bearing capacity but on a duty of fiduciary dimension. . . . The implicit feeling of security engendered by a hotel's image leads the guest to seek refuge there; certainly, it deters him from making independent arrangements for his personal security. Beyond that, considerations of humanity enter. Not only entrustment by the guest of his personal safety but also a bedrock obligation founded on a relationship in which one person effectively has another's security in his care require the power holder both to provide and to maneuver against the terror of potential criminal assault.

Id.

58. W. KEETON, *supra* note 2, § 56, at 374.

59. See discussion of Rowland v. Christian, *supra* notes 18-23 and accompanying text.

60. See, e.g., *Hayes v. State of Cal.*, 11 Cal. 3d 469, 472 n.3, 521 P.2d 855, 857 n.3, 113 Cal. Rptr. 599, 601, n.3 (1974).

Nevertheless, in *Lopez v. Southern California Rapid Transit District*,⁶¹ the court stated that some relationships are

by their very nature "special" ones giving rise to an "initial duty" to come to the aid of others, regardless of whether there has been detrimental reliance in a particular case. The relationship between . . . a possessor of land and those who enter in response to the landowner's invitation [is just such a relationship]⁶²

As a preliminary matter, such a sweeping generalization overlooks the fact that applying the special relationship doctrine in the "landowner/occupier" context must necessarily take into consideration the varied factual circumstances of cases involving this particular form of relationship.⁶³ A mechanical application of the doctrine to all landowner liability cases disregards those factual elements which distinguish varying degrees of dependence, power and control.

A careful analysis of the factual circumstances in those cases in which an affirmative duty of protection has been held to exist reveals that such a determination may be traced to some or all of the following criteria:

- (1) The extent to which the defendant's activities isolated the plaintiff from the peacekeeping operations of law enforcement personnel;
- (2) the degree of power and control the defendant had over the security and welfare of the plaintiff;
- (3) the extent to which the plaintiff relinquished his right of self-protection to the defendant;
- (4) the extent to which the plaintiff made independent arrangements for his personal security;
- (5) the extent to which the defendant limited the plaintiff's freedom of action; and
- (6) the period of time the relationship existed.

61. 40 Cal. 3d 780, 710 P.2d 907, 221 Cal. Rptr. 840 (1985).

62. *Id.* at 789, 710 P.2d at 912, 221 Cal. Rptr. at 845.

63. See, e.g., Annotation, *Liability of Hotel or Motel for Guest's Loss of Money from Room by Theft or Robbery Committed by Person Other Than Defendant's Servant*, 28 A.L.R. 4TH 120 (1984); Annotation, *Liability of Hotel or Motel Operator for Injury to Guest Resulting from Assault by Third Party*, 28 A.L.R. 4TH 80 (1984); Annotation, *Liability of Storekeeper for Injury to Customer Arising Out of Pursuit of Shoplifter*, 14 A.L.R. 4TH 950 (1982); Annotation, *Liability of University, College, or Other School for Failure to Protect Student from Crime*, 1 A.L.R. 4TH 1099 (1980); Annotation, *Liability of Owner or Operator of Shopping Center, or Business Housed Therein, for Injury to Patron on Premises from Criminal Attack by Third Party*, 93 A.L.R. 3D 999 (1979); Annotation, *Liability of Owner or Operator of Theatre or Other Amusement to Patron Assaulted by Another Patron*, 75 A.L.R. 3D 441 (1977); Annotation, *Liability of Storekeeper for Death or Injury to Customer in Course of Robbery*, 72 A.L.R. 3D 1269 (1976); Annotation, *Liability of Bank for Injuries Sustained by Customer in Course of Bank Robbery*, 51 A.L.R. 3D 711 (1973).

However, courts have begun treating landowner-occupier cases differently, assuming, as in *Lopez*, that a special relationship exists without investigation. While this will certainly increase a landowner's exposure, there has been a more radical modification in such cases which will expand liability not only in those situations, but also potentially all cases involving harm to a plaintiff: The jury is supplanting the court in finding that a duty exists under the guise of foreseeability.

III. FORESEEABILITY: THE ROLE OF THE JUDGE AND THE JURY IN NEGLIGENCE CASES

More significant than assuming the existence of a duty, the California judiciary has begun to rely almost exclusively on the concept of foreseeability to determine whether there is a protective duty. To fully appreciate the ramifications of this policy, reviewing the roles played by the judge and jury in negligence cases is helpful.

Two of the basic elements in a negligence cause of action are duty and proximate cause.⁶⁴ Duty is defined as an obligation to conform to a particular standard of conduct toward another.⁶⁵ Duty is a determination of law for the court.⁶⁶ Proximate cause, on the other hand, has been described as a "limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct."⁶⁷ According to Judge Andrews in his dissenting opinion in the famous *Palsgraf* case, "[w]hat we do mean by the word 'proximate' is that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."⁶⁸ Proximate cause generally has been held to be a question of fact for the jury.⁶⁹

64. See *supra* note 2.

65. See *supra* note 8 and accompanying text.

66. *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471 (1975); *Clarke v. Hoek*, 174 Cal. App. 3d 208, 219 Cal. Rptr. 845 (1985).

67. W. Keeton, *supra* note 2, § 41, at 264.

In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation." As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.

Id. (quoting *North v. Johnson*, 58 Minn. 242, 59 N.W. 1012 (1894)).

68. *Palsgraf v. Long Island Ry. Co.*, 248 N.Y. 339, 352, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting).

69. B. WITKIN, *supra* note 4, § 621, at 2903. See also *Bigbee v. Pacific Tel. & Tel.*

In the ordinary negligence case,⁷⁰ "foreseeability of risk may be treated, alternatively, as one of the multiple factors giving rise to a duty of care, or as an element in the delineation of proximate cause."⁷¹ In the absence of overriding policy considerations, foreseeability of risk has been deemed to be of primary importance in establishing the element of duty.⁷² This does not, however, make the determination of duty a question of fact. As noted in *Clarke v. Hoek*,⁷³

[w]hile it is in the province of the jury, as trier of fact, to determine whether an unreasonable risk of harm was foreseeable under the particular facts of a given case, the trial court must still decide as a matter of law whether there was a duty in the first place, even if that determination includes a consideration of foreseeability.⁷⁴

In the context of "third party" premises liability for criminal violence, however, the California courts are deciding the affirmative duty issue by balancing competing policy considerations rather than focusing on the nature of the particular relationship involved. That is, the analysis of *Rowland*⁷⁵ and *Dillon*⁷⁶ has been

Co., 34 Cal. 3d 49, 56, 665 P.2d 947, 952-53, 192 Cal. Rptr. 857, 860-61 (1983). Where the facts are undisputed, the question of proximate cause is occasionally regarded as one of law. B. WITKIN, *supra*, at 2903.

70. In this sense, "ordinary" excludes those cases in which an "initial duty" to come to the aid of others arises from a special relationship.

71. 46 CAL. JUR. 3D *Negligence* § 7, at 147 (1978) (footnote omitted).

[M]any of the circumstances involved in a consideration of the foreseeability of an occurrence which will determine the existence of a duty on the part of the defendant to exercise due care toward a particular plaintiff may be equally pertinent in considering the test of foreseeability of an injury to determine whether a precedent act of negligence proximately caused that injury.

Id. (footnote omitted). For an explanation of the variety of roles that foreseeability plays in tort doctrine, see *Ballard v. Uribe*, 41 Cal. 3d 564, 572 n.6, 715 P.2d 624, 628 n.6, 224 Cal. Rptr. 664, 669 n.6 (1986) *reh'g denied*, May 29, 1986.

The concept of foreseeability is difficult to define precisely. Moreover, a great deal of controversy exists among the legal commentators regarding its role in negligence analysis. See, e.g., *Dias, The Breach Problem and the Duty of Care*, 30 TULANE L. REV. 377 (1956); *Dias, The Duty Problem in Negligence*, 13 CAMBRIDGE L.J. 198 (1955); *Fleming, The Passing of Polemis*, 39 CAN. BAR REV. 489 (1961); *Goodhart, Liability and Compensation*, 76 LAW Q. REV. 567 (1960); *Goodhart, The Imaginary Necktie and the Rule in Re Polemis*, 68 LAW Q. REV. 514 (1952); *Green, Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961); *Payne, Foreseeability and Remoteness of Damage in Negligence*, 25 MOD. L. REV. 1 (1962); *Payne, The "Direct" Consequences of a Negligent Act*, 5 CURR. LEGAL PROB. 189 (1952); *Williams, The Risk Principle*, 77 LAW Q. L. REV. 179 (1961); *Wilson & Salde, A Re-examination of Remoteness*, 15 MOD. L. REV. 458 (1952); *Wright, Re Polemis*, 14 MOD. L. REV. 393 (1951).

72. *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471 (1975); *Dillon v. Legg*, 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968).

73. 174 Cal. App. 3d 208, 219 Cal. Rptr. 845 (1985).

74. *Id.* at 214, 219 Cal. Rptr. at 849 (citation omitted).

75. *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

76. *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

grafted to those cases involving landowners/occupiers and the visitors who were injured as a result of the criminal acts of others.⁷⁷ Yet, those decisions do not address the issue of duty to aid others. More significantly, *foreseeability* has now become the focal point of the duty analysis and is being decided entirely by the jury.

A recent example of this analysis can be found in *Isaacs v. Huntington Memorial Hospital*.⁷⁸ There, the plaintiff, an anesthesiologist affiliated with a private hospital, filed a lawsuit against the hospital and its insurer to recover for severe injuries sustained as a result of a gunshot wound inflicted by an unknown assailant in one of the hospital's parking lots. The plaintiff alleged that the hospital had failed to provide adequate security measures to protect its visitors against the criminal acts of other persons on its premises. He also alleged that the insurance carrier had been negligent for participating in the hospital's decision to disarm its security guards which had directly contributed to the inadequacy of the security measures. The question presented was whether, in an action against a landowner for criminal acts of persons on the landowner's property, a plaintiff may establish foreseeability other than by evidence of prior similar incidents on those premises.⁷⁹

The court's discussion of the duty issue⁸⁰ presupposed that foreseeability is the gravamen of the duty determination in the "third

77. Many of the modern decisions have characterized *Rowland* as a major departure from the classification of negligence as active or passive in favor of an approach in which an affirmative duty of protection is grounded in the possession, control and management of the premises. However, those decisions necessarily involved injury which *directly* resulted from conditions on the land. See, e.g., *Sprecher v. Adamson Companies*, 30 Cal. 3d 358, 368, 636 P.2d 1121, 1126, 178 Cal. Rptr. 783, 788 (1981); *Preston v. Goldman*, 42 Cal. 3d 108, 118-19, 720 P.2d 476, 481-82, 227 Cal. Rptr. 817, 823 (1986). An injury incurred as a result of the *criminal conduct* of another, on the other hand, may or may not be related to a condition of the premises on which the incident took place. Therefore, it would be anomalous to depart from the feaseance/nonfeaseance dichotomy in this context.

78. 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985).

79. Several prior California appellate court decisions had adopted the rule that "in the absence of prior similar incidents, an owner of land is not bound to anticipate the criminal activities of third persons, particularly where the wrongdoer was a complete stranger to both the landowner and the victim and where the criminal activity leading to the injury came about precipitously." *Wingard v. Safeway Stores, Inc.*, 123 Cal. App. 3d 37, 43, 176 Cal. Rptr. 320, 323-24 (1981). See also *Anaya v. Turk*, 151 Cal. App. 3d 1092, 1099, 199 Cal. Rptr. 187, 190 (1984); *Riley v. Marcus*, 125 Cal. App. 3d 103, 109 & n.2, 177 Cal. Rptr. 827, 830-31 & n.2 (1981); *Jamison v. Mark C. Bloome Co.*, 112 Cal. App. 3d 570, 578-80, 169 Cal. Rptr. 399, 402-04 (1980); *Totten v. More Oakland Residential Housing, Inc.*, 63 Cal. App. 3d 538, 543, 134 Cal. Rptr. 29, 33-34 (1976); *Rogers v. Jones*, 56 Cal. App. 3d 346, 351-52, 128 Cal. Rptr. 404, 407 (1976); *Jubert v. Shalom Realty*, 135 Cal. App. 3d Supp. 1, 6, 185 Cal. Rptr. 641, 644 (1982). In *Isaacs*, however, the California Supreme Court criticized the "prior incidents rule," preferring to adopt the much broader test of foreseeability. The court stated that "[p]rior similar incidents are helpful to determine foreseeability but they are not necessary." *Isaacs*, 38 Cal. 3d at 127, 695 P.2d at 659, 211 Cal. Rptr. at 362.

80. *Isaacs*, 38 Cal. 3d at 123, 695 P.2d at 657, 211 Cal. Rptr. at 360.

party” premises liability area. In fact, the opinion reaffirmed *Taylor v. Centennial Bowl, Inc.*,⁸¹ an earlier decision that specifically determined the duty owed by a business proprietor to his business invitees. In *Taylor*, the state supreme court held that the general duty included

not only the duty to inspect the premises in order to uncover dangerous conditions . . . but, as well, the duty to take affirmative action to control the wrongful acts of third persons which threaten invitees *where the occupant has reasonable cause to anticipate such acts and the probability of injury resulting therefrom.*⁸²

Oddly enough, however, the *Isaacs* opinion added that “[t]his duty is premised on the special relationship between the landowner and the invitee”⁸³ The court nonetheless failed to articulate those factors which make any given relationship special. Rather, the court held that the trial court had erred in finding that as a matter of law the attack on plaintiff was not foreseeable⁸⁴ and so remanded the case for further proceedings.

In its opinion, the court enumerated the *Rowland* factors which would be “weighed” to determine whether a duty existed.⁸⁵ Yet the question remains whether the basis of the duty is a special relationship or the product of a “balancing” of social policy considerations.

The most significant aspect of the *Isaacs* opinion is the broad interpretation given the factor of “foreseeability.” Quoting Harper and James, the court characterized it as an “elastic factor”⁸⁶ and criticized recent appellate rulings for having “rigidified the foreseeability concept in situations involving a landowner’s liability for the criminal acts of third persons against invitees.”⁸⁷ Disapproving their “rigid application of a mechanical ‘prior similars’ rule,”⁸⁸

81. 65 Cal. 2d 114, 416 P.2d 793, 52 Cal. Rptr. 561 (1966).

82. *Id.* at 121, 416 P.2d at 797, Cal. Rptr. at 565 (emphasis added) (citation omitted).

83. *Isaacs*, 38 Cal. 3d at 123, 695 P.2d at 657, 211 Cal. Rptr. at 360 (citation omitted).

84. *Id.* at 130-31, 695 P.2d at 662, 211 Cal. Rptr. at 365.

85. *Id.* at 124-25, 695 P.2d at 662-63, 211 Cal. Rptr. at 361.

86. *Id.* at 125, 695 P.2d at 658, 211 Cal. Rptr. at 361 (quoting 2 HARPER & JAMES, LAW OF TORTS § 18.2, at 1026 (1956)).

87. *Isaacs*, 38 Cal. 3d at 125, 695 P.2d at 658, 211 Cal. Rptr. at 361.

88. *Id.* at 126, 695 P.2d at 658, 211 Cal. Rptr. at 362. Specifically, the *Isaacs* court criticized the “prior incidents” rule for (1) being unfair to “first victims” and for “discouraging landowners from taking adequate measures to protect premises which they know are dangerous” (*id.* at 125, 695 P.2d at 658, 211 Cal. Rptr. at 361); (2) leading to arbitrary results and distinctions. “Under [the prior incidents] rule, there is uncertainty as to how ‘similar’ the prior incidents must be to satisfy the rule. . . . [H]ow close in time do the prior incidents have to be? How near must they be in location?” (*id.* at 126, 695 P.2d at 658-59, 211 Cal. Rptr. at 361-62); (3) “equat[ing] foreseeability of a particular act with previous

the court greatly generalized the concept of foreseeability. Quoting *Bigbee v. Pacific Telephone & Telegraph Co.*,⁸⁹ the *Isaacs* court wrote: “[W]hat is required to be foreseeable is the general character of the event or harm . . . not its precise nature or manner of occurrence.”⁹⁰ Thus, other types of evidence which may also establish foreseeability include “the nature, condition and location of defendants’ premises.”⁹¹

Based on contemporary human experience, criminal activity can be predicted with a significant degree of probability in certain situations.⁹² What is most disturbing about the characterization of foreseeability in this case, however, is that foreseeability in effect is used interchangeably with “possibility.” In *Kline v. 1500 Massachusetts Avenue Apartment Corp.*,⁹³ Judge Wilkey warned that foreseeability should not be given such a construction for then everyone could foresee the perpetration of crimes by anyone, anywhere and at any moment.⁹⁴ This is especially true in light of the significant increase in crime during the last four decades. Instead, foreseeability should be construed in terms of probability and predictability.⁹⁵

Cited and discussed with approval in *Isaacs* are *Gomez v. Ticor*⁹⁶ and *Cohen v. Southland Corp.*⁹⁷ In *Gomez*, robbers shot and killed a man as he was returning to his automobile which was parked in an office building’s parking structure. The plaintiffs were the victim’s survivors who brought a wrongful death action against the owner of the parking structure, alleging that he negligently failed to take reasonable precautions to prevent violent acts

occurrences of similar acts” (*id.* at 126, 695 P.2d at 659, 211 Cal. Rptr. at 362); and (4) “improperly remov[ing] too many cases from the jury’s consideration.” (*Id.*)

89. 34 Cal. 3d 49, 665 P.2d 947, 192 Cal. Rptr. 857 (1983).

90. *Isaacs*, 38 Cal. 3d at 127, 695 P.2d at 659, 211 Cal. Rptr. at 362 (quoting *Bigbee*, 34 Cal. 3d at 57-58, 665 P.2d at 952, 192 Cal. Rptr. at 862).

91. *Isaacs*, 38 Cal. 3d at 129, 695 P.2d. at 661, 211 Cal. Rptr. at 364 (citing *Gomez v. Ticor*, 145 Cal. App. 3d 622, 193 Cal. Rptr 600 (1985), and *Cohen v. Southland Corp.*, 157 Cal. App. 3d 130, 203 Cal. Rptr. 572 (1984)).

92. Comment, *supra* note 3, at 465.

93. 439 F.2d 477 (D.C. Cir. 1970).

94. The court in *Goldberg v. Housing Auth.*, 38 N.J. 578, 186 A.2d 291 (1962), interpreted “foreseeability” in this manner:

Everyone can foresee the commission of crime virtually anywhere and at anytime.

If foreseeability itself gave rise to a duty to provide “police” protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have to be patrolled by the private arm of the owner. And since hijacking and attack upon occupants of motor vehicles are also foreseeable, it would be the duty of every motorist to provide armed protection for his passengers and the property of others. Of course, none of this is at all palatable.

Id. at 578, 186 A.2d at 293. See also *infra* notes 136-37 and accompanying text.

95. *Kline*, 439 F.2d at 483.

96. 145 Cal. App. 3d 622, 193 Cal. Rptr. 600 (1983).

97. 157 Cal. App. 3d 130, 203 Cal. Rptr. 572 (1984).

on patrons. In support of their allegation of negligence, the plaintiffs introduced affidavits attesting to the high-crime character of the neighborhood and of specific instances of thefts as well as other nonviolent crimes which had occurred in the building in the three years preceding the attack. The trial court granted summary judgment in favor of the owner.

In reversing this ruling, the court of appeal commenced its analysis of duty in a manner typical of most of the California decisions: The court injected the issue of foreseeability into the issue of duty and argued that because foreseeability is a question of fact for the jury, the trial court's granting of summary judgment was improper.⁹⁸ Again, the responsibility of determining duty—a legal determination—in effect was delegated to the jury. In fact, the court took a backwards approach as indicated by its statement that “[p]laintiffs’ allegation of foreseeability, if confirmed by the trier of fact, will support the finding of a minimal duty of care.”⁹⁹ Furthermore, the court construed “foreseeability” in terms of mere likelihood, thus making it easier for juries in future cases to conclude that such incidents were the result of a defendant’s negligence.¹⁰⁰

A similar rationale was used in *Cohen v. Southland Corp.*¹⁰¹ in which the court again rested its duty analysis on foreseeability. There, a customer in a 7-11 store was shot while attempting to prevent an armed robbery. In his complaint, the customer alleged that the franchise owner, the franchisee and the employee all failed to protect the store’s patrons from assault or other threatening behavior of armed thieves. The court of appeal once again reversed an award of summary judgment in favor of the defendants. In its discussion of the duty to protect owed by owners and occupiers of land to their visitors, the court adopted the policy-oriented

98. *Gomez*, 145 Cal. App. 3d at 627, 193 Cal. Rptr. at 603 (citations omitted): In California, it is well settled that an owner of land held open for business purposes may have a duty to protect visitors from the wrongful acts of third persons. . . . Whether such a duty in fact exists is a question of law to be determined separately in each case, based on the weighing of a number of factors. . . . Most important among these is the foreseeability of the harm. . . . Unlike duty, foreseeability is a question of fact, which must be decided by the jury in any case about which reasonable minds can differ. . . . Accordingly, we first decide whether plaintiffs have raised a triable issue of foreseeability.

99. *Id.* at 629, 193 Cal. Rptr. at 604.

100. “The California Supreme Court has recently reiterated that ‘“foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonable thoughtful person would take account of it in guiding practical conduct.”’” *Id.* (quoting *Bigbee v. Pacific Tel. & Tel. Co.*, 34 Cal. 3d 49, 57, 665 P.2d 947, 952, 192 Cal. Rptr. 857, 862 (1983) (quoting *HARPER & JAMES*, *supra* note 86, § 18.2, at 1020)). Subsequent to the ruling in *Gomez*, the defendant, Ticor, paid \$150,000 in settlement.

101. 157 Cal. App. 3d 130, 203 Cal. Rptr. 572 (1984).

analysis first enunciated in *Rowland v. Christian*¹⁰² and acknowledged that foreseeability of harm was of primary importance in establishing the element of duty.¹⁰³ Further, in the same breath, the court reasoned that foreseeability "is ordinarily a question of fact for the jury, and [is] 'decided as a question of law *only if*, under the undisputed facts there is no room for a reasonable difference of opinion.'"¹⁰⁴ Given the judiciary's extreme reluctance to remove any foreseeability question from the jury, the practical effect of this analytical approach is to assign to the jury the sole responsibility for determining the existence or non-existence of a protective duty.¹⁰⁵

IV. RAMIFICATIONS AND THE NEED FOR LEGISLATION

This current method of analysis in "third party" premises liability cases is unsound for two reasons. First, such a process lends itself to *ad hoc* decisions, making inconsistent results inevitable.¹⁰⁶ A more equitable balancing of policy considerations would give stronger emphasis to factors such as the moral blameworthiness of the defendant's conduct and the closeness of the connection between his conduct and the injury suffered.¹⁰⁷ Second, the courts are not impartially considering all interests when they rely so heavily on the element of foreseeability.¹⁰⁸ The broad construction that the courts have accorded this term means that almost any criminal occurrence may be deemed foreseeable.

102. See *supra* note 22 and accompanying text.

103. *Cohen*, 157 Cal. App. 3d at 138, 203 Cal. Rptr. at 576.

104. *Id.* (quoting *Bigbee*, 34 Cal. 3d at 56, 665 P.2d at 950, 192 Cal. Rptr. at 860) (emphasis added). Subsequent to the opinion in *Cohen*, plaintiff entered into a structured settlement with defendants for an undisclosed amount.

105. See *Clarke v. Hoek*, 174 Cal. App. 3d 208, 219 Cal. Rptr. 845 (1985).

106. Comment, *supra* note 3, at 471. Compare *Cohen v. Southland Corp. with Gregorian v. National Convenience Stores, Inc.*, 174 Cal. App. 3d 944, 220 Cal. Rptr. 302 (1985) (defendants, owners of a Stop 'N' Go Market, were under no duty to protect a shopper from a sudden attack by a youth gang). See also *Noble v. Los Angeles Dodgers, Inc.*, 168 Cal. App. 3d 912, 915, 214 Cal. Rptr. 395, 397 (1985), where the court recognized that

[c]ase law has taken a rather uncertain and non-uniform approach in providing compensation by the property owner for victims of criminal activity occurring on the property. Most of the reported decisions have dealt with cases at the pleading stage or on appeal from a summary judgment in favor of the property owners, and have varied in result according to a particular court's view of the plaintiff's allegation concerning a "special" foreseeability which set the land owner apart from the community at large.

107. Note, *supra* note 2, at 547.

108. See also *Peterson v. San Francisco Community College Dist.*, 36 Cal. 3d 799, 806, 685 P.2d 1193, 1196, 205 Cal. Rptr. 842, 845 (1984) (female college student filed suit against community college district for injuries sustained as a result of an attempted daylight rape in the parking lot area of the campus).

Recall that the concept of duty serves as a restraint on the proclivity of juries to indulge their sympathy for injury victims without due regard for the wider implication of their findings.¹⁰⁹ The current judicial expansion of duty is ensuring that the exact opposite occurs: A landowner is frequently and unwarrantedly exposed to liability.

At this point, it is important to emphasize that this critique is not meant to imply that landowners should bear no responsibility in the social fight to reduce the incidence of crime. Although citizens traditionally have relied exclusively on the local police for protection against the hazards of crime, law enforcement agencies alone clearly cannot be expected to safeguard all persons from all crimes today.

[E]very segment of society has obligations to aid in law enforcement and to minimize the opportunities for crime. The average citizen is ceaselessly warned to remove keys from automobiles. . . . In addition, auto manufacturers are persuaded to install special locking devices and buzzer alarms, and real estate developers, residential communities, and industrial areas are asked to install especially bright lights to deter the criminally inclined.¹¹⁰

Other precautions may also involve citizens banding together and undertaking steps for their mutual protection through the creation of so-called neighborhood "crime-watch" programs.

On the other hand, the plaintiffs in cases such as *Isaacs v. Huntington Memorial Hospital*,¹¹¹ *Gomez v. Ticor*¹¹² and *Cohen v. Southland Corp.*¹¹³ essentially demanded that private citizens assume law enforcement functions. However, police protection is, and should remain, a governmental, not a private obligation. Recognition of this governmental duty is clearly evidenced by legislative declaration¹¹⁴ and by the enactment of financial indemnity

109. See *supra* note 9 and accompanying text.

110. *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, 439 F.2d 477, 484 (D.C. Cir. 1970).

111. 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985).

112. 145 Cal. App. 3d 622, 193 Cal. Rptr. 600 (1983).

113. 157 Cal. App. 3d 130, 203 Cal. Rptr. 572 (1984).

114. CAL. PENAL CODE § 13900 (Deering 1980) provides:

The Legislature finds and declares:

- (a) That crime is a local problem that must be dealt with by state and local governments if it is to be controlled effectively.
- (b) That criminal justice needs and problems vary greatly among the different local jurisdictions of this state.
- (c) That effective planning and coordination can be accomplished only through the direct, immediate and continuing cooperation of local officials charged with general governmental and criminal justice agency responsibilities.
- (d) That planning for the efficient use of criminal justice resources requires a permanent coordinating effort on the part of local governments and local criminal justice and delinquency prevention agencies.

statutes to assist injured victims of violent crime.¹¹⁵ Certain relationships do justify the imposition on private individuals of a duty to protect.¹¹⁶ This is especially so where the peacekeeping operations of municipal police are effectively hindered by the landowner's use of his property and where the victim is particularly vulnerable and dependent on the landowner who has power over his welfare and safety. Not all relationships, however, implicate these distinguishing elements. Given the wide ranging circumstances that may exist in cases involving landowners and occupiers and the analytical complexity in determining which setting justifies a protective duty,¹¹⁷ there is clearly a definite need for better guidance than that presently offered by the judiciary.

Harper and Kime postulate that the social policies which determine what relationships require special assurances of safety "reflect the general attitude of the community."¹¹⁸ Yet, the judicial branch of government is making adjustments, implicated by fast-changing social circumstances, without the guidance of the very body created to debate and decide social questions, the legislature. According to the Report of the California Citizen's Commission on Tort Reform:¹¹⁹

Given the limitations of the case-by-case process and the limited opportunity for broad social analysis that it provides, it is not surprising that policy-making in the tort area has had a fitful, lurching quality. The fault here is not in our judges, but primarily in the failure of the rest of the policy-making mechanism to address the questions pressed upon the judiciary, and to provide sensible and authoritative answers.¹²⁰

To date, California has no statute which establishes the conditions that give rise to an affirmative duty on the part of an owner

115. See CAL. GOV'T CODE §§ 13959-13969.1 (Deering 1982 & Supp. 1987) which provides for reparation to crime victims from the state-sponsored Restitution Fund and prescribes the procedures by which a crime victim may apply for financial assistance.

116. See *supra* notes 49-59 and accompanying text.

117.

Human beings by their activities have all sorts of dealings with each other and come into all sorts of relations. Some of these are tenuous, and to them the law attaches no special obligations. Others are regarded as of sufficient importance to require for a sound and stable social order certain assurances of safety to person and property on the part of the parties thereto. The social policies which determine what relationships require such special assurance and what ones are sufficiently unimportant not to require them are so incredibly complicated as almost to defy analysis. These policies in the main reflect the general attitude of the community; they represent for the most part the popular notions of what constitutes proper assumptions on the part of one person when dealing with another.

Harper & Kime, *supra* note 3, at 904.

118. *Id.*

119. REPORT, *supra* note 23.

120. *Id.* at 142

or occupier of land to come to the aid of or provide protection to his visitors. The only provision directly relevant is almost 114 years old and provides in pertinent part that “[e]very one is responsible . . . for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person,” except so far as the injured person contributes to his own injury.¹²¹ The California Supreme Court has deemed this section a continuation of the common law and thus has made it the foundation of California negligence law.¹²² However, *Rowland v. Christian* and its progenies have failed to provide acceptably rational guidance on the issue of “third party” premises liability.

Nevertheless, California’s highest tribunal has made clear that any departure from the fundamental principle enunciated by section 1714 of the Civil Code must be clearly supported by public policy.¹²³ Thus far, the only statutory reaction to the court’s expansion of liability has been the 1978 amendment to section 1714 wherein the legislature abrogated the California Supreme Court’s dram shop¹²⁴ liability decisions.¹²⁵ Those decisions had overturned the holding of *Cole v. Rush*¹²⁶ that “as to a competent person it is the voluntary consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use”¹²⁷ The new principle created was that one who furnished alcoholic beverages to an intoxicated person who subsequently injured another could be held liable for those injuries.

In 1978, the California Legislature amended Civil Code section 1714¹²⁸ (and Business and Professions Code section 25602¹²⁹) to create a broad statutory immunity against civil liability for social hosts who furnish alcoholic beverages to any person.¹³⁰ These

121. CAL. CIV. CODE § 1714(a) (Deering Supp. 1987). See also *supra* note 20 and accompanying text.

122. *Rowland v. Christian*, 69 Cal. 2d 108, 112, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968).

123. *Id.*

124. “Many states have Dram Shop or Civil Liability Acts which impose liability on the seller of intoxicating liquor . . . when a third party is injured as a result of the intoxication of the buyer where the sale has caused or contributed to such intoxication.” BLACK’S LAW DICTIONARY 444 (5th ed. 1979). California, however, created similar liability by case law. See *infra* note 125.

125. For examples of court-created Dram Shop liability, see *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) (tavern owner held liable); *Bernhard v. Harrah’s Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, cert. denied, 429 U.S. 859 (1976) (out-of-state tavern owner held liable); *Coulter v. Superior Court*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

126. 45 Cal. 2d 345, 289 P.2d 450 (1955).

127. *Id.* at 356, 289 P.2d at 457.

128. See CAL. CIV. CODE § 1714(a) (Deering Supp. 1987).

129. CAL. BUS. & PROF. CODE § 25602 (Deering Supp. 1987).

130. The 1978 amendments added subdivisions (b) and (c) to Civil Code § 1714:

amendments effectively reinstated the prior common law as expressed in *Cole*.

An argument has been made that the California decisions supporting civil liability of third persons for negligently failing to provide protection to crime victims contravene the basic legislative policy established in the 1978 amendments to Civil Code section 1714. This policy holds that "intentional acts causally supersede negligent acts when both contribute to a person's injury."¹³¹ As one commentator has concluded:

Although it might be said that the legislature addressed itself only to the narrow area of dram shop liability when reinstating the common law rule that voluntary or intentional acts are the proximate cause of injuries in third party cases, such an interpretation is unduly restrictive. In dram shop liability, it is the negligence of the voluntarily intoxicated person that results in injury to another. In the criminal violence situations, however, it is the violent act of the criminal that intentionally causes injury to the victim. The legislature's statement that a person's voluntary act in becoming intoxicated is the proximate cause of any reasonably foreseeable consequences, therefore, should apply with greater weight to the willful acts of criminals and the intended consequences of their acts.

The dram shop liability area represents extreme judicial expansion met with rare and radical legislative curtailment. Al-

(b) It is the intent of the Legislature to abrogate the holdings in cases such as *Vesely v. Sager* (5 Cal. 3d 153), *Bernhard v. Harrah's Club* (16 Cal. 3d 313), and *Coulter v. Superior Court* ([21] Cal. 3d [1447]) and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.

(c) No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages.

The 1978 amendments also added subdivisions (b) and (c) to Business and Professions Code § 25602:

(b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.

(c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Vesely v. Sager* (5 Cal. 3d 153), *Bernhard v. Harrah's Club* (16 Cal. 3d 313) and *Coulter v. Superior Court* ([21] Cal. 3d [1447]) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

The constitutionality of the 1978 amendments was upheld in *Cory v. Shierloh*, 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981).

131. Note, *supra* note 2, at 536.

though the legislature's amendment of Civil Code section 1714 weighs heavily against judicial expansion of any third party liability, the uniqueness of the legislature's action intimates that a well-reasoned approach to third party cases that imposes rational limits to liability could escape legislative scrutiny. Thus, the lesson to be learned from California's experience in dram shop liability is that the courts should be very reluctant to extend third party civil liability for criminal violence. If extensions are warranted, the court's decisions should be legally sound, persuasive, and limited in scope.¹³²

Unfortunately, the trend to expand the liability of landowners continues to gain momentum in the absence of specifically controlling legislation. Given the increased tendency of lawyers to file a legal action when there is substantial uncertainty or lack of uniformity in the law,¹³³ the current approach to "third party" premises liability for criminal violence clearly is not the best instrument of social policy. Landowners and occupiers, particularly those in high crime areas, have good reason to entertain feelings of paranoia and doubt concerning their rights and responsibilities. Practical questions necessarily include: What circumstances will give rise to a protective duty? What types of relationships will impose a higher duty of protection? Since protection costs money,¹³⁴ how would a business operating on a small profit margin fulfill its obligation in a high-crime area? If business owners absorb the high cost of protection by raising the price of their goods and services, how will the poor (who most often reside in areas where the incidence of crime is greatest) be able to meet their basic needs given the minimal financial resources available to them? In all practicality, would they not be singled out as the ones to pay for their own police protection? Would it not be more economical for businesses to close their doors and relocate to "safer ground"? If so, how would indigent members of that community who lack adequate means of transportation be able to obtain needed goods and services?

Other practical concerns were addressed in *Goldberg v. Housing Authority*¹³⁵ in which Chief Justice Weintraub of the New

132. *Id.* at 540.

133. REPORT, *supra* note 23, at 132.

134. The utilization of a private security force must take into account not only the normal expenses inherent in an employer-employee relationship—compensation, social security, and workmen's compensation—but also additional expenditures that would be required because of the nature of the task—high insurance payments, incidental expenses such as advertising costs incurred in recruiting personnel, and costs for equipment such as uniforms, weapons, and . . . communications equipment.

Note, *supra* note 45, at 1193 (footnote omitted).

135. 38 N.J. 578, 186 A.2d 291 (1962).

Jersey Supreme Court wrote:

[I]t is fairly simple to decide how many ushers or guards suffice at a skating rink or a railroad platform to deal with the crush of a crowd and the risks of unintentional injury which the nature of the business creates, but how can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and the psychotic? Must the owner prevent *all* crime? We doubt that any police force in the friendliest community has achieved that end. How then can the owner know what is enough to protect . . . persons and property?¹³⁶

Although *Goldberg* addressed the specific context of landlords and tenants, the concerns expressed are equally relevant to situations involving other landowners and occupiers.

Not only would there be uncertainty as to *when* the duty to furnish police protection arises and as to *what* measures will discharge the duty, there would also be exceptional uncertainty with respect to the issue of causation. This is so because of the extraordinary speculation inherent in the subject of deterrence of men bent upon criminal ventures. It would be quite a guessing game to determine whether some unknown thug of unknowable character and mentality would have been deterred if the owner had furnished some or some additional policemen. It must be remembered that police protection does not, and cannot, provide assurance against all criminal attacks, and so the topic presupposes that inevitably crimes will be committed notwithstanding the sufficiency of the force. Hence the question of proximate cause is bound to be of exceptional difficulty.¹³⁷

The current approach to "third party" premises liability for criminal violence may even entail concerns of constitutional dimension. As alluded to above, merchants and consumers who operate and reside in economically depressed areas where crime is most prevalent may very well constitute that segment of the citizenry which will have to bear the burden of providing for their own police protection. Note also that the governmental duty to provide police protection and to provide financial assistance to injured victims of violent crime has been clearly recognized by the California legislature.¹³⁸ Arguably, these legitimate state functions cannot be accomplished under the constitution¹³⁹ at the expense of one particular group of people. In other words, when the government—here the judicial branch—seeks to charge the cost of

136. *Id.* at 589-91, 186 A.2d at 297.

137. *Id.*

138. *See supra* notes 114-15 and accompanying text.

139. The fourteenth amendment of the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

operation of a state function, conducted for the benefit of the public, to a particular class of persons, it is denying its citizens equal protection of the laws.¹⁴⁰

CONCLUSION

The issue of "third party" premises liability for criminal violence is one which calls out for *legislative* attention. "The social and economic costs inflicted by the absence of a general definition of the circumstances that create a legal duty of care are simply too great to ask the citizen to pay."¹⁴¹ Legislative guidelines for ascertaining the existence of an affirmative duty of security protection in this context should delineate criteria that explore the degree of power, control, submission and dependence in a given relationship.

Such criteria might include:

1. The extent to which the landowner's premises are accessible to state and municipal law enforcement personnel. This factor may be instrumental in distinguishing the average merchant from the owner of a large, enclosed shopping mall or the landlord of a single family dwelling from the owner of a multidwelling apartment complex.

2. The degree of power and control the landowner has over the security and welfare of his guests. Visitors who are under supervision might be more likely to be apprised of impending criminal conduct sooner than those who are not. Moreover, those who are encouraged to move about freely on the premises might be more vulnerable to criminal attack than those who are confined to certain areas or are forced to congregate with others.

3. The extent to which the visitor relinquishes his right of self-protection to the landowner. This may be determined by ascertaining the guest's motive for entering the premises. In turn, knowledge of the visitor's motive may shed light as to his expectations regarding protection against crime. For example, one who checks into a motel is likely to expect more protection than another who drives into a service station to purchase gasoline.

140. See, e.g., *In re Jerald C.*, 36 Cal. 3d 1, 6, 678 P.2d 917, 919, 201 Cal. Rptr. 342, 344 (1984) (citing tenBroek, *California's Dual System of Family Law; Its Origins and Development and Present Status*, 17 STAN. L. REV. 614, 639 (1965): "To charge the cost of operation of state functions conducted for public benefit to one class of society is arbitrary and violates the basic constitutional guarantee of equal protection of law . . ."; *Department of Mental Hygiene v. Kirchner*, 60 Cal. 2d 716, 723, 388 P.2d 720, 724, 36 Cal. Rptr. 488, 492 (1964), *remanded* 380 U.S. 194 (1965), *subsequent opinion at* 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965).

141. REPORT, *supra* note 23, at 154.

4. The extent to which the visitor makes independent arrangements for his personal security. Evidence in this regard might be indicative of a mutual agreement between landowner and visitor as to the level of protection to be provided by the former.

5. Whether the means of entering and exiting the premises are limited and under the exclusive control of the landowner. A finding of a special relationship is more likely where the visitor's freedom of action and access to safety is restricted.

6. The period of time the relationship is to exist. This may be helpful in ascertaining the parties' expectations concerning the nature of protective measures to be implemented.

Additionally, it is imperative that the proper role of the test of foreseeability be defined. Specifically, foreseeability should not be equated with mere likelihood and should only determine the scope of a preexisting duty that is based on the nature and character of the relationship involved. Thus, depending on the degree of probability of a criminal occurrence on the premises, a protective duty might entail a mere warning or might necessitate the hiring of trained security personnel.

The foregoing recommendations are not comprehensive but nevertheless are intended to provide a starting point for a more rational analysis of the duty issue in this area of law. The California judiciary has taken an ambiguous approach, making landowners unable to predict their legal responsibilities. They will undoubtedly remain in this precarious position until guiding legislation is enacted.