THE DEATH OF *PALSGRAF*: A COMMENT ON THE CURRENT STATUS OF THE DUTY CONCEPT IN CALIFORNIA

The California courts are in the forefront of the development of modern tort law into a pro-plaintiff, pro-recovery system. This Comment analyzes the evolution of the duty concept in California tort law. Duty has become a plaintiff-oriented doctrine. Duty has reduced the importance of proximate cause in the negligence analysis. Pro-defendant aspects of duty have atrophied, replaced by an analysis based primarily on foreseeability. Duty, traditionally decided by the trial judge as a threshold question of law, has in many recent cases been decided, in effect, by the jury as a question of fact.

> [We] have not followed the historic limitations of duty. . . . The concept has at once been obliterated and obfuscated. Duty, as such, has lost most of its meaning.[1]
>
> Justice Matthew O. Tobriner

INTRODUCTION

The duty question inquires whether the defendant's obligation to use due care to avoid injuring others extends to the plaintiff.[2] The duty issue in tort law has two conflicting functions. First, duty helps the plaintiff's chances of recovery by providing a simplified alternative to a proximate cause analysis. However, a second function, which tends to bar recovery, is duty's position as a threshold, judge-determined question of law.

This Comment discusses the historical evolution of the duty rule in California with particular emphasis on recent decisions of the California Supreme Court and their implementation by the lower courts. During the first half of this century, tort cases were

1. Tobriner, *The Changing Concept of Duty in the Law of Torts*, 9 CAL. TRIAL LAW. J. 17, 21-22 (1970).

2. Green, *The Submission of Issues in Negligence Cases*, 18 U. MIAMI L. REV. 30, 36 (1963), *reprinted in* L. GREEN, THE LITIGATION PROCESS OF TORT LAW 397 (2d ed. 1977).

decided by an extensive proximate cause analysis. Duty, as a part of this analysis, was determined either as a threshold issue before the case went to the jury or simply as one minor factor considered at a later stage.[3] California shifted from the latter approach to the threshold analysis of duty around mid-century.[4] The emphasis on proximate cause in determining liability subsequently declined as courts paid more attention to the duty question. The pro-defendant aspects of duty such as visitor status[5] and zone-of-danger[6] rules, as well as foreseeable class of plaintiff concepts,[7] have atrophied in the last three decades. Foreseeability that harm might result has become the primary factor in assessing whether a duty exists.

In 1975, in *Weirum v. RKO General, Inc.*,[8] duty was decided, in effect, by the jury on the basis of foreseeability. Since *Weirum*, duty is no longer a judge-determined potential barrier to recovery in a substantial number of cases. Appellate courts have increasingly reversed dismissals and upheld plaintiffs' verdicts on the duty issue if any evidence supporting foreseeability of harm was introduced.[9] This change is significant because the trial judge's discretion to defer the duty question to the jury in novel causes of action has been increased. The judge's discretion to dismiss the suit has been sharply limited to areas protected by public policy considerations.

CALIFORNIA ADOPTS THE DUTY RULE: *MOSLEY* TO *DILLON*

The concept of duty in tort law has changed throughout history. When tort law was first separated from criminal law, a duty existed to act with care toward all others. Tort law was, in effect, a law of strict liability.[10] In the nineteenth century duty evolved into a legalism to protect industrial enterprises from suit by those injured in their factories or by their machines and products.[11] In the first half of the twentieth century, this pro-defendant bias began to erode with respect to the duty issue and in most other ar-

3. These are, respectively, the Cardozo and the Andrews positions in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

4. Mosley v. Arden Farms Co., 26 Cal. 2d 213, 157 P.2d 372 (1945).

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

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

7. *See* Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

8. 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975).

9. *See* notes 54-67 and accompanying text *infra*.

10. Tobriner, *The Changing Concept of Duty in the Law of Torts*, 9 CAL. TRIAL LAW. J. 17, 18 (1970).

11. *See generally* Note, *The Origin of the Modern Standard of Due Care in Negligence*, 1976 WASH. U.L.Q. 447.

eas of tort law. In the early twentieth century, tort cases were determined by an extensive proximate cause analysis. Duty was included either as a threshold, judge-determined question or as a minor factor in the entire proximate cause equation. The champions of these two approaches were Justices Cardozo and Andrews, respectively, in *Palsgraf v. Long Island R.R.*[12]

California shifted from the Andrews to the Cardozo view as a result of *Mosley v. Arden Farms Co.* in 1945.[13] In *Mosley* the plaintiff was injured when his mowing machine collided with milk crates hidden by weeds between a sidewalk and a property line. The defendant milk company had piled the crates on a parking strip near the sidewalk and had left them unguarded and unattended for over a month. The crates, as the milk company might have foreseen, were scattered by a third party. The issue was not a *Palsgraf* foreseeable plaintiff question but was whether an intervening third party relieved the defendant of liability. The majority held the defendant liable using a proximate cause analysis. Justice Traynor concurred, arguing for the adoption of the Cardozo *Palsgraf* position so that "in time the courts will dispel the mists that have settled on the doctrine of proximate cause in the field of negligence."[14] Justice Traynor also stated "that defendant's liability depends entirely upon whether it violated a duty of protecting the plaintiff from unreasonable risk of harm. . . ."[15] Justice Traynor's goal was to simplify and ease the plaintiff's burden by eschewing the Byzantine maze of the proximate cause analysis in favor of a more streamlined system of showing duty, breach, causal connection, and damages. The effect of this shift was to increase the importance of the duty issue and to decrease the role of the proximate cause analysis.[16]

---

12. 248 N.Y. 339, 162 N.E. 99 (1928).
13. 26 Cal. 2d 213, 157 P.2d 372 (1945).
14. *Id.* at 222, 157 P.2d at 377 (1945) (Traynor, J., concurring).
15. *Id.* at 220, 157 P.2d at 376 (Traynor, J., concurring). William Prosser's approval of Justice Traynor's concurrence may have influenced its subsequent acceptance. Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 413 n.213 (1950).
16. The important practical effect of the *Palsgraf* theory is that liability for unforeseeable consequences is avoided by limiting the scope of the *duty*, rather than by the application of restrictive rules of proximate cause. Hence the admonition of writers to "look for the duty before you talk causation" and "there is no duty to an unforeseeable plaintiff."
4 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 489, at 2750-51 (8th ed. Supp. 1978).

Mosley had the effect of adopting the *Palsgraf* duty concept. At the time, however, this doctrine was pro-defendant in two important respects. First, duty was limited by now obsolete rules such as visitor status, zone of danger, and foreseeable class of plaintiffs. Second, duty was a threshold, judge-determined question that could prevent a victim's case from going to trial. The next thirty years of California tort law is a history of the elimination of these pro-defendant aspects of duty. Justice Traynor's expectation that proximate cause would become less complex and important has been concurrently realized.[17]

Although some courts have continued to use duty as a bar to recovery,[18] the dominant theme has been the metamorphosis of duty into a pro-plaintiff doctrine. This new concept of duty follows Justice Cardozo's view because it continues to be a threshold question; it resembles Justice Andrews' version by imposing a nearly universal duty of care.[19]

Another important shift in emphasis in the duty analysis is reflected in the transition toward duty defined by foreseeability of harm rather than by the relationship between the parties.[20] In

---

17. Hoyem v. Manhattan Beach City School Dist., 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978), supports the proposition that proximate cause has declined in importance and complexity:

> Although defendant argues that its [negligence was not] a proximate cause of the accident because [it] . . . bore no duty . . . [o]ur opinion [in Daley v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970)] made clear that the [defendant] could be held liable so long as its negligent supervision was an actual ("but for") cause of the injury and the general type of injury was reasonably foreseeable.

Id. at 520-21 n.6, 585 P.2d at 858 n.6, 150 Cal. Rptr. at 8 n.6.

18. The following cases illustrate a defendant-oriented approach to duty. In Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954), the defendant left her keys in the ignition of her auto in violation of a city ordinance. Someone stole the car and negligently struck the plaintiff. Held, the statute did not create a duty because its intention was solely to prevent theft, not to protect a class of persons who might be injured by negligent driving. O'Keefe v. South End Rowing Club, 64 Cal. 2d 729, 414 P.2d 830, 51 Cal. Rptr. 534 (1966), held that a landowner owes no duty to children injured while swimming and playing on the landowner's pier if they were neither invited nor given explicit permission to be there. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), refused to extend liability in a situation in which a mother suffered emotional distress when a negligent motorist struck her child. The rationale was that the plaintiff was not within that class toward which the defendant was negligent; thus, the injury did not give rise to liability.

See also Brousseau v. Jarrett, 73 Cal. App. 3d 864, 878, 141 Cal. Rptr. 200, 208 (1977) (dissenting opinion) ("[T]here is no duty on the part of a physician to his patient to write a nonnegligent medical report.").

19. Palsgraf v. Long Island R.R., 248 N.Y. 339, 350, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting).

20. The courts have continued to pay tribute to the Cardozo *Palsgraf* opinion, not for its "class of plaintiffs" view but rather for the concept that "the risk reasonably to be perceived defines the duty to be obeyed." Dillon v. Legg, 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968); Valdez v. J.D. Diffenbaugh Co., 51

Richardson v. Ham,[21] the court found a duty owed by a defendant construction company for damages caused by a stolen bulldozer that passers-by had found unlocked and had taken for a joyride. The court observed that the foreseeability of harm from the joyride created a duty on the part of the owner to prevent the injury. In the years following the *Richardson* decision, foreseeability of harm resulted in a finding of liability against the following defendants: an attorney whose poor draftsmanship of a will harmed the intended beneficiaries;[22] a bank, for damages to a depositor as a result of an erroneously dishonored check;[23] a contractor whose truck was stolen when the keys were left in the ignition, for harm to a plaintiff struck by the truck;[24] and a bowling alley whose management did not protect a patron from a known assailant waiting outside.[25]

These cases demonstrate the evolution from a defendant-oriented duty rule toward the early law of strict liability. At the time of *Mosley*, many urged a duty analysis as an attractive alternative to the elaborate proximate cause approach with its myriad pitfalls for the plaintiff. The effect of adopting the duty analysis was to increase recovery by allowing the case to go to the jury if the injury was reasonably foreseeable. California did not adopt the parts of the *Palsgraf* theory insulating defendants from suit. On the contrary, the cases above demonstrate a duty concept that is not to be used to protect a defendant from a meritorious suit. This use of the duty concept is consistent with the California Supreme Court's subsequent sweeping reevaluation of tort law as a pro-plaintiff, pro-recovery system of compensation for injured victims.

Cal. App. 3d 494, 505, 124 Cal. Rptr. 467, 474 (1975) (quoting Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928)). Duty is defined by foreseeability of harm viewed from the plaintiff's perspective as the reasonable expectation of an innocent party not to be harmed by the acts of others. B. CORNBLUM, MODERN CALIFORNIA PERSONAL INJURY LITIGATION § 8 (Supp. 1976).

21. 44 Cal. 2d 772, 285 P.2d 269 (1955).

22. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (defendant, however, held not negligent as a matter of law).

23. Weaver v. Bank of America, 59 Cal. 2d 428, 380 P.2d 644, 30 Cal. Rptr. 4 (1963).

24. Hergenrether v. East, 61 Cal. 2d 440, 393 P.2d 164, 39 Cal. Rptr. 4 (1964).

25. Taylor v. Centennial Bowl, Inc., 65 Cal. 2d 114, 416 P.2d 793, 52 Cal. Rptr. 561 (1966).

In 1968 the California Supreme Court handed down two landmark duty cases, *Dillon v. Legg*[26] and *Rowland v. Christian*.[27] *Dillon* eliminated the artificial zone-of-danger requirement from suits for negligent infliction of emotional distress.[28] *Rowland* eliminated the equally artificial visitor status barriers to recovery in negligence cases against landowners.[29] Traditional duty rules were rejected as "legal device[s] . . . designed to curtail the feared propensities of juries toward liberal awards."[30]

In *Dillon* the court recognized a cause of action for a mother, not in the zone of danger, who suffered emotional distress when she witnessed a negligently driven vehicle strike and kill her child. Attacking the defendant's contention that it owed no duty to the mother, the court in *Dillon* stated flatly that the duty analysis begs the question, that the duty concept has questionable historical justification, and that it should not be used as a means of limiting liability simply because defining the limits of recovery is difficult.[31] The court emphasized that foreseeability of risk is the primary factor in establishing the element of duty.[32]

Rowland followed a similar reasoning in ruling that plaintiff's status as a "licensee" on the property artificially immunizes the defendant from suit. *Rowland* held that the foundation of California negligence law is California Civil Code section 1714, which provides: "Everyone 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 . . . ."[33] Therefore, the court believed, no departure should be made from this general duty of care rule unless clearly supported by public policy. *Rowland* considered foreseeability of harm to the plaintiff to be the most important factor in assessing

26. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

27. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

28. Parents suffering emotional distress from witnessing injury to their children could recover damages only if they were close enough to the accident to have some fear for their own safety. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963); W. PROSSER, THE LAW OF TORTS 333-34 (4th ed. 1971).

29. The extent of the duty the landowner or occupier owed to a plaintiff injured on his property was dependent on whether the plaintiff was classified as an invitee, licensee, trespassing child, or trespassing adult. *See* W. PROSSER, THE LAW OF TORTS 351-99 (4th ed. 1971).

30. Dillon v. Legg, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968).

31. *Id.* at 728, 441 P.2d at 912, 69 Cal. Rptr. at 72.

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

33. CAL. CIV. CODE § 1714 (Deering 1979), *construed in* Rowland v. Christian, 69 Cal. 2d 108, 111-12, 443 P.2d 561, 563-64, 70 Cal. Rptr. 97, 99-100 (1968).

whether to depart from the general duty of care rule.[34] The California Supreme Court from 1968 to 1974 further defined duty by foreseeability.[35] The pro-plaintiff trend in these cases reflects evolving societal attitudes favoring greater protection for the consumer, the individual, and the innocent victim.[36]

---

34. A departure from this fundamental principle involves the balancing of numerous 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 on 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.
Rowland v. Christian, 69 Cal. 2d 108, 112-13, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

35. In Conner v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968), the commercial lender that did not investigate a developer to which it lent funds was held to owe a duty to exercise reasonable care to prevent the construction and sale of seriously defective houses. In Barrera v. State Farm Mut. Auto. Ins. Co., 71 Cal. 2d 659, 456 P.2d 674, 79 Cal. Rptr. 106 (1969), the defendant insurance company attempted to rescind a policy in force for one and one half years because of the belated discovery, after an auto accident, that the co-defendant-insured driver had falsified information in his original application. The court held that an insurance company must promptly investigate or lose any right of rescission. The insurance company owed a duty to the motoring public to investigate promptly to protect the public from the spectre of loss resulting from cases involving retroactively uninsured drivers. In Elmore v. American Motors Co., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969), a strict products liability case, the court found the manufacturer liable for injuries to an innocent bystander. The court, in effect, eliminated any duty (or privity) requirement from products liability and held that an obligation of safety runs to anyone injured because of a product's defective performance. *Id.* at 586, 451 P.2d at 89, 75 Cal. Rptr. at 656-57. Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971), held a tavern keeper liable for the injuries from a vehicle accident involving an intoxicated person to whom he had sold alcoholic beverages. The court specifically rejected the argument for nonliability based on proximate cause and instead found a duty owed by the tavern keeper to the public at large. The court relied on a duty arising from a violation of CAL. BUS. & PROF. CODE § 25602 (Deering 1979), which makes the furnishing of an alcoholic beverage to an intoxicated person a misdemeanor. The court did not decide whether a common law duty existed. Vesely v. Sager, 5 Cal. 3d at 165, 486 P.2d at 159, 95 Cal. Rptr. at 631. *Vesely* was abrogated by the legislature in 1978. CAL. BUS. & PROF. CODE § 25602 (Deering 1979). *See* Comment, *Liquor, the Law, and California: One Step Forward—Two Steps Backward*, 16 SAN DIEGO L. REV. 355 (1979). Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974), allowed yet another previously barred cause of action: recovery for a wife's loss of consortium with her husband. In a revealing passage, Justice Mosk quoted from Justice Tobriner's majority *Dillon* opinion: "That the courts should allow recovery . . . would appear to be a compelling proposition." *Id.* at 386, 525 P.2d at 671, 115 Cal. Rptr. at 767 (quoting Dillon v. Legg, 68 Cal. 2d 728, 730, 441 P.2d 912, 914, 69 Cal. Rptr. 72, 74 (1968)).

36. *See generally* Rintala, *"Status" Concepts in the Law of Torts*, 58 CALIF. L.

Justice Tobriner commented that the concept of duty has become simply "a shorthand statement that one party must recompense another for the loss."[37] Duty was used to place the risk on the party whose status, power, and financial responsibility placed it in the best position to compensate the victim or to avoid the risk. Specifically, *Dillon* and its progeny turned duty from a defendants' shield to a plaintiffs' sword in finding liability against insured motorists, insurance carriers, financial institutions, and landlords. "[T]hese cases . . ." wrote Justice Tobriner, "have not followed the historic limitations of duty. . . . The concept has at once been obliterated and obfuscated. Duty, as such, has lost most of its meaning."[38]

An appellate court case amply summarizes these decisions: "*Dillon* postulated reasonable foreseeability as the primary, court-determined test of liability. . . . [*Dillon* and *Rowland*] relegated the duty test to a secondary role" as a safeguard against remote and unexpected liabilities.[39] The trend, clearly, was to use duty to the plaintiffs' advantage rather than as a barrier to recovery.[40] The class of plaintiffs to which Mrs. Palsgraf belonged had become foreseeable in California.[41] By 1974 duty was a pro-plain-

---

REV. 80 (1970); Tobriner, *Retrospect: Ten Years on the California Supreme Court*, 20 U.C.L.A. L. REV. 5 (1972).

37. Tobriner, *The Changing Concept of Duty in the Law of Torts*, 9 CAL. TRIAL LAW. J. 17, 21 (1970).

38. *Id.* at 21-22.

39. Adams v. Southern Pac. Transp. Co., 50 Cal. App. 3d 37, 41-42, 123 Cal. Rptr. 216, 219 (1975), *hearing denied*, *id.* at 48 (court ruled in favor of defendant on authority of Fifield Manor v. Finston, 54 Cal. 2d 632, 354 P.2d 1073, 7 Cal. Rptr. 377 (1960)) (Justices Tobriner and Mosk were of the opinion that petition for hearing should be granted).

40. Excellent source materials examining this reversal of perspective in the duty analysis are Horvitz, *Justice Tobriner's Tort Decisions: A Reaffirmation of the Common Law Process*, 29 HASTINGS L.J. 167 (1977); Rintala, *"Status" Concepts in the Law of Torts*, 58 CALIF. L. REV. 80 (1970); Sulnick, *A Political Perspective of Tort Law*, 7 LOY. L.A.L. REV. 410 (1970); Tobriner, *Retrospect: Ten Years on the California Supreme Court*, 20 U.C.L.A. L. REV. 5 (1972).

41. Sulnick, *A Political Perspective of Tort Law*, 7 LOY. L.A.L. REV. 410, 416 n.37 (1970). Any lingering belief in the vitality of the *Palsgraf* "unforeseeable plaintiff" class concept has been put to rest by Justice Tobriner:

> Perhaps the third party, the "unforeseeable" plaintiff, is no more than a symbol of the general public, and perhaps the courts are saying that they require no special "duty" upon which to rest recovery for that class but primarily look to the status of the obligor and to the public's reasonable expectancy as to the performance of his product or as to the defendant's conduct. If so, in one sense, the courts *have imposed a universal duty of care* that runs to all mankind, and thus indeed have returned to the feudal notion of duty and status that predated the restrictive barriers on liability that were the hallmarks of the Industrial Revolution.

Tobriner, *The Changing Concept of Duty in the Law of Torts*, 9 CAL. TRIAL LAW. J. 17, 22 (1970).

tiff concept defined primarily by foreseeability that harm might result and subject only to public policy-based exceptions.

WEIRUM GIVES THE DUTY QUESTION TO THE JURY

In 1975 the California Supreme Court in *Weirum v. RKO General, Inc.*,[42] in effect allowed the jury to decide the question of duty. This decision indicates that, except when clear public policy considerations demand insulation of the defendant from liability, the courts will not apply a restrictive, pro-defendant duty rule in California.[43]

Duty historically has been a question of law.[44] Duty as a restriction on liability developed along with other restrictions on liability. As a general rule, if the judge let the case go to the jury, the plaintiff usually recovered regardless of the merits of the case,[45] often for reasons of sympathy, prejudice, and emotion.[46]

In the pre-*Weirum* duty analysis, foreseeability was examined twice. First, the judge decided whether the defendant owed the plaintiff a duty, using a variety of factors of which foreseeability was paramount.[47] Second, the jury used foreseeability to determine whether the defendant was negligent.[48] Recognizing this bi-

42. 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975).

43. The functions of the judge and the jury are elastic and subject to change. Any rule that enlarges the jury's sphere extends liability, and any rule that restricts the jury's sphere restricts liability. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 15.1, at 871 (1956).

44. "The issue of duty to the plaintiff is very definitely one of law and can be nothing else." Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 423 (1950). *Accord*, B. CORNBLUM, MODERN CALIFORNIA PERSONAL INJURY LITIGATION § 7, at 6 (Supp. 1976); 3 J. DOOLEY, MODERN TORT LAW § 45.02, at 230 (West 1978); W. PROSSER, THE LAW OF TORTS 206 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 328B(b) (1965); 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 493, at 2756 (8th ed. Supp. 1978); Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1417-18 (1961), *reprinted in* L. GREEN, THE LITIGATION PROCESS IN TORT LAW 299-300 (2d ed. 1977).

45. For statistical support of the thesis that juries are pro-plaintiff, see 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 15.5, at 892 nn.12-14 (1956).

46. "[I]f the jury is given the power to decide the case, it is impossible actually to prevent them from deciding it on any basis whatever which appeals to their own minds, tastes, prejudices, or emotions." *Id.* at § 15.4, at 884. "Whenever such issues [as duty] are left to the jury in the great grab-bag of proximate cause, the court is again abdicating decisions in favor of men who do not know the law." Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 423 (1950).

47. *See, e.g.*, Rowland v. Christian, 69 Cal. 2d 108, 111-13, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

48. Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1417-18

furcated analysis of foreseeability is necessary to understanding the *Weirum* decision.

Weirum is an extraordinary case in which "the Real Don Steele," a radio disc jockey, conducted a radio contest in which he encouraged his teenaged listeners to chase him about Los Angeles by offering nominal cash prizes and the ephemeral notoriety of a short radio interview to the first person to catch him as he traveled about the city. Two young listeners were involved in a high speed vehicle chase which resulted in the death of an uninvolved third party. The survivors brought a wrongful death suit against the two drivers and RKO, the parent corporation of the Real Don Steele's radio station KHJ. The plaintiffs prevailed at trial, and the California Supreme Court unanimously affirmed RKO's liability. Justice Mosk's opinion stated that "duty is primarily a question of law."[49] Thus, the emphasis shifted from duty as an absolute question of law to a question primarily of law. However, the court further stated that "foreseeability of the risk is a primary consideration in establishing the element of duty. . . . While duty is a question of law, foreseeability is a question of fact for the jury."[50]

The court then upheld the jury's finding of the existence of a duty by concluding that ample evidence of foreseeability was submitted to the trier of fact:

> The verdict in plaintiffs' favor here necessarily embraced a finding that decedent was exposed to a foreseeable risk of harm. It is elementary that our review of this finding is limited to the determination whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. We conclude that the record amply supports the finding of foreseeability.[51]

Weirum thus has the practical effect of giving the jury the determination of duty. The judge is thereby severely limited in his ability to sustain a demurrer or to declare a nonsuit when the defendant raises the duty issue as a defense. The appellate process is invoked only once—after trial—if the judge defers the duty question to the jury. A pre-trial dismissal, conversely, potentially leads to separate appeals on the pre-trial dismissal and the trial verdict. This situation adds time and cost to the judicial process and further delays compensation to an injured party.

Certain areas of vitality for a determination by the judge on the

(1961), *reprinted in* L. GREEN, THE LITIGATION PROCESS IN TORT LAW 299-300 (2d ed. 1977).

49. Weirum v. RKO Gen., Inc., 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471 (1975).

50. *Id.*

51. *Id.* at 46, 539 P.2d at 39-40, 123 Cal. Rptr. at 471-72.

duty issue remain. When the other factors that determine duty[52] (especially public policy) outweigh the importance of foreseeability, the judge may decide the duty question. Furthermore, the judge may rule positively that a duty exists,[53] an action that produces the same result as deferring the duty question to the jury. The net effect of *Weirum*, nevertheless, is that in a substantial number of cases the trial judge may not bar the case from going to the jury by reason of the defendant's claim that he owes no duty to the plaintiff.

CASE LAW FOLLOWING *WEIRUM*

The California Supreme Court has reaffirmed the *Weirum* view of duty in subsequent cases, and the appellate courts have responsively followed this lead. These cases indicate that if the plaintiff pleads foreseeability and no countervailing policy reasons are present, the case should proceed to trial.

Supreme Court Decisions

In *Landeros v. Flood*,[54] a physician treating an injured child negligently failed to diagnose "battered child syndrome." The child was subsequently further abused. The court used, curiously enough, a proximate cause analysis in affirming the doctor's liability. Citing *Weirum*, the court held that liability turns on foreseeability, which is a question of fact for the jury.[55]

In *Ewing v. Cloverleaf Bowl, Inc.*,[56] a tavernkeeper was sued for the wrongful death of a young man by alcohol poisoning. The decedent was served ten shots of 151-proof rum in less than one and

52. *See* note 44 *supra*.

53. *See, e.g.*, Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

54. 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976).

55. As we recently observed with respect to a determination of duty, however, "foreseeability is a question of fact for the jury." (*Weirum v. RKO General, Inc.* (1975) 15 Cal. 3d 40, 46 [123 Cal. Rptr. 468, 539 P.2d 36].) The same rule applies when the issue is whether the intervening act of a third person was foreseeable and therefore did not constitute a superseding cause: in such circumstances "The foreseeability of the risk generally frames a question for the trier of fact" (*Weaver v. Bank of America* (1963) 59 Cal. 2d 428, 434 [30 Cal. Rptr. 4, 380 P.2d 644]; accord, Rest. 2d Torts, § 453, com. b).

Id. at 411, 551 P.2d at 395, 131 Cal. Rptr. at 75. *See also* Isaacson, *Child Abuse Reporting Statutes: A Case for Holding Physicians Civilly Liable for Failing to Report*, 12 SAN DIEGO L. REV. 743 (1975).

56. 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

one half hours. The California Supreme Court overruled a nonsuit. The issues of duty, foreseeability, contributory negligence, and willful and wanton misconduct were all held to be questions for the jury to decide. The court dismissed the issue of a bartender's duty to a patron as a foregone conclusion, observing that "a person is liable for the reasonably foreseeable injuries caused by his failure to exercise reasonable care. . . . The questions of causality, foreseeability, and reasonableness which derive from this rule are factual, and thus constitute questions for the jury."[57]

In both *Ewing* and *Landeros* duty is eliminated as a barrier to presenting the case to the trier of fact. The jury determines the defendant's liability by measuring his conduct against the foreseeability of the risk. When the jury finds foreseeability, this finding is used to answer both the negligence and the duty question. The traditional bifurcated foreseeability analysis is therefore eliminated.[58]

Appellate Court Decisions

The appellate courts promptly applied the *Weirum* doctrine. One court succinctly summarized the new approach in reversing a dismissal on the duty issue by the trial judge: "Foreseeability of the risk is the primary consideration in establishing a duty of care. . . . Thus, the question is whether appellant's evidence . . . established facts from which the jury could have inferred a duty . . . ."[59] *Weirum* has led the appellate courts to limit severely the trial judge's authority to rule in the defendant's favor on a demurrer, a nonsuit, a motion for summary judgment, or a directed verdict based on the duty question. Conversely, the appellate courts have not questioned on duty grounds trial judges' decisions to entertain novel causes of action.

The question of duty has been held to be within the province of the jury in cases in which the state failed to provide a safe place to work to a contractor's employee,[60] a landlord failed to warn a

57. *Id.* at 399, 572 P.2d at 1159, 143 Cal. Rptr. at 17-18.

58. For a discussion of the bifurcated foreseeability analysis, see text accompanying notes 42-48 *supra.*

59. Holman v. State, 53 Cal. App. 3d 317, 332, 124 Cal. Rptr. 773, 782 (1975). In *Holman* a heavy-equipment operator fell into the unguarded driveshaft of an earth-moving machine and was injured. He sued the state on two counts: negligence in selecting an incompetent contractor (the plaintiff's employer) and failure in its duty as a statutory employer to provide a safe place to work, as required by CAL. LAB. CODE §§ 6401-6408 (Deering 1979). The trial judge sustained a demurrer to the first count and at the close of the plaintiff's case-in-chief granted a nonsuit in favor of the state as to the second count. The appellate court reversed, citing *Weirum* and *Dillon.*

60. Holman v. State, 53 Cal. App. 3d 317, 124 Cal. Rptr. 773 (1975).

new tenant about a rapist,[61] a traffic officer did not take affirmative action to protect a disabled vehicle from an ensuing collision,[62] a doctor issued an incorrect medical report to an insurance company to the detriment of the insured,[63] a poorly lighted airport parking area became the scene of a mugging,[64] police officers negligently created a situation in which a fleeing suspect injured a third party,[65] the state failed to correct a design defect in a bridge and an accident occurred,[66] and self-dealing general partners made a capital call on limited partners for the purpose of

61. O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977). The appellate court reversed the trial court with instructions to overrule the demurrer. The plaintiff had been raped in her apartment. She alleged that the defendant landlord concealed information about a man who had raped several female tenants, deceitfully misrepresented the safety and security of the apartment building, and failed to provide security. The appellate court brushed aside the landlord's duty defense that the rape had not taken place in the common area, stating: "An analysis of the factors set forth in *Rowland* [used to decide duty] shows that there is potential liability here. The existence of the most important factor, foreseeability, was alleged." *Id.* at 804, 142 Cal. Rptr. at 490. The allegation of foreseeability of harm in the complaint was thus sufficient to vitiate the trial judge's discretion to dismiss the case.

62. Mann v. State, 70 Cal. App. 3d 773, 139 Cal. Rptr. 82 (1977). A directed verdict for the defendant was reversed. A California highway patrolman had stopped for two disabled vehicles on the freeway and left when a tow truck arrived before the tow truck assumed the screening position that the CHP vehicle had been in. An elderly, partially blind driver then ran into the stalled vehicles, injuring the plaintiffs. Ruling immunity inapplicable, the appellate court also held that the independent intervening negligent conduct of a third party was reasonably foreseeable by the traffic officer.

63. Brousseau v. Jarrett, 73 Cal. App. 3d 864, 141 Cal. Rptr. 200 (1977). The physician, employed by the insurance company, wrote an unduly conservative report as to the extent of the plaintiff's residual disability. The plaintiff detrimentally relied on the report when settling his claim. The trial court sustained the defendant physician's demurrer, and the appellate court reversed.

64. Slapin v. Los Angeles Int'l Airport, 65 Cal. App. 3d 484, 135 Cal. Rptr. 296 (1976). Held, the plaintiffs, victims of the mugging, were entitled to attempt to prove that the poor lighting created a reasonable risk of the kind of injury that they sustained.

65. Sparks v. City of Compton, 64 Cal. App. 3d 592, 134 Cal. Rptr. 684 (1976). Undercover policemen brandished firearms and initiated a high speed vehicle chase. The fleeing suspects were unaware that their pursuers were police officers. The suspects struck and injured the plaintiff, another motorist. Reversing a summary judgment for the defendant, the City of Compton, the court stated that the jury decides foreseeability and that foreseeability determines duty. *Id.* at 597-98, 134 Cal. Rptr. at 687-88.

66. Harland v. State, 75 Cal. App. 3d 475, 142 Cal. Rptr. 201 (1977). The trial court found for the plaintiffs on two counts of negligence. First, the state failed in its duty to safely design, construct, and maintain the bridge. The state lost its statutory design immunity when it failed to correct defects reported to it by the California Highway Patrol. Second, the driver of the vehicle that crashed into a guardrail and then crossed the unprotected median strip, colliding with plaintiffs' vehicle, was a resident of a California Veteran's Home and regularly took prescrip-

squeezing them out.[67] These cases either affirmed plaintiffs' verdicts or reversed sustained demurrers, nonsuits, directed verdicts, or summary judgments that were in favor of the defendants. These cases reiterated the *Weirum* principle that the jury decides foreseeability, and foreseeability of harm creates a duty of care subject to negation only by judicially discerned policy factors.

CASE LAW AFFIRMING THE PUBLIC POLICY LIMITATIONS OF *WEIRUM*

The doctrinal implications of *Weirum* are that in most cases the duty rule no longer stands as an initial barrier to the plaintiff. *Weirum*, however, leaves open some areas of continued vitality for a judicial assessment of the duty question.[68]

To rule on the duty issue when public policy considerations are of paramount importance remains within the province of the trial judges and the appellate courts. Justice Traynor's observation in 1945 is still good law today: "[The issue of] liability as a matter of public policy . . . is for the court."[69] *Rowland* echoes this theme, holding that liability must flow from the fundamental principle stated in California Civil Code section 1714 except when a departure from this principle is "clearly supported by public policy."[70]

Supreme Court Decisions

Since *Weirum*, the California Supreme Court, in reviewing plaintiffs' appeals from dismissal on the duty question, has frequently affirmatively instructed trial judges that a duty exists.[71]

---

tion drugs. The trial court relied on the "special relationship" doctrine of Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), to find that the Veteran's Home owed the plaintiffs a duty of care to control their charges. The appellate court affirmed the first count, with a concurring justice stating that he would affirm both counts.

67. Baldwin v. Marina City Properties, Inc., 79 Cal. App. 3d 393, 145 Cal. Rptr. 406 (1978). The plaintiffs, vendors of a limited partnership interest, brought suit against their vendee, the general partner, and the limited partnership for transactions including unanswered capital calls that resulted in losses to and impairment of plaintiff's security under the contract of sale. Although it questioned the strength of plaintiff's allegations, the appellate court ruled that for the trial court to sustain defendant's demurrers without leave to amend was an abuse of discretion "under the principle of both willful and negligent liability as set forth in section 1714 of the Civil Code and under the concept that reasonable foreseeability of harm can create a duty of care. . . ." *Id.* at 414, 145 Cal. Rptr. at 418.

68. "The determination of duty is primarily a question of law . . . [and] must be decided on a case-by-case basis." Weirum v. RKO Gen., Inc., 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471 (1975).

69. Mosley v. Arden Farms Co., 26 Cal. 2d 213, 223, 157 P.2d 372, 377 (1945) (concurring opinion).

70. Rowland v. Christian, 69 Cal. 2d 108, 112, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968), *cited in* Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 823, 131 Cal. Rptr. 854, 859 (1976).

71. *See, e.g.,* Hoyem v. Manhattan Beach School Dist., 22 Cal. 3d 508, 585 P.2d

The court has defined limits, however, by declaring that no duty exists in situations in which financial considerations rather than substantive merits predominate. Policy considerations such as protecting certain relationships and institutions and reducing excessive awards have led the court to reject the plaintiffs' duty arguments in cases involving the attorney-client relationship,[72] an assigned-risk auto insurance plan,[73] alternative compensation schemes,[74] and nonpecuniary loss.[75] The limits of the expansive

851, 150 Cal. Rptr. 1 (1978); Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). In all these cases the plaintiff appealed a dismissal on the duty question. Had the trial judges allowed the cases to go to the jury, the results would have been procedurally similar to *Weirum*. Assuming the plaintiff would have prevailed, the defendant would have appealed and lost, and the matter would have been finished. Instead, the cases had to be sent back for trial. *Weirum* indicates that the procedural aspects of tort law should adopt the pro-plaintiff bias that the substantive law has already incorporated. Perhaps the lesson to trial judges is that, absent strong public policy reasons to the contrary, a tort case should not be dismissed on the duty issue. *Coulter* was abrogated by the legislature in 1978. CAL. BUS. & PROF. CODE § 25602 (Deering 1978). *See* Comment, *Liquor, the Law, and California: One Step Forward—Two Steps Backward*, 16 SAN DIEGO L. REV. 355 (1979).

72. In Goodman v. Kennedy, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976), an attorney gave poor advice to his client. Another party relied on this advice to its detriment. The supreme court held that the attorney owed no duty of care to the other party in an arm's-length transaction. The public policy rationale is not clear in this case. Justice Mosk, joined by Justice Tobriner, dissented: "The refusal to impose a duty on the attorney in these circumstances unfairly penalizes innocent persons whose injury was the foreseeable result of the attorney's negligence . . . . [A]n attorney who negligently advises his client to enter into a transaction which will inevitably harm another may be liable to the person injured." *Id.* at 354, 556 P.2d at 749, 134 Cal. Rptr. at 387. *Accord*, Parnell v. Smart, 66 Cal. App. 3d 833, 136 Cal. Rptr. 246 (1977).

73. Nipper v. California Auto. Assigned Risk Plan, 19 Cal. 3d 35, 560 P.2d 743, 136 Cal. Rptr. 854 (1977). The fear of ruin of the California Automobile Assigned Risk Plan led the supreme court to hold that no duty exists when the defendant insurance companies fail to screen from coverage potentially dangerous drivers. *See* Fireman's Fund Ins. Co. v. Superior Court, 75 Cal. App. 3d 627, 142 Cal. Rptr. 249 (1977). *But cf.* Barrera v. State Farm Mut. Auto. Ins. Co., 71 Cal. 2d 659, 456 P.2d 674, 79 Cal. Rptr. 106 (1969) (no public policy considerations barred a finding of duty). *See* note 35 *supra*.

74. In Walters v. Sloan, 20 Cal. 3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977), a policeman sued the parents of a teenager who hosted a party at their home. Disorder developed and the policeman was sent to the residence. The policeman attempted to arrest some individuals for being drunk in public but was attacked and injured. The trial judge sustained a demurrer to the parents' duty, and the supreme court affirmed, invoking the "fireman's rule" that no cause of action exists against a defendant whose negligence occasions an officer's exposure to danger. The court held the fireman's rule is premised on sound public policy and cited the availability to the policeman of medical and disability benefits, workers' compensation, and special disability pensions.

75. In Borer v. American Airlines, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302

modern duty rule appear to be those relatively few cases in which public policy considerations clearly outweigh the judicial preference for compensation of the victim. These cases do not significantly depart from *Weirum*'s pro-plaintiff analysis.

Appellate Court Decisions

Further definition of the boundaries of duty has come from the intermediate appellate courts. The courts have affirmed dismissals in favor of a defendant school district sued for negligent failure to provide an adequate education and for negligent misrepresentation that the plaintiff, a pupil, was performing adequately[76] and a defendant public housing corporation sued by a third party injured in a gunfight in the apartment laundry room.[77] In the latter case, all the people involved were strangers to the apartment building. Both cases cited fairness to the defendants as the basis for dismissing otherwise meritorious suits.

The public policy rationale was implicit but unstated in dismissals on duty grounds in the following situations: a tow-truck operator, injured on a highway while preparing to tow a vehicle, who sued the municipality because a policeman was present at the

(1977), and Baxter v. Superior Court, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977), the supreme court affirmed dismissals in actions for recovery for negligently caused injury resulting in loss of parent-child consortium by either the child or the parent. Justice Mosk, the sole dissenter in *Borer* and *Baxter*, pointed out that California cases of the last decade dictated that a cause of action be recognized when harm to the plaintiffs was foreseeable. The reasoning of the majority is not clear. The REPORT OF THE CALIFORNIA CITIZEN'S COMMISSION ON TORT REFORM: RIGHTING THE LIABILITY BALANCE 65 (1977) asserts that *Borer* and *Baxter* are temporary abberations unlikely to remain law. Levy & Ursin, *California Tort Law: At the Crossroads?*, 67 CALIF. L. REV. 497 (1979), while noting the Commission Report, suggests that these decisions are best understood as damages cases limiting damage awards when nonpecuniary loss is involved. *See also* Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) (no duty owed in a suit involving nonpecuniary loss).

76. Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976). The court, after recognizing the evolution of duty to the incorporation of foreseeability test, went on to say that duty is a question of law. The court stated that considerations of public policy are part of the duty analysis and in this case were the most important factor. Fearing tort claims in countless numbers by disaffected students and parents, the court dismissed the case, reasoning that the "ultimate consequences, in terms of public time and money, would burden [the schools]—and society—beyond calculation." *Id.* at 825, 131 Cal. Rptr. at 861. This case presented a duty-foreseeability question that, under the *Weirum* analysis, could have gone to the jury but for the superseding importance of the public policy issue.

77. Totten v. More Oakland Residential Housing, Inc., 63 Cal. App. 3d 538, 134 Cal. Rptr. 29 (1976).

scene;[78] a company, the victim of embezzlement by a probationer, that sued the county probation department for failure to warn;[79] county employees who were assaulted by a probationer whom they had investigated and who sued the county for negligently allowing the assailant to go free.[80]

A reasonable counterweight to California's liberal, pro-plaintiff duty analysis is reservation of the court's discretion to assess the public policy considerations. Duty should not be used as a defense to obscure the more important considerations of recovery for an injured plaintiff: insurance, foreseeability of the harm, and the ability of the defendant to distribute the risk. In a suit that might have detrimental effects on the general public, however, considerations of public policy should reasonably be assessed and, if of sufficient importance, should prevail.

CONCLUSION

The duty question in California has evolved into a pro-plaintiff doctrine determined primarily by foreseeability of harm. Duty as an obstacle to the plaintiff's recovery is highly suspect unless clear considerations of public policy militate against finding the defendant liable. The jury rather than the judge can now answer the duty question in a significant number of cases.

In 1945 Justice Traynor's concurrence in the *Mosley* decision adopted the Cardozo *Palsgraf* duty analysis as a simpler, more plaintiff-oriented alternative to proximate cause. As a pro-plaintiff doctrine, two drawbacks to the duty approach existed. One was the necessity of demonstrating some relationship between the plaintiff and the defendant giving rise to a duty. The second was that duty, as a threshold, judge-determined question, represented a barrier to bringing the case before the jury. In the last decade these two barriers have been destroyed.

Weirum put to rest the last sacred cow of the duty paradigm by allowing the jury in many cases to determine the duty question.

78. Mikialian v. Los Angeles, 79 Cal. App. 3d 150, 144 Cal. Rptr. 794 (1978). *But cf.* Mann v. California, 70 Cal. App. 3d 773, 139 Cal. Rptr. 82 (1977) (state liable for traffic officer investigating and then leaving motorists in a dangerous situation).

79. J.A. Meyers & Co. v. Los Angeles County Probation Dep't, 78 Cal. App. 3d 309, 144 Cal. Rptr. 186 (1978). *But cf.* Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968) (Youth Authority liable to injured foster parents for placing violent youth without warning of youth's homicidal tendencies).

80. Whitcombe v. County of Yolo, 73 Cal. App. 3d 698, 141 Cal. Rptr. 189 (1977).

Previously, foreseeability was examined twice during a tort suit, first by the judge in evaluating duty, then by the jury in deciding the question of negligence. Now, in many cases the jury alone decides foreseeability and then applies it to both the negligence and the duty questions.

The net result is that, with respect to duty, the appellate courts have not overturned a jury finding for the plaintiff if he introduced evidence of foreseeability at trial. The appellate courts have instead overruled sustained demurrers, nonsuits, directed verdicts, and summary judgments for the defendant if the complaint or other evidence raised an issue of foreseeability of harm.

The California Supreme Court has consistently held, nevertheless, that a departure from a plaintiff-oriented duty rule is permissible if clearly supported by public policy. This amorphous concept of public policy allows the judiciary the flexibility to incorporate present-day concepts of economic reality and common sense to deny recovery. Since *Weirum*, courts have invoked public policy to deny damages for nonpecuniary loss and to protect institutions deemed more important than the plaintiffs' claims against them.

Duty is therefore an assumed constant in the negligence equation, with a secondary, rejective role invoked only in the interests of public policy. Duty has thus become a plaintiff-oriented concept in an increasingly plaintiff-oriented tort system. The potential ramifications of this trend are that a universal duty of care will be incorporated into tort law, including an affirmative duty to act to prevent foreseeable harm. Other factors, such as availability of insurance and policies of risk distribution and accident reduction, have replaced the duty analysis in determining which victims should recover and when. Judicial discretion has been restricted in directions that would deny recovery and broadened in directions that encourage recovery. Thus, absent public policy considerations to the contrary, duty no longer presents a bar to a jury trial on a novel cause of action if the harm was reasonably foreseeable.

ARTHUR N. BUCK