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TORT LAW—Duty as a Matter of Policy: *Solon v. WEK Drilling*

I. INTRODUCTION

In *Solon v. WEK Drilling Co., Inc.*,¹ the New Mexico Supreme Court once again visited the issue of the relationship between duty and foreseeability in negligence actions. The court's decision is the latest in a string of three cases² establishing New Mexico's position on *Palsgraf*³ questions. These cases document the emergence of the view that the determination of whether a duty exists in a negligence action is governed by policy considerations. Chief Justice Ransom and Justices Baca and Montgomery have expressed differing opinions regarding the role of policy, but all agree that policy is a factor that may limit liability, even when an injury is foreseeable. This Note evaluates the evolving policy standard for duty analysis in New Mexico and the competing views regarding duty. The Note concludes with a discussion of the existing views of the role of policy in duty analysis and how this analysis might develop in the future.

II. STATEMENT OF THE CASE

Ivan Ponce, the 25-year-old son of Alvino and Maria Ponce ("the Ponces"), was employed by an independent contractor working in and around a drilling rig owned and operated by WEK Drilling Co., Inc., ("WEK Drilling"). The court assumed that "Ivan was killed as a proximate result of WEK Drilling's negligence in failing . . . to maintain [and operate the rig safely]." Arthur Solon, as personal representative of the estate of Ivan and on behalf of Ivan's daughter, Ambrosia, brought a wrongful death action against WEK Drilling for damages suffered due to Ivan's death. The Ponces sought to intervene in this suit, claiming they suffered damages including: "loss of financial support provided by their son; loss of consortium with their son, including loss of society, companionship, and affection; and grief, sorrow, and bereavement."⁴

At the time of his death, Ivan was living with his parents. According to the Ponces' depositions, Ivan enjoyed a loving relationship with both his parents and provided them with financial assistance by performing various work projects around the Ponce home. Ivan had been divorced, and Ambrosia was his only child.⁵

1. 113 N.M. 566, 829 P.2d 645 (1992).

2. *Id.*; *Calkins v. Cox Estates*, 110 N.M. 59, 792 P.2d 36 (1990); *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983).

3. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928). In *Palsgraf*, Judge Cardozo stated that a duty is not owed if the plaintiff is not found to be foreseeable or within the zone of danger.

4. *Solon*, 113 N.M. at 567, 829 P.2d at 646.

5. *Id.*

The court dismissed the loss of consortium claim, citing several New Mexico cases rejecting loss of consortium as a valid cause of action.⁶ The court also held that the Ponces could not bring a cause of action under the New Mexico Wrongful Death Act,⁷ as they were not the personal representatives of their son's estate. The court considered whether the Ponces could not intervene, based on whether their complaint stated a cause of action upon which relief could be granted.⁸ In determining whether the Ponces would be permitted to intervene under Rule 24(B), the court addressed the question of duty and the role of foreseeability and policy in negligence claims.⁹

III. AN HISTORICAL LOOK AT DUTY ANALYSIS

The principle duty analysis case in tort jurisprudence is *Palsgraf v. Long Island Railroad*.¹⁰ Then-Judge Cardozo, serving on the New York Court of Appeals, established the standard for duty analysis which has been universally embraced by state courts all over the country.¹¹ In *Palsgraf*, a man being assisted by railroad employees dropped a bag of fireworks he was carrying, and they exploded.¹² Mrs. Helen Palsgraf was standing nearby and was struck by a scale that fell as the result of the explosion.¹³ In deciding whether the railroad was liable to Mrs. Palsgraf, the court addressed the issue of whether the railroad owed a duty to her. Judge Cardozo, writing the majority opinion, held that Helen Palsgraf's injuries were not foreseeable to the railroad employees when they acted to assist the passenger on the train.¹⁴ Hence, the court found that the defendant owed Mrs. Palsgraf no duty.¹⁵

Plainly stated, *Palsgraf* resolved the issue of to whom a duty is owed. The court held that a duty is owed only to individuals whom the defendant

6. *Id.* at 571, 829 P.2d at 650 (citing *Tondre v. Thurmond-Hollis-Thurmond, Inc.*, 103 N.M. 292, 293, 706 P.2d 156, 157 (1985); *Roseberry v. Starkovich*, 73 N.M. 211, 218, 387 P.2d 321, 328 (1963); *Wilson v. Wylie*, 86 N.M. 9, 16, 518 P.2d 1213, 1220 (Ct. App. 1973), *cert. denied*, 86 N.M. 5, 518 P.2d 1209 (1974)).

7. N.M. STAT. ANN. §§ 41-2-1 to -3 (Repl. Pamp. 1989).

8. The court addressed the issue of permissive intervention under N.M. R. Civ. P. 1-024(B). In order for the court to allow permissive intervention the court would have to find that the "Ponces' proposed complaint in intervention stat[ed] a legally sufficient common law claim, independent of the wrongful death act, for the economic loss . . . they suffered from the death of their son, which was caused by the negligence of defendant WEK Drilling." *Solon*, 113 N.M. at 569, 829 P.2d at 648.

9. *Id.* at 569-72, 829 P.2d at 648-51.

10. 162 N.E. 99 (N.Y. 1928).

11. [A]ctor is liable if actor's conduct is negligent with respect to plaintiff or class of persons within which he is included; fact that actor's conduct causes harm to person whom actor could not reasonably have anticipated injury does not make actor liable to person so injured . . . [P]revailing view is that obligation to refrain from negligent conduct is owed only to those who are foreseeably endangered by the conduct.

Solon, 113 N.M. at 570, 829 P.2d at 649 (citing RESTATEMENT (SECOND) OF TORTS § 281(b) & cmt. c (1965); and FOWLER V. HARPER ET AL., THE LAW OF TORTS § 18.2, at 655 (2d ed. 1986)).

12. *Palsgraf*, 162 N.E. at 99.

13. *Id.*

14. *Id.* at 101.

15. *Id.*

reasonably could foresee would be harmed by the defendant's conduct.¹⁶ Cardozo's formulation has often been questioned. In *Palsgraf*, Judge Andrews dissented, stating that "[e]very one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others."¹⁷ Judge Andrews stated that a duty could be owed even if the plaintiff was outside the zone of foreseeable danger.¹⁸ Dean Prosser questioned Cardozo's strict foreseeability analysis by stating that liability should be a problem governed by the social policy of "where to draw the line against otherwise unlimited liability."¹⁹ Taken together, Dean Prosser and Judge Andrews' views represent the prevalent opposition to the Cardozo standard for duty analysis.

New Mexico case law on the *Palsgraf* question is limited to several recent cases which directly address the relationship between duty and foreseeability.²⁰ The principle question in New Mexico revolves around how a court is to define this relationship. The prevalent view, as expressed in New Mexico opinions on duty analysis, is that duty is determined by considering foreseeability along with policy and that even if foreseeability is present, policy may negate duty. If a difference in these views is to be found, it is likely to be in the articulation of the policy analysis. Each statement of the policy standard is phrased differently. The subtle differences between these definitions raise the question of whether significant differences truly exist and, if so, which analysis provides the clearest definition of what policies should be used.

IV. POLICY IN NEW MEXICO DUTY ANALYSIS

A. *Ramirez: The Seminal Case*

The elements of duty in New Mexico were first considered in *Ramirez v. Armstrong*.²¹ In *Ramirez*, the plaintiffs brought suit for damages resulting from the negligent infliction of emotional distress suffered when they witnessed or were told of the death of their father.²² The court, noting the *Palsgraf* standard for duty analysis, stated that "[i]f it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant."²³ This quotation, standing alone, suggests that the sole test of duty is foreseeability. However, the court qualified this simple test by referring to Dean Prosser's

16. *Id.* at 100.

17. *Id.* at 103.

18. *Id.*

19. *Solon*, 113 N.M. at 569, 829 P.2d at 648 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 287 (5th ed. 1984)).

20. For the purposes of clarity, this note will focus on *Solon*, on *Calkins v. Cox Estates*, 110 N.M. 59 (1990), and on *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983). *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 824 P.2d 614 (1991), also raised a question concerning foreseeability but did not provide a clear *Palsgraf* question.

21. 100 N.M. 538, 673 P.2d 822 (1983).

22. *Id.* at 539, 673 P.2d at 823.

23. *Id.* at 541, 673 P.2d at 825.

definition of duty,²⁴ which provides that analysis of the interest sought to be protected "establishes the legally recognized obligation of [a] defendant."²⁵

In *Ramirez*, the court held that the interest to be protected, that of the prevention of the infliction of emotional distress, was an interest protected and recognized by New Mexico law.²⁶ The court, utilizing existing New Mexico case law, held that a duty was owed to the plaintiffs.²⁷ Hence, it was unnecessary for the court to decide how duty is to be determined absent existing precedent identifying plaintiffs' interest as one to be protected.

Ramirez teaches that duty analysis involves the consideration of both the presence of foreseeability and an analysis of policy protecting the interest invaded by a defendant's conduct. The relevant policy consideration is based upon existing common and statutory law regarding the complained-of conduct. Because, in *Ramirez*, Justice Federici did not find foreseeability and policy in conflict, he did not have occasion to assess the relative weight to be given to each in the duty analysis.²⁸ Hence, *Ramirez* does not decide whether absence of foreseeability would be determinative, nor does it demonstrate the means of analysis where foreseeability is present, but policy reasons exist not to impose a duty.

B. Justice Baca in Calkins: Policy is Governed by Existing Legal Precedent, Statutes and Other Principles

Though an analysis of how duty is to be determined was begun in *Ramirez*, the principal case in New Mexico defining duty is *Calkins v. Cox Estates*.²⁹ In *Calkins*, the plaintiff, as personal representative of the estate of Daniel Enriquez, brought a wrongful death action against Enriquez's landlord, claiming that eight-year-old Daniel died due to the landlord's negligence.³⁰ Enriquez died after he wandered through a hole in the fence surrounding his apartment playground, crossed an arroyo and walked to Interstate 25 which was 945 feet away. He was then struck and killed by an automobile.³¹ The plaintiff alleged negligence by the landlord based on the landlord's failure to secure the playground area.³² The district court and the court of appeals both found that the landlord did not owe a duty to the child to secure the playground.³³ The supreme court granted certiorari on the question of duty.³⁴

24. *Id.* (citing WILLIAM L. PROSSER, *THE LAW OF TORTS* § 53 (4th ed. 1971)). Dean Prosser, suggesting that there is nothing "sacred" about duty, proposes that the duty of a defendant must be an obligation that the law recognizes.

25. *Id.*

26. *Id.*

27. *Id.* at 541-42, 673 P.2d at 825-26.

28. *Id.* The court held both that the plaintiffs were foreseeable and that existing law recognized the interest they sought to be protected.

29. 110 N.M. 59, 792 P.2d 36 (1990).

30. *Id.* at 61, 792 P.2d at 38.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

Justice Baca, writing the majority opinion in which then-Chief Justice Sosa and Justices Montgomery and Wilson concurred, remanded on the question of whether a duty was, indeed, owed to the plaintiff.³⁵ The court declared that, before finding a duty, a court must “determine that the injured party was a foreseeable plaintiff—that he was within the zone of danger created by [defendant’s] actions.”³⁶ Justice Baca, applying language from *Ramirez*, wrote that “[i]f it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant.”³⁷ Justice Baca, however, did not limit the duty analysis to foreseeability alone.

In support of his holding finding a duty, Justice Baca ruled that duty is a matter of law and that the existence of a duty is a question of policy that can be determined by “legal precedent, statutes, and other principles comprising the law.”³⁸ Like Justice Federici in *Ramirez*, Justice Baca in *Calkins* deferred to existing New Mexico case and statutory law in his policy analysis. Justice Baca looked to existing law regarding the relationship between landlord and tenant when he determined that, as a matter of law, the landlord owed a duty to the child.³⁹ Justice Baca stated that the “difficult question, whether respondent had a duty toward the young child, can be answered with reference to our statutes and well-established common law traditions.”⁴⁰

Because there was existing law imposing duties in the landlord-tenant relationship, it was once again unnecessary to identify the seminal policies which might further define a legal duty in negligence actions. The ambiguity of Justice Baca’s analysis arises when the relationship between plaintiff and defendant is not governed by an existing law such as that between landlord and tenant. If duty is a question of law, the judge must resolve any policy questions surrounding duty. The standard for such judicial discretion is unclear. Justice Baca stated that “legal precedent, statutes and other principles comprising the law”⁴¹ would govern the decision but did not offer examples of what “other principles” might be. If duty can be found based upon “other principles comprising the law,” it is important that some method by which one can determine those principles be provided.

Justice Baca failed to state what evidence in support of or contrary to “other principles comprising the law” would be allowed.⁴² He stated

35. *Id.* at 66, 792 P.2d at 43. In holding that there was a duty, Justice Baca distinguished the elements of duty and proximate cause, explaining the role of foreseeability in duty and proximate cause. The court further distinguished the two elements of negligence by stating that foreseeability regarding duty “must be decided as a matter of law by a judge, using established legal policy . . .,” and that, as an element of proximate cause, foreseeability is a question of fact. *Id.* at 61, 792 P.2d at 38.

36. *Id.*

37. *Id.* at 62.

38. *Id.*

39. *Id.* at 63-65, 792 P.2d at 40-43.

40. *Id.* at 62, 792 P.2d at 39.

41. *Id.*

42. In a footnote to his opinion, Justice Baca alluded to an expert witness’s affidavit

the significance of policy more clearly than did Justice Federici in *Ramirez* when he wrote:

In the case presented to us today, it is not necessary for us to balance the policy interests to determine whether defendant owed plaintiff a duty. References to our statutes and common law establishes that plaintiff was owed a duty based on the landlord-tenant relationship.⁴³

Hence, for Justice Baca, if a clear policy standard exists, policy may be the determinative factor in deciding whether a duty was owed. The principal teaching of *Calkins* is that foreseeability is a factor, but not the determinative factor, in duty analysis. Furthermore, *Calkins* suggests that a court could find a duty absent foreseeability, since, as Justice Baca held, "the existence of a duty is a question of policy."⁴⁴

C. Justice Montgomery in *Solon*: The Interest to be Protected Governs the Policy

Justice Montgomery, who concurred in the majority opinion in *Calkins*, wrote for the majority in *Solon v. WEK Drilling Co. Inc.*⁴⁵ Justice Montgomery identified *Solon* as questioning the relationship between duty and foreseeability and, therefore, as a *Palsgraf* case.⁴⁶ Before stating whether a duty existed, Justice Montgomery took note of Dean Prosser's view of the duty analysis, acknowledging that determining the existence of a duty implicates the question of "where to draw the line against otherwise unlimited liability."⁴⁷ Nevertheless, Justice Montgomery stated that:

[The court is not] writing on a clean slate, and we do not perceive this case to be a good one in which to reexamine the social policy that limits a tortfeasor's liability to the foreseeable plaintiff and excludes it where the plaintiff is unforeseeable.⁴⁸

Justice Montgomery signalled his willingness to accept the well-established principle in New Mexico that foreseeability of harm is a prerequisite to the creation of a duty.⁴⁹ He was hesitant to adopt the view that social policy is solely determinative of duty. This decision was made easy since

offered by the petitioner in support of a finding of foreseeability and duty. According to Justice Baca, the affidavit was useful in the proximate cause analysis but did not state whether it should be considered in the duty analysis. *Id.* at 65 n.6, 792 P.2d at 41. Nevertheless, it seems this type of evidence might be the factual basis by which a judge could determine the policy that lay behind Justice Baca's "other principles of law." Still, Justice Baca maintains that policy regarding the duty element is not a factual determination and that factual determinations should be left to the proximate cause analysis. Hence, Justice Baca may leave consideration of foreseeability to his analysis of proximate cause.

43. *Id.* at 63, 792 P.2d at 40.

44. *Id.* at 62, 792 P.2d at 39.

45. 113 N.M. 566, 829 P.2d 645 (1992).

46. *Id.* Justice Montgomery begins his opinion by stating that *Solon* is "a *Palsgraf* case (though not a particularly good one)." *Id.* at 566, 829 P.2d at 645 (footnote omitted).

47. *Id.* at 569, 829 P.2d at 648 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 287 (5th ed. 1984)).

48. *Id.* at 569-70, 829 P.2d at 648-49.

49. *Id.* at 571, 829 P.2d at 650.

he held that, as a matter of law, the Ponces' interests were unforeseeable to the defendant, WEK Drilling.⁵⁰ Justice Montgomery reasoned that while it was foreseeable that Ivan might have living parents, it was not foreseeable that such parents might sustain injury as a result of his death.⁵¹

Justice Montgomery's duty analysis, however, was not based solely upon foreseeability. He wrote that "the social policy of cutting off the liability that would otherwise extend to these family members seems sound, at least in a case in which they allege no more palpable injury than that claimed here."⁵² Justice Montgomery held that as a matter of law the Ponces' interests were unforeseeable, yet he felt compelled to add that social policy considerations were consistent with the no-duty-because-no-foreseeability holding.

Justice Montgomery explained that the *Ramirez* court expanded the *Palsgraf* standard to include Prosser's suggestion that "the foreseeability of harm to the plaintiff should be but one factor in determining the existence of a duty, and not always conclusive, and that situations will more or less inevitably arise which do not fit within any fixed and inflexible rule."⁵³ The added factor in *Ramirez*, which was adopted by the *Calkins* court and then by the court in *Solon*, is that of policy considerations. Justice Montgomery suggested that even if the Ponces were foreseeable plaintiffs, social policy mandates a finding of no duty.⁵⁴ Hence, he interpreted the majority opinion in *Calkins* to require that foreseeability is a precondition to a finding of duty, but is not determinative of duty. The presence of a countervailing social policy could outweigh the finding of foreseeability. While Justice Montgomery acknowledged the limitations social policy places on determining duty, he stopped short of finding that policy alone could create a duty in the absence of foreseeability. According to him, the role of policy is to limit duty when foreseeability is present and not to extend duty when foreseeability is absent.

Justice Montgomery's view is consistent with Justice Baca's view that, in addition to finding that a plaintiff was foreseeable, the court must find, as a matter of law, that a duty to that plaintiff should be extended based on policy considerations. Justice Baca's and Justice Montgomery's views differ, however, because where Justice Baca's policy analysis is governed by legal precedent, statutes, and other principles comprising the law, Justice Montgomery's definition of policy more broadly encompasses what he calls "social policy."⁵⁵

Justice Montgomery failed to define precisely what he meant by the term "social policy". He did not assign the same role to policy consid-

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 570, 829 P.2d at 649 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 288 (5th ed. 1984)).

54. *Id.* at 571, 829 P.2d at 650.

55. *Id.*

erations as did Justice Baca. Nevertheless, language in *Solon* hints at possible considerations behind Justice Montgomery's "social policy" analysis. After acknowledging that foreseeability may not be the sole factor in duty analysis, Justice Montgomery evaluated the Ponces' claim to determine whether there was an invasion of an interest that the law would protect. This analysis is in concert with that of *Ramirez*. The *Ramirez* court held that duty is "an obligation to which the law will give recognition and effect"⁵⁶ and that the "interest establishes the legally recognized obligation."⁵⁷ Hence, the standard for Justice Montgomery's social policy, the consideration of the interest to be protected, seems to be the same as the *Ramirez* standard.⁵⁸

When determining if an interest is to be protected, the court must look to existing law and social policy. Justice Montgomery did this when he evaluated the Ponces' claim in light of the existing legal theories of loss of consortium and the wrongful death statute.⁵⁹ Neither provided the Ponces with a protected interest.⁶⁰ Furthermore, social policy also prevented the extension of liability to the Ponces under Justice Montgomery's analysis.⁶¹ Hence, Justice Montgomery, utilizing analysis similar to that suggested in *Ramirez*, arrived at the same conclusion as did Justice Baca in *Calkins*. After looking at legal precedent and existing statutes, Justice Montgomery searched for other principles that might find a duty owed to the Ponces. As opposed to Justice Baca, Justice Montgomery identified and applied what Justice Baca called "other principles" of law.

D. Ransom in *Calkins* and *Solon*: Policy is the Doctrine of Remoteness

Justice Ransom, writing as the sole dissenter in *Calkins*, disagreed with the majority's reading of the duty analysis in *Palsgraf*. In *Calkins*, Justice Ransom first stated his position that duty is not determined exclusively by foreseeability. The heart of Justice Ransom's dissent was his disagreement with the court's use of foreseeability in duty analysis. Justice Ransom stated that only in the rare case will foreseeability be exclusively a question of law; therefore, legal policy should be the controlling factor in duty analysis.⁶² According to Justice Ransom, the "crux of the duty

56. *Ramirez*, 100 N.M. at 541, 673 P.2d at 825 (quoting WILLIAM L. PROSSER, LAW OF TORTS §§ 53a and 324 (4th ed. 1971)).

57. *Id.*

58. See *Lovelace Medical Center v. Mendez*, 111 N.M. 336, 805 P.2d 603 (1991). In *Lovelace*, Justice Montgomery, writing the majority opinion, stated that not all injuries are an invasion of a legally protected interest and that courts must decide what interests should be protected. *Id.* at 343, 805 P.2d 610. This decision is governed by what Justice Montgomery, in *Solon*, calls social policy. *Solon*, 113 N.M. at 571, 829 P.2d at 651.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Calkins*, 110 N.M. at 67, 792 P.2d at 44. Justice Ransom's reading of *Palsgraf* is that it represents the rare case when foreseeability is the controlling factor in duty analysis. His dissent seems to suggest that Judge Cardozo would have gone on to discuss policy if he had found Mrs. Palsgraf's injuries foreseeable. *Id.*

analysis turn[ed] not on a factual determination of foreseeability, but instead, on a legal determination of public policy.”⁶³ Hence, he clearly stated the position that policy, not foreseeability, should be the controlling factor in determining whether a duty existed.

Justice Ransom’s perceptions of the role of policy suggested that public policy would limit duty, which would in turn preclude a finding of liability that is too remote.⁶⁴ Justice Ransom wrote:

More often, duty as a matter of law turns not on an absence of the fact issue of foreseeability, but rather the policy issue of whether it is reasonable to impose a duty to avoid a risk of injury which, although foreseeable, is remote.⁶⁵

In formulating what he calls the “doctrine of remoteness,” Justice Ransom proposed that, when deciding duty as a matter of law, the court should adopt Justice Andrews’ analysis of proximate cause in *Palsgraf*. In proposing this, Justice Ransom provided a definition of his policy analysis. Judge Andrews, writing about proximate cause, stated 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.”⁶⁶ Justice Ransom translated this limitation of causation into a limitation of duty. As Judge Andrews wrote and Justice Ransom cited, this is not logic but, instead, “practical politics.”⁶⁷ Justice Ransom felt that the court, in determining the presence of a duty, should have used this principle of “practical politics” as a matter of law instead of considering proximate cause, which has its own “factual application.”⁶⁸ Hence, Justice Ransom’s policy analysis is governed by a rough sense of justice and an “arbitrary” sense of the appropriate limits of liability that he applies when determining remoteness.

In *Calkins*, Justice Ransom suggested twice that, as a “matter of public policy,”⁶⁹ it would not have been reasonable to require the landlord to owe a duty to the child under those specific circumstances. Justice Ransom acknowledged that, even if the injury was foreseeable, it would have been too remote to permit liability.⁷⁰ He stated that “[u]nder the doctrine of remoteness, foreseeability is not controlling.”⁷¹ Justice Ransom’s stated view is that the duty analysis is “a matter of public policy driven by the doctrine of remoteness.”⁷² Justice Ransom’s view was best stated when he wrote:

63. *Id.*

64. *Id.*

65. *Id.*

66. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928).

67. *Calkins*, 110 N.M. at 67, 792 P.2d at 44 (citing *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928)).

68. *Id.*

69. *Id.* at 68, 792 P.2d at 45.

70. *Id.*

71. *Id.* at 67, 792 P.2d at 44.

72. *Id.* at 68, 792 P.2d at 45.

It may be unreasonable and, therefore, negligent not to avoid a foreseeable risk of harm unless the risk is remote as a matter of law. Remoteness, however, is not a fact. It is policy. Failure to maintain a fence, foreseeability of a risk of harm, and proximate causation may give rise to genuine issues of fact; but those issues are not material to a determination of whether there exists in law a duty to avoid that which may be remote as a matter of public policy. Said another way, it is not unreasonable in law to fail to avoid that which is remote.⁷³

Justice Ransom dismissed foreseeability as an only rarely controlling factor. Hence, his reasoning offers the clearest statement of the role of policy in duty analysis. He clearly stated that duty is governed by social policy and all but eliminated foreseeability as a prerequisite. Nevertheless, Justice Ransom did not take the extra step expressly to dispense with foreseeability altogether.

Justice Ransom did state that "only rarely" would foreseeability be the appropriate measure of duty.⁷⁴ He stated that "more often," the social policy determination of remoteness would be the governing principle, but never stated that social policy would always govern duty, nor that foreseeability should never be a factor.⁷⁵ He did explain that "remoteness and foreseeability are separate and divergent roads by which we approach the question of duty."⁷⁶ Hence, Justice Ransom believes that policy analysis, filtered through the doctrine of remoteness, should be the principle means of resolving the question of duty and that only rarely will foreseeability be a controlling factor. Still, because Justice Ransom does not state that policy is the only factor in duty analysis, his view leaves room for argument and refinement.

In *Solon*, Justice Ransom concurred only to reiterate the view he expressed in *Calkins* regarding the duty analysis.⁷⁷ In this concurrence, Justice Ransom critiqued the majority's use of foreseeability. First, he rejected Justice Montgomery's conclusion that injury to the Ponces was not a foreseeable result of the defendant's negligence.⁷⁸ Second, he stated that the *Calkins* court "fell into error" when it adopted the principle that finds a duty wherever foreseeability is present.⁷⁹ According to Justice Ransom, this standard was an erroneous reading of *Palsgraf* and should be left to proximate cause analysis.⁸⁰ He argued that, if a foreseeable plaintiff is found, the court must address the policy consideration of limiting liability and might find no duty, despite foreseeability, based on that policy analysis.⁸¹

73. *Id.* at 67, 792 P.2d at 43.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Solon*, 113 N.M. at 572-73, 829 P.2d at 651-52.

78. *Id.* at 573, 829 P.2d at 652.

79. *Id.* at 572, 829 P.2d at 651.

80. *Id.*

81. *Id.*

Justice Ransom stated that the Ponces' injuries were both foreseeable and palpable, but that no duty to the Ponces was owed by the defendant.⁸² The controlling factor was the policy limitation on such injuries. The Ponces' claim failed not for lack of foreseeability, but because their injury was too remote. Hence, taking his concurrence in *Solon* and dissent in *Calkins* together, Justice Ransom's stated opinion is that duty analysis is primarily controlled by policy analyzed in light of the doctrine of remoteness and that only in the rare case will foreseeability play a determinative role. Justice Ransom does not view the remoteness analysis as solely a limiting factor, assuming foreseeability is present, but instead as a factor by which a court could find a duty even in the absence of a finding of foreseeability. Hence, absent a finding of foreseeability, Justice Ransom contends that a court could create a duty solely through the application of public policy.

V. POLICY: AN ATTEMPT AT A DEFINITION

In *Solon*, Justice Montgomery explains that the case was not a "good one" for the court to reexamine its position on duty analysis. Hence, the *Solon* decision does not provide a clear statement of the appropriate relationship between foreseeability and the role of policy in duty analysis. However, the New Mexico trilogy raises four questions that are keys to the issue: 1) Is the presence or absence of foreseeability the only test for duty? 2) Assuming foreseeability, can policy analysis nonetheless negate a finding of duty? 3) If policy analysis can negate duty to foreseeable victims, what policies are considered and how are they weighed against the presence of foreseeability? 4) If injury to the plaintiff is not reasonably foreseeable, can policy alone justify the imposition of a duty? The answers to these questions provide the framework for the appropriate duty analysis.

1) Is the presence or absence of foreseeability the only test for duty? The answer to this question is unanimous. None of the justices have expressed the opinion that foreseeability should be the sole factor in duty analysis. Each of the four justices who have written on the subject have stated that policy considerations are a factor in duty analysis. Hence, an appropriate duty analysis must not use foreseeability as the sole criterion.

2) Assuming foreseeability, can policy analysis nonetheless negate a finding of duty? Only one justice has yet resolved this question. In *Ramirez*, the injury was both foreseeable and consistent with sound policy. Justice Federici did not state the relative weight of foreseeability and policy because he did not find the two in conflict.⁸³ Justice Baca, in *Calkins*, also found the injury complained of foreseeable and consistent with existing policy.⁸⁴ For Justice Baca, policy buttresses the foreseeability analysis, but it is not clear whether policies disfavoring a finding of duty

82. *Id.* at 573, 829 P.2d at 652.

83. *See supra* note 28 and accompanying text.

84. *See supra* note 40 and accompanying text.

would prevail over a finding of foreseeability.⁸⁵ Justice Montgomery, in *Solon*, found the injury complained of unforeseeable and stated that policy analysis would also lead to a finding of no duty.⁸⁶ Only Justice Ransom, both in *Calkins* and *Solon*, clearly took the position that analysis of policy can and often may negate duty despite the presence of foreseeability.⁸⁷

3) If policy considerations can negate a finding of duty owed to a foreseeable plaintiff, what policies are considered and how are they weighed against the presence of foreseeability? Justice Federici's and Justice Montgomery's definitions of the role of policy in determining the existence of duty agree. They agree that the social policy in duty analysis is determined by analysis of the interests that existing law will protect and recognize. In their opinions, these justices were able to perform their interest analysis with reference to existing statutory and case law and were, therefore, not forced to decide what the social policy consideration would be absent existing law.⁸⁸ Justice Baca defined policy as being "determined with reference to legal precedent, statutes, and other principles comprising the law."⁸⁹ The only ambiguity in Justice Baca's position is what he means by "other principles."⁹⁰ Like Justices Federici and Montgomery, Justice Baca had an existing legal principle to refer to and, therefore, did not have to explain in detail what "other principles" would be.⁹¹

Justice Ransom stated his definition of policy as the doctrine of remoteness governed by practical politics and convenience.⁹² The current parameters of the policy analysis are, therefore, still fluid. However, the majority view seems to define policy as determined by the interest that is recognized by the existing legal framework.

4) If injury to the plaintiff is not reasonably foreseeable, can policy alone justify imposition of a duty? Because none of the Justices expressly stated whether duty could exist, even in the absence of foreseeability of harm, the issue is left open. Justice Montgomery views policy as only a limiting factor and not something that could create a duty absent foreseeability.⁹³ Justice Federici analyzed policy as a factor in duty analysis, only after finding foreseeability.⁹⁴ Therefore, he did not state whether policy alone could create a duty if foreseeability of harm was missing.

Even though Justice Baca did not clearly enunciate a complete definition of his policy analysis, he did declare that duty was a question of policy.⁹⁵

85. See *supra* note 44 and accompanying text.

86. See *supra* note 56 and accompanying text.

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

88. See *supra* notes 27 & 61 and accompanying text.

89. See *supra* note 41 and accompanying text.

90. See *supra* note 42 and accompanying text.

91. See *supra* note 43 and accompanying text.

92. See *supra* note 67 and accompanying text.

93. See *supra* note 54 and accompanying text.

94. See *supra* note 24 and accompanying text.

95. See *supra* notes 40-41 and accompanying text.

Hence, in Justice Baca's policy analysis, the presence of a "legal precedent" or "[an] other principle comprising the law" could create a duty absent foreseeability.⁹⁶ Because policy plays such a decisive role in Justice Ransom's duty analysis, it is likely that it could create a duty absent foreseeability.⁹⁷ Nevertheless, if policy is to create a duty, the injury would have to be well within one of the expressed policy standards.

VI. CONCLUSION

New Mexico's duty analysis began with the *Ramirez* statement that foreseeability is the sole factor in determining the existence of duty. Other language in *Ramirez*, however, as well as all the opinions in *Calkins* and *Solon*, demonstrate that policy considerations also play a critical role in duty creation. Unless Justice Ransom's view that foreseeability is largely irrelevant prevails, future duty cases will have to focus on identifying the proper factors encompassed within the policy analysis and the question of the relative weight to be given to foreseeability and policy when these two criteria point to opposite conclusions.

DAVID J. JARAMILLO

96. See *supra* note 42 and accompanying text.

97. See *supra* note 69 and accompanying text.