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### How the Law Court Uses Duty to Limit the Scope of Negligence Liability

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# HOW THE LAW COURT USES DUTY TO LIMIT THE SCOPE OF NEGLIGENCE LIABILITY

*Paul F. Macri\**

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## HOW THE LAW COURT USES DUTY TO LIMIT THE SCOPE OF NEGLIGENCE LIABILITY

Paul F. Macri\*

### I. INTRODUCTION

The element of duty is the least understood and most amorphous element of negligence.<sup>1</sup> One reason that duty is not well understood is that duty analysis combines consideration of fact-specific issues of foreseeability of harm, relationship between the parties, and seriousness of injury with analysis of the public policy implications of finding a duty in the specific case, including the burden that will be placed on defendants by imposing a duty. This is a delicate balancing act for most courts.

Over the last eleven years, the Maine Supreme Judicial Court, sitting as the Law Court, has employed duty analysis in negligence cases as a means for imposing its own ideas of policy on the law of negligence irrespective of prior case law or the facts of the case being decided, a practice that has almost inevitably resulted in the imposition of severe limitations on the scope of negligence liability. When a court concludes as a matter of law that a defendant has no duty to a plaintiff in a given situation, the possibility of liability is negated before the claim can reach a jury. Such a conclusion is also essentially unreviewable unless the legislature is willing to act.

Limiting negligence liability by finding that no duty exists is ordinarily a proper and legitimate exercise of judicial power if the court uses the correct legal standard. What makes the recent duty decisions of the Law Court institutionally unpalatable and ultimately threatening to our system of justice is that the court has focused its duty analysis on a single factor, public policy, to the exclusion of other elements of duty, such as the nature of the relationship between the parties, the reasonable foreseeability of the event, and the potential seriousness of the injury. In a line of cases beginning with *Trusiani v. Cumberland & York Distributors, Inc.*,<sup>2</sup> the court has gradually made duty into a device used to reach a desired result based solely on the court's view of public policy rather than on the facts of the individual case.

One result of this trend is that fewer and fewer negligence claims are reaching the jury. Another is that public policy is being established without the input and

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1. Analysis of duty as an element of negligence has been prolific over the years, and we are no nearer agreement on its scope and nature today than we were 100 years ago. Some of the more well-known and influential articles on this subject include William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953); Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41 (1934); Leon Green, *The Duty Problem in Negligence Cases I*, 28 COL. L. REV. 1014 (1928) [hereinafter Green, *Duty Problem I*]; Leon Green, *The Duty Problem in Negligence Cases II*, 29 COL. L. REV. 255 (1929) [hereinafter Green, *Duty Problem II*]; Percy H. Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. REV. 184 (1926). See also generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE THE LAW OF TORTS § 43 (5th ed. 1984).

2. 538 A.2d 258 (Me. 1988).

information a legislature usually receives before enacting a statute and without the citizen control guaranteed by election of representatives. Perhaps most insidious, however, is that these decisions have imposed limitations on negligence claims which are as severe as the tort reform proposals that have been rejected by the Maine Legislature. This Article will demonstrate how the Law Court is undermining the traditional concept of duty in the law of negligence and will argue that the court ought to return to using the factors of nature of the relationship between the parties, reasonable foreseeability, and seriousness of injury in determining whether a duty exists.<sup>3</sup>

## II. THE GENERAL LAW OF DUTY

Duty has always been a difficult concept for courts to formulate and apply. One reason for this difficulty is that most definitions of duty are circular. Dean Prosser states that duty is "the relation between individuals which imposes upon one a legal obligation for the benefit of the other."<sup>4</sup> In *Glidden v. Bath Iron Works Corp.*,<sup>5</sup> the Law Court stated that "where a person is placed in such a position with regard to another that it is obvious that, if he does not use due care . . . he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation."<sup>6</sup> These formulations say nothing more than that a duty arises under circumstances where there should be a duty. Analysis of these definitions and of the history of negligence, however, gives some context to the element of duty.

Under both of the above definitions, there must be a societally recognized or established legal relationship between the plaintiff and the defendant in order to impose a duty of care. Thus, whether one person owes a duty to another depends to a large extent on the plaintiff's relationship to the defendant factually and legally.<sup>7</sup> Under this view of duty, negligence is not "in the air" but is relative, depending in part on previously recognized legal relationships between the parties.<sup>8</sup> This definition of duty is based in part on social policy.<sup>9</sup> For example, it asks whether it is a societal good for a common carrier to owe a duty of care to a customer and, if so, what the scope of that duty should be.<sup>10</sup> In addition to the legal

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3. The Author of this Article was appellate counsel of record in many of the cases discussed herein.

4. KEETON ET AL., *supra* note 1, § 53, at 356.

5. 143 Me. 24, 54 A.2d 528 (1947).

6. *Id.* at 32, 54 A.2d at 532 (quoting 45 C.J. *Torts* 842, ¶ 260).

7. See, e.g., KEETON ET AL., *supra* note 1, § 53, at 356. In *Duty in Tortious Negligence*, Professor Winfield points out that early relationships creating duties arose from the legal status of the defendant, for example, as a common carrier. Winfield, *Duty*, *supra* note 1, at 44-45. Thus, the relationship between a passenger and a common carrier imposes upon the carrier a duty to use reasonable care. *Id.*

8. KEETON ET AL., *supra* note 1, at 357 (quoting F. POLLACK, *LAW OF TORTS* 408 (13th ed. 1920)). There is theoretical support for a theory of duty as a reciprocal of a legal right. Green, *Duty Problem I*, *supra* note 1, at 1026. This theory holds that in the natural state of society a person is free to do what she pleases. *Id.* Her legal rights are uncircumscribed. *Id.* When society imposes a duty on an individual to act in a certain way with respect to another, that freedom is curtailed to the extent of the duty. *Id.* at n.25. Unlike the accretionary approach described in the text, duty under this view is unitary and exists where rights have been limited. Because the factors used in determining whether a duty exists are the same under both of these theories, there is no need to further analyze the theoretical bases of that concept in this Article.

9. See KEETON ET AL., *supra* note 1, at 169.

10. Winfield, *Duty in Tortious Negligence*, *supra* note 1, at 44-45.

relationship between the parties, courts also consider whether there is a reasonably foreseeable risk of harm under the specific facts of the case.<sup>11</sup> The Law Court applied this more sophisticated concept of duty as recently as 1968. In *MacDonald v. Hall*,<sup>12</sup> the court stated that duty analysis must include consideration of the relationship between the parties, the defendant's knowledge of the danger, and the probability of injury, issues of both law and fact, in order to determine whether a duty existed.<sup>13</sup>

Today, courts consider a variety of factors, both legal and factual, in determining whether a defendant owes a duty of care to a plaintiff. These factors include, but are not limited to:

1. the reasonable foreseeability of injury;
2. the likelihood of injury;
3. the potential seriousness of the injury;
4. the nature and extent of the burden that will be placed on the defendant if a duty is held to exist;
5. the consequences of placing that burden on the defendant; and
6. the social utility of the defendant's conduct.<sup>14</sup>

This modern concept of duty in negligence cases requires a court to balance considerations of law and policy with factors involving the specific facts of the case. A court giving less than full consideration to any of those factors of both fact and law does not afford duty the full scope required by the system. The dissenting opinion in *Trusiani* neatly describes how this multi-factorial test should be applied:

The determination of the existence of a duty is necessarily an ad hoc process, specific to the facts of each case. Concededly, no legal duty is owed to an unforeseeable plaintiff.

. . . .

. . . [Determining whether a duty exists] requires a balancing of the importance of the societal interest and the probability and burden of potential injury to a plaintiff against the burden placed on a defendant if he were required to take precautions to prevent injury.<sup>15</sup>

The dissent's approach to the determination of duty accurately reflects the law's concern for both the actual effect on the parties of its decisions and the more long-term implications for society as a whole.

As we shall learn in the next section, however, since its decision in *Trusiani*,

11. 57A Am. Jur. 2d. *Negligence* §§ 14, 23, 24 (1989); see also KEETON ET AL., *supra* note 1, at 169.

12. 244 A.2d 809 (Me. 1968).

13. See *id.* at 814. The relationship between duty and reasonable foreseeability has historically been a particularly difficult one, in part because of the circular nature of some definitions of duty. See, e.g., *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928), *reargument denied*, 164 N.E. 564. See also generally KEETON ET AL., *supra* note 1, § 43, at 284-88.

14. See, e.g., *Staples v. Krack Corp.*, 186 F.3d 977, 979-80 (7th Cir. 1999); *Swieckowski v. City of Fort Collins*, 923 P.2d 208, 211-12 (Colo. Ct. App. 1995); *Janicki v. Hospital of St. Raphael*, 744 A.2d 963 (Conn. Super. Ct. 1999); *Washington v. City of Chicago*, 720 N.E.2d 1030, 1032-33 (Ill. 1999); *Williams v. O'Brian*, 669 A.2d 810, 813 (N.H. 1995); *O'Neill v. Maiara*, 701 N.Y.S.2d 108, 109 (N.Y. App. Div. 1999); *Frank v. Bear, Stearns & Co.*, 11 S.W.3d 380, 383 (Ten. Ct. App. 2000); *Miller v. Whitworth*, 455 S.E.2d 821, 825 (W. Va. 1995).

15. *Trusiani v. Cumberland & York Distr.*, 538 A.2d 258, 263-64 (Me. 1988) (Scolnik, J., dissenting).

the Law Court has not balanced the various factors described above. It has declined to take into consideration the legal relationship between the parties or the reasonable foreseeability of the harm in determining whether a duty exists. Instead, the court has based its duty analysis exclusively on its own view of the policy consequences of finding a duty. This practice has severely circumscribed the scope of negligence liability by preventing arguably meritorious claims from reaching a jury. The court's decisions on duty since *Trusiani* have created a serious threat to the people's right of access to courts for the legal redress of injuries.

### III. *TRUSIANI V. CUMBERLAND & YORK DISTRIBUTORS, INC. AND ITS PROGENY*

Before the *Trusiani* decision, the Law Court properly applied the multi-factor balancing test for duty. For example, in *Klingerman v. SOL Corp. of ME*,<sup>16</sup> the question raised was whether a bartender is liable for the sale of alcoholic beverages to a person who dies from intoxication. Couching its analysis in terms of proximate cause,<sup>17</sup> the court found that a duty could exist:

We conclude that we are unable to rule as a matter of law that the sale of intoxicants could never constitute a proximate cause of injury if those intoxicants were voluntarily consumed by the purchaser . . . . We have recently said that if an injury is reasonably foreseeable, proximate cause exists. It is a question of fact whether a particular result is reasonably foreseeable, and that question is to be resolved by the trier of fact. *It is not the function of this Court to judge the social desirability of a grant of immunity to the vendors of alcoholic beverages. We must fairly apply the law as developed in this jurisdiction. We refuse to encumber the law of proximate causation with an artificial limitation that precludes jury consideration of the causal relationship between the sale of intoxicating beverages and consequent harm.*<sup>18</sup>

As we shall see, this reasoning is the polar opposite of the duty analysis that the Court would later apply, starting with the *Trusiani* decision and continuing to the present.

#### A. *Trusiani: The Court Begins to Limit the Scope of Duty*

In *Trusiani v. Cumberland & York Distributors, Inc.*,<sup>19</sup> an employee of a wholesale liquor distributor had a collision with another automobile after the employee had left the employer's Christmas party where he had been drinking alcoholic

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16. 505 A.2d 474 (Me. 1986).

17. Although analyzed in terms of proximate causation, *Klingerman* is a duty case because its analysis is informed by the same considerations of reasonable foreseeability and social policy as are used in determining whether a duty exists. This close relationship between the elements of duty and proximate causation has been recognized by courts in Maine and elsewhere, as well as by commentators. *See, e.g.*, *Brewer v. Roosevelt Motor Lodge*, 295 A.2d 647, 651-52 (Me. 1972) (foreseeability is basis for both proximate cause and duty); *Valentine v. On Target, Inc.*, 727 A.2d 947, 950 (Md. App. 1999); *Dwyer v. Eric Investment Co.*, 350 A.2d 268, 273 (N.J. Super. Ct. App. Div. 1975) (alternative analysis); *Pittsburgh Nat'l Bank v. Perr*, 637 A.2d 334, 337 (Pa. Super. Ct. 1994); *Turner v. Jordan*, 957 S.W.2d 815, 818 n.3 (Tenn. 1997) (analysis of duty and proximate cause "similar"); *Mellon Mfg. Co. v. Holder*, 5 S.W.3d 654, 659 (Tex. 1989) (foreseeability analysis same for duty and proximate cause); *see generally*, KEETON ET AL., *supra* note 1, § 43, at 284 & n.34, § 53 at 358 (duty "frequently . . . dealt with in terms of . . . proximate causation usually with resulting confusion").

18. *Klingerman v. SOL Corp.*, 505 A.2d at 474 (citations omitted) (emphasis added).

19. 538 A.2d 258 (Me. 1988).

beverages.<sup>20</sup> The employee was tired from having worked two jobs the day before and his regular delivery shift on the day of the accident.<sup>21</sup> The issue presented was whether the employer owed a duty to drivers at large to exercise reasonable care in preventing his employee from driving after the party.<sup>22</sup>

The trial court permitted the issue of negligence to go to the jury which found in favor of the plaintiffs.<sup>23</sup> In response to post-trial motions, the trial judge concluded that the defendant owed a duty to the plaintiffs "to prohibit the consumption of alcohol on its premises."<sup>24</sup>

On appeal, the defendant argued that the trial court had erred in imposing a duty upon the defendant.<sup>25</sup> The Law Court first addressed the plaintiff's argument that the risk of injury was "immense" compared to the burden on defendant to prevent it.<sup>26</sup> It rejected that argument on the basis that the employee had brought his own alcohol to the employer's premises and that he had not been visibly intoxicated.<sup>27</sup> The court reasoned that these circumstances severely increased the burden on the employer to prevent this type of accident and that it therefore would not impose a duty.<sup>28</sup> For the same reason, the court rejected the plaintiff's argument that the employer should have known that his employee was too tired to be driving that morning.<sup>29</sup> Up to this point, the court's duty analysis was sound. However, the court did not stop there.

The plaintiff next argued that the court should find that there was a duty based on state liquor regulations prohibiting drinking on the premises of wholesale liquor distributors.<sup>30</sup> The burden on defendant to comply with state regulations could not be considered heavy since he was required by law to do so.<sup>31</sup> The court rejected this argument pointing out that violating state regulations was not negligence *per se* in Maine.<sup>32</sup> By giving the regulations virtually no weight in its duty analysis, however, the court substituted its judgment for that of the Legislature in making liquor-related policy. It not only ignored the fact that it was reasonably foreseeable that people would drink in the specific circumstances of this case, where the employer had turned a blind eye to the consumption of its own alcohol by its own employees at its Christmas party; it also gave no weight whatsoever to the best evidence of what Dean Prosser called "our social ideas as to where the loss should fall," the state regulations.<sup>33</sup>

The regulations addressed the very issues upon which the court based its decision. Under them, the licensee had a duty to prohibit any drinking on the premises, not just the consumption of the licensee's own liquor.<sup>34</sup> The regulations also pro-

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20. *Id.* at 260.

21. *Id.* at 262.

22. *Id.* at 260.

23. *Id.* at 261.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 262.

29. *Id.* at 261-62.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 261.

34. *Id.* at 262 n.3.

hibited the licensee from permitting a visibly intoxicated person to remain on the premises and, more generally, from allowing any liquor consumption at all.<sup>35</sup> The effect of the court's decision in *Trusiani* was to significantly loosen the restrictions on wholesale dealers that had been imposed by the authoritative regulatory agency.

While the court paid lip service to the more fact-driven elements of duty, its ultimate decision was based almost solely on social policy. As it would do in many later cases, the court quoted Dean Prosser's classic article, *Palsgraf Revisited*,<sup>36</sup> in support of its decision:

In the decision of whether or not there is a duty, many factors interplay: the hand of history, our ideals of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, "always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."<sup>37</sup>

The court, however, took this quotation out of context. In *Palsgraf Revisited*, Prosser was clearly aware of the shortcomings of duty as a definable element of negligence and the fact that courts could and did use the duty element to manipulate results in negligence cases, but he also understood that the concept of duty should not only incorporate ideas of policy but should also consider the foreseeability of harm to the particular plaintiff and his relationship to the defendant.<sup>38</sup>

Justice Scolnick's dissent made similar points, pointing out that the employer "share[d] responsibility" for the employee's impairment and "acquies[ced] in the employee's consumption of his own intoxicants in the permissive environment of an impromptu Christmas party on the employer's premises," which "for purposes of determining the existence of a duty, [was] the functional equivalent of an employer affirmatively furnishing liquor at such a gathering."<sup>39</sup> He also pointed out that the court wholly ignored "company policy and State regulations," which "are relevant factors to be considered together with all other circumstances in determining whether a plaintiff is reasonably foreseeable."<sup>40</sup> Finally, Justice Scolnick pointed out that "the jury reasonably concluded that the burden of this risk should be borne by the Defendant, not the public. That common sense judgment should not be disturbed on appeal."<sup>41</sup> A jury's "common sense judgment," based on foreseeability and relationship of the parties, is a better reflection of "our social ideas as to where the loss should fall" and "the mores of the community" than the court's own sometimes idiosyncratic policy views.

Justice Scolnick's critique of the Law Court's policy-based duty analysis unfortunately fell on deaf ears. The court has not only continued to use policy to reach desired results in negligence cases but has also increasingly substituted its own judgment for that of the community in doing so. In *Trusiani*, the court demonstrated for the first time its willingness to employ the concept of duty as a basis for limiting negligence liability. In so doing, the Law Court served notice that

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35. *Id.*

36. William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953).

37. *Id.* (quoting *Palsgraf v. Long Island R.R. Co.*, 162 (N.Y. 1928)).

38. *See id.* at 16-19.

39. *Trusiani v. Cumberland & York Dist., Inc.*, 538 A.2d at 263-64 (Scolnick, J., dissenting).

40. *Id.* at 264.

41. *Id.* at 265.



social policy would now be the most important factor in determining whether a duty existed in negligence cases.

### *B. The Negligent Infliction of Emotional Distress Cases*

In a series of decisions issued in the 1990s, the Law Court applied the skewed view of duty it used in *Trusiani* to the tort of negligent infliction of emotional distress (NIED). These decisions severely limited the scope of NIED as it had initially been formulated by the court in *Culbert v. Sampson's Supermarkets Inc.*,<sup>42</sup> and *Gammon v. Osteopathic Hosp. of Maine, Inc.*<sup>43</sup> In order to understand the significance of the impact of the court's duty decisions on the cause of action for NIED, we must first look briefly at *Culbert* and *Gammon*.

#### *1. Culbert v. Sampson's Supermarkets, Inc.: NIED Liability to Bystanders*

The Law Court first held that a bystander could recover for NIED in *Culbert v. Sampson's Supermarkets Inc.*, where a mother sued a food manufacturer after she witnessed her child chewing pieces of glass that came from a baby food container.<sup>44</sup> In concluding that the mother could recover for her emotional injury, the Law Court adopted the very liberal rule for bystander liability first applied by the California Supreme Court in *Dillon v. Legg*.<sup>45</sup> In *Dillon*, the California court held that defendants owed bystanders a duty of reasonable care where the bystander was a close relative of the physically injured person, was at or near the scene of the accident when it occurred, and suffered distress as a result of directly observing the accident.<sup>46</sup>

Like the *Dillon* court, the Law Court concluded that applying these factors would guarantee that the harm to the bystander was reasonably foreseeable and that the relationship of the parties would be close enough to support imposing a duty on the defendant to the bystander who witnessed the injury to her relative.<sup>47</sup> Moreover, no greater burden was imposed upon a defendant by the *Dillon* rule than already existed under ordinary negligence principles. In the court's view, this rule was less arbitrary and more consistent with reasonable foreseeability than the other two then-current bystander rules, the "physical impact" rule and the majority "zone of danger" rule.<sup>48</sup>

In adopting the *Dillon* rule, the Law Court specifically refuted five common policy arguments used against it.<sup>49</sup> It found that medical science was "sophisticated enough to provide reliable and accurate evidence of the causes of mental trauma" and that the concern for fraud and "a litigation deluge" was "specious."<sup>50</sup> Furthermore, the court stated that:

A generalized policy concern to prevent fraud or collusion, as well as a paternalistic interest to protect the citizenry against itself through the elimination of temp-

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42. 444 A.2d 433 (Me. 1982).

43. 534 A.2d 1282 (Me. 1987).

44. *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d at 434.

45. 441 P.2d 912 (Cal. 1968).

46. *Id.* at 920-21.

47. *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d at 438.

48. *Id.*

49. *Id.*

50. *Id.*

tations for fraud or collusion, are, in our view, insufficiently weighty to render tolerable the basic unfairness and inequity inhering in the denial of a remedy to one who has suffered wrong at the hands of another.<sup>51</sup>

The court also rejected the argument that recognizing a broad duty to bystanders would unduly burden defendants, stating that:

The conduct which is offered as supporting the liability—i.e., in this case the negligent operation of the vehicle—is of the kind that has traditionally been held to have been actionable by plaintiffs who had sustained provable damages. The departure that is being urged is as to *the scope of damages that will be recognized as flowing from that conduct*. In this context, we are satisfied that the developments in the fields of medical science and psychiatry do provide the impetus for expanding our legal recognition of the consequences of the negligent act. *To arbitrarily refuse to recognize a now demonstrable injury flowing from a negligent act would be wholly indefensible.*<sup>52</sup>

Finally, the court rejected the assertion that bystander recovery is inherently unlimited in nature.<sup>53</sup> It held that bystander recovery would be limited to those cases in which the mental distress was serious, defined as “where a reasonable person ‘normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances’ of the event.”<sup>54</sup> The court reaffirmed that, “since the imposition of liability is ultimately a factual determination which must be made on a case by case basis, the *Dillon* test should not be applied formulistically to bar arguably valid claims.”<sup>55</sup>

In concluding that a motorist owed a duty of reasonable care to a foreseeable bystander as well as a fellow driver, the Law Court employed the settled principles of duty analysis, which included examining the foreseeability of injury, the relationship between the parties, the burden that would be imposed upon a defendant by establishing a duty, and the potential seriousness of the injury.<sup>56</sup> While it also considered issues of public policy, for example, rejecting as specious concern for “opening the floodgates of litigation,” it categorically denounced formulaic conceptions of duty and vowed not to create “arbitrary” limitations on duty in negligence cases.<sup>57</sup> As we shall see, however, in later cases, the Court would develop and apply a more arbitrary, policy-oriented duty analysis, breaking the promise it made in *Culbert*.

## 2. *Gammon v. Osteopathic Hospital of Maine, Inc.: NIED Liability in Non-Bystander Cases*

In *Gammon v. Osteopathic Hospital of Maine, Inc.*,<sup>58</sup> the Law Court addressed the issue of non-bystander emotional distress liability with the same flexibility and concern for the facts of the individual case it demonstrated in *Culbert*. In *Gammon*, the plaintiff, whose father had just died, picked up a package prepared by the de-

51. *Id.* at 436-37 (quoting *Moulton v. Moulton*, 309 A.2d 224, 229 (Me. 1973)).

52. *Id.* at 437 (quoting *Sinn v. Burd*, 404 A.2d 672, 683 (Pa. 1979)) (second emphasis added).

53. *Id.*

54. *Id.* (quoting *Sinn v. Burd*, 404 A.2d at 683 (quoting *Leong v. Takasaki*, 520 P.2d 758, 764 (Haw. 1974))).

55. *Id.*

56. *See id.* at 438.

57. *Id.* at 436-37.

58. 534 A.2d 1281 (Me. 1987).

fendant hospital that he thought contained his father's personal belongings.<sup>59</sup> He was badly shocked when he discovered a human leg in the bag.<sup>60</sup> He sued the hospital for NIED.<sup>61</sup> The Superior Court dismissed on the basis that the plaintiff failed to establish physical impact, objective manifestation of harm, an underlying tort, or any other special circumstances that, prior to *Gammon*, were prerequisites to recovery for emotional distress.<sup>62</sup>

The Law Court reversed and apparently ushered in a new age for emotional distress cases in Maine. As it did in *Culbert* for bystander cases, the *Gammon* court adopted a new, simplified rule for non-bystander NIED recovery.<sup>63</sup> It specifically renounced previous "arbitrary" requirements such as physical impact, acknowledging that these rules:

demonstrate the frailty of supposed lines of demarcation when they are subjected to judicial scrutiny in the context of varying fact patterns. Moreover, these [prior rules] disclose our awareness of the extensive criticism aimed at the artificial devices used by courts to protect against fraudulent claims and against undue burden on the conduct of defendants.<sup>64</sup>

In place of those rules, the court adopted an approach based on foreseeability and the severity of the emotional distress. As it observed:

[T]he traditional tort principle of foreseeability relied upon in *Wallace* and *Culbert* provides adequate protection against unduly burdensome liability claims for emotional distress. Jurors or trial judges will be able to evaluate the impact of the trauma with no greater difficulty than pertains to assessment of damages for any intangible injury. . . . A defendant is bound to foresee psychic harm only when such harm reasonably could be expected to befall the ordinarily sensitive person.<sup>65</sup>

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59. *Id.* at 1283.

60. *Id.*

61. *Id.*

62. *Id.* at 1282. In Maine, as in most other jurisdictions, the development of the cause of action for negligent infliction of emotional distress has been marked by the Law Court's adoption of one arbitrary rule after another in an effort to limit recovery and ensure that such claims are genuine. See P. Macri, *Negligent Infliction of Mental Distress in Maine: The Unrecognized Tort*, 1 Me. B.J. 180, 182-83 (1986).

The first NIED case decided by the court was *Herrick v. Evening Express Pub. Co.*, 120 Me. 138 (1921), in which it held that in order to recover for mental distress a plaintiff must show that she was also physically injured. The court was concerned that, in the absence of physical injury, there would be no evidence of mental injury. *Id.* at 140. This rule stood for almost 50 years until, in *Wallace v. Coca-Cola Bottling Plants, Inc.*, 269 A.2d 117 (Me. 1970), the court overruled *Herrick* in light of the availability of better medical proof of mental injury and held a plaintiff could recover for serious mental distress if he had had physical contact with the injuring instrumentality. *Id.* at 121.

After a few detours along the way, the court adopted the *Culbert* rule which eliminated the arbitrary contact and objective symptomatology tests, relying instead on the traditional elements of negligence. Macri, *supra*, at 183-84 (citing *Culbert v. Sampson's Supermarket, Inc.*, 444 A.2d 433, 435 (Me. 1982)). A similarly rational rule was adopted for non-bystander cases in *Gammon*.

Recently, the Court has returned to imposing more arbitrary restrictions on recovery for NIED by requiring the plaintiff to have a "unique relationship" to the defendant or that there be an underlying tort. *E.g.*, *Richards v. Town of Eliot*, 2001 ME 132, ¶ 4, 780 A.2d 281, 291, 293.

63. See *Gammon v. Osteopathic Hospital of Maine, Inc.*, 534 A.2d at 1286.

64. *Id.* at 1285.

65. *Id.*

Under *Gammon*, the court would apply to non-bystander NIED claims the same non-arbitrary, fact-specific rule it had adopted in *Culbert* for bystander recovery. As a result of *Culbert* and *Gammon*, the duty to use reasonable care to avoid mental injury became co-extensive with the duty to avoid physical injury. Unfortunately, the rationalizing of mental distress law that occurred in these cases would almost immediately be abandoned as the court began to use duty analysis to arbitrarily prevent recovery in those cases because of its fear of a litigation deluge, a fear it had earlier rejected as "specious."

### 3. Cameron v. Pepin: A Turning Point

Only five years after deciding *Gammon*, the Law Court began to restrict the scope of bystander liability, starting in *Cameron v. Pepin*.<sup>66</sup> The issue presented in *Cameron* was whether the *Culbert* requirement that the plaintiff actually witness the injury was an absolute prerequisite to bystander recovery or simply one of several factors to be considered in determining whether the defendant owed a duty to the plaintiff.<sup>67</sup>

In *Culbert*, the court specifically pointed out that the three criteria it adopted for bystander recovery were not to be viewed as absolute requirements but only as evidence that mental injury was reasonably foreseeable in a given case.<sup>68</sup> As the court observed, "[a]ll these elements, of course, shade into each other; the fixing of obligation, intimately tied into the facts, depends on each case."<sup>69</sup> Thus, a plaintiff could recover for the emotional distress associated with the injury of a close relative, even if he did not actually witness the accident, if his relationship with the injured person was sufficiently close and his emotional distress was caused by the injury to the other.<sup>70</sup>

The Camerons did not witness the accident in which their son was injured, but they were at the hospital when he arrived, "cut, bloody, and battered," and stayed with him virtually continuously until he died six days later.<sup>71</sup> Thus, while the plaintiffs did not actually witness the accident, they saw their son within minutes after it occurred and before he had been cared for and cleaned up, and experienced six days of severe mental pain and suffering.<sup>72</sup>

Plaintiffs sued for NIED and prevailed in the trial court.<sup>73</sup> On appeal, however, the Law Court reversed on the ground that, under a strict reading of *Culbert*, the defendant owed no duty to persons who were not present at the scene of the accident and who did not suffer emotional distress as a result of witnessing the

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66. 610 A.2d 279 (Me. 1992).

67. *Id.* at 280.

68. See *Culbert v. Sampson's Supermarket, Inc.*, 444 A.2d 433, 435 (Me. 1982).

69. *Id.* (quoting *Dillon v. Legg*, 444 P.2d at 920-21).

70. *Id.* at 435. The Court quoted *Dillon* as follows:

In light of these factors the court will determine whether the accident and harm was reasonably foreseeable. Such reasonable foreseeability does not turn on whether the particular defendant as an individual would have in actuality foreseen the accident and loss; it contemplates that courts, on a case-by-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances reasonably should have foreseen. The courts thus mark out the areas of liability, excluding the remote and unexpected.

*Id.* (quoting *Dillon v. Legg*, 441 P.2d at 920-21 (emphasis added)).

71. *Cameron v. Pepin*, 610 A.2d at 280.

72. *Id.*

73. *Id.*

accident.<sup>74</sup> The court implicitly abandoned the fact-based duty analysis it had previously embraced in *Culbert* and *Gammon*. It stated that, “whether one party owes a duty of care to another necessarily involves considerations *beyond the factual determination that a particular injury was a foreseeable consequence of some particular conduct.*”<sup>75</sup> Those other “considerations” were matters of public policy which the court had looked to in *Trusiani* in concluding that no duty existed.<sup>76</sup> The *Cameron* court not only cited *Trusiani*, but quoted the same passage from *Palsgraf Revisited*.<sup>77</sup>

The court’s concern in *Cameron*, as in both *Culbert* and *Gammon*, was that a pure foreseeability test would result in “unlimited liability and liability out of all proportion to culpability.”<sup>78</sup> But this concern ignored the fact that the duty determinations it had made in *Gammon* and *Culbert* were not based solely on foreseeability but also considered policy, the relationship between the parties, and the effect upon defendant of imposing a duty.

Nonetheless, instead of *balancing* these factors to determine whether a duty existed in the particular circumstances, the *Cameron* court relied solely on its policy concern that there was a “need for some principled limitations on the extent of liability in this area”<sup>79</sup> in finding that no duty existed and that the *Culbert* factors were to be strictly construed. The court realized that its holding was inconsistent with its earlier decisions in *Gammon* and *Culbert* but attempted to justify the bright-line test it adopted as follows: “Recognizing real differences between classes of potential plaintiffs does not automatically give rise to the arbitrary distinctions that *Culbert* and *Gammon* rejected. Rather, it is precisely these real differences that prevent legal demarcation from being purely arbitrary.”<sup>80</sup>

It is difficult to argue with this proposition in a vacuum, and one sympathizes with the court’s attempt to rationalize its decision in light of *Culbert* and *Gammon*. As the court apparently perceived in *Cameron*, any decision in a negligence case holding that a duty does not exist is arbitrary in the sense that it will preclude recovery by a reasonably foreseeable plaintiff. The argument that, absent some type of bright-line rule on duty, liability based solely on foreseeability is unlimited is a powerful one. But, as the court itself recognized in *Cameron*, in attempting to prevent unlimited liability it should not adopt rules whose effect is to eliminate liability altogether, irrespective of the “real differences between classes of potential plaintiffs.”<sup>81</sup>

In *Cameron*, the Law Court did not recognize *real* differences among plaintiffs because the rule it adopted was not related to the foreseeability of harm or to the purpose of holding persons liable for negligent infliction of emotional distress. Under *Culbert*, it was equally likely that the Camerons would suffer serious mental distress upon seeing their son’s injuries whether they saw them at the accident scene or within minutes of the accident at the hospital. Making this guideline into

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74. *Id.* at 284.

75. *Id.* at 282 (emphasis added).

76. *Id.*

77. *Id.* (quoting KEETON ET AL., *supra* note 1, at 15).

78. *Id.* at 283.

79. *Id.*

80. *Id.* at 284 (citation omitted).

81. *Id.*

a bright-line rule did not recognize *meaningful* differences between potential plaintiffs and was unresponsive to the facts of *Cameron*.

The *Cameron* rule is easily applied, but it is arbitrary because it does not distinguish between foreseeable and unforeseeable claimants nor advance a policy related to the rationale of the tort of NIED. The only purpose it serves is to ensure that not all plaintiffs in NIED cases will get to trial.

By contrast, the difference between a plaintiff who is closely related to the victim and one who is not is a much more "real" distinction because it is related to the foreseeability of actual emotional distress: the closer the relationship, the greater the likelihood of serious emotional distress. Focusing on this factor would also advance the policy of limiting recovery for NIED but in a way that is directly related to the purpose of the tort. A parent who sees her son's terrible injuries within a short time of the accident should recover for her emotional distress while a great-uncle should not.

Considering the purpose of the tort, the reasonable foreseeability of harm, and the relationship between the parties, in the context of the facts of the particular case constitutes traditional duty analysis. Removing the factual context and applying policy considerations unrelated to these factors, as the court did in *Cameron*, results in arbitrary rules based on the court's own ideas of policy.<sup>82</sup>

### C. After *Cameron*: The Trend Continues

Since *Cameron*, the Law Court has continued to base duty decisions in negligence cases solely on policy, ignoring the specific facts of the case and other relevant duty considerations. By deciding cases based solely on its own ideas of policy, the court has substantially reduced the scope of negligence liability, harming the interests of plaintiffs and undermining the foundations of the tort.

#### 1. *Michaud v. Great Northern Nekoosa Corp.*<sup>83</sup>

This case presented issues of duty to bystanders and rescuers and arose from a particularly tragic accident. In 1989, Great Northern was repairing the deepgate of the Ripogenus Dam on the Penobscot River near Millinocket, Maine.<sup>84</sup> In attempting to make the repairs, two divers, employees of an independent contractor,

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82. It may be argued that the conclusive effect of the *Cameron* court's decision is simply a function of the principle that duty is an issue of law and must be decided as a matter of law. The court itself, however, rejected this view in both *Culbert* and *Gammon*. In the former, it quoted *Dillon v. Legg* to the effect that the factorial test adopted in that case "contemplates that the courts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen." *Dillon v. Legg*, 441 P.2d at 921. In the latter, the Law Court stated that "[j]urors or trial judges will be able to evaluate the impact of psychic trauma with no greater difficulty than pertains to assessment of damages for any intangible injury." *Gammon v. Osteopathic Hosp. of Me., Inc.*, 534 A.2d at 1285. Both of these decisions contemplate that determining whether a duty exists *in a given case* is essentially a factual inquiry, even though it may be performed by a judge or an appellate court. The problem with the Law Court's approach in *Cameron* and too many other cases is that the court has failed to take into account the facts of the particular case and has instead applied its own rules too woodenly. As will be suggested below, perhaps the task of applying duty factors to specific fact situations should be given to the factfinder.

83. 1998 ME 213, 715 A.2d 955.

84. *Id.* ¶ 3, 715 A.2d at 957.

became trapped in a submerged dam gate and drowned.<sup>85</sup> Mr. Michaud was a diver who worked for the same contractor but not at Ripogenus Dam.<sup>86</sup> When he heard that two of his co-workers had become trapped, he came to the site to help save them.<sup>87</sup> Michaud dove and attempted to free the other divers.<sup>88</sup> The scene was chaotic and the rescue attempt failed; the subsequent recovery of the divers' bodies, in which Mr. Michaud took part, was grisly.<sup>89</sup> As a result of his efforts, Mr. Michaud suffered serious mental distress and sued Great Northern for damages resulting from his injuries.<sup>90</sup>

Summary judgment was granted in favor of Great Northern on the ground, among others, that it did not owe a duty of care to the plaintiff as a rescuer.<sup>91</sup> On appeal, the Law Court affirmed on the same basis, stating that:

[e]ven if the rescue doctrine gives rise to an independent duty of care owed to the rescuer and emotional distress is a foreseeable result of the defendants' negligence, "policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk." In claims for the negligent infliction of emotional distress, we must avoid inappropriately shifting the risk of loss and assigning liability disproportionate to culpability.<sup>92</sup>

In other words, as in *Cameron*, the court in *Michaud* would not itself determine a bright-line test for duty in such situations but did not trust a jury to decide the issue based on the specific facts of the case. Also as in *Cameron*, the court relied solely on the policy of limiting the number and size of tort claims as a basis for refusing to impose a duty. Thus, the Court again decided a negligence case based solely on a policy wholly unrelated to the facts of the case or the purpose of the tort.

## 2. *Flanders v. Cooper*<sup>93</sup>

In *Flanders v. Cooper*, the Plaintiff was a father who had previously been criminally prosecuted and acquitted of sexually abusing his daughter.<sup>94</sup> He sued a physical therapist who had allegedly "unlocked" his daughter's repressed memories of the abuse through "scream therapy," a technique the defendant was not trained or legally authorized to employ.<sup>95</sup> Nonetheless, the court upheld the dismissal of the father's claim on the basis that the physical therapist owed no duty of care to the father in treating the daughter.<sup>96</sup> It rested that analysis solely on its concern that imposing a duty upon a physical therapist who was practicing beyond the scope of his expertise would discourage real psychologists and therapists from discussing sexual abuse with their patients because of the possibility that they might be sued by the patients' parents.<sup>97</sup> As the court put it, "[o]ur recognition of the

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85. *Id.* ¶ 7, 715 A.2d at 957.

86. *Id.* ¶ 9, 715 A.2d at 958.

87. *Id.*

88. *Id.* ¶ 11, 715 A.2d at 958.

89. *Id.* ¶¶ 12-13, 715 A.2d at 958.

90. *Id.* ¶ 14, 715 A.2d at 958.

91. *Id.*

92. *Id.* ¶ 20, 715 A.2d at 960 (quoting *Cameron v. Pepin*, 610 A.2d 279, 282 (Me. 1992)).

93. 1998 ME 28, 706 A.2d 589.

94. *Id.* ¶ 2, 706 A.2d at 589.

95. *Id.*

96. *Id.* ¶ 3, 706 A.2d at 590.

97. *Id.* ¶ 8, 706 A.2d at 591.

duty Flanders advocates might restrict the treatment choices of health care professionals, and hence it would intrude directly on the professional-patient relationship."<sup>98</sup>

*Flanders* is a particularly egregious example of the Law Court again analyzing duty solely in terms of public policy. There is no evidence in the record supporting the court's policy position or showing how the decision would affect the treatment of patients by actual professional therapists. Even if there had been such evidence, the court's concern about reporting child abuse could have been addressed by limiting its holding to persons practicing psychotherapy without a license to do so, which would have related the duty to the actual facts of the case.

The court also failed to consider the relationship between the parties in arriving at its decision that there was no duty. It ignored both Maine and other authority that has long recognized that a caregiver's duty may, under appropriate circumstances, extend to persons other than his patients. In *Joy v. Eastern Maine Medical Center*,<sup>99</sup> the Law Court held that a doctor had a duty to highway travelers to warn his patient that his ability to drive was impaired by his treatment.<sup>100</sup> The *Flanders* court attempted to distinguish *Joy* on the basis that that decision did not affect the doctor's actual treatment of his patient but only its consequences.<sup>101</sup> This distinction is specious, however, because the *Joy* decision could affect actual treatment decisions, creating a potential risk of injuries to third parties greater than that posed in *Flanders*.

Many other courts have held that there are specific circumstances under which a professional should be held accountable to a third party for injuries arising out of his treatment of a patient.<sup>102</sup> This principle was first recognized by the California Supreme Court in *Tarasoff v. Regents of the University of California*,<sup>103</sup> in which it held that a psychotherapist would be liable to a person injured by his patient where the therapist was aware that the patient had made threats about the plaintiff and had failed to warn the victim.<sup>104</sup>

In *Flanders*, the Law Court attempted to distinguish *Tarasoff* on the basis that the *Tarasoff* defendant's failure to inform the police that his patient had threatened to kill someone "did not implicate medical judgments that the therapist must make during the course of treatment about the appropriate care of the patient."<sup>105</sup> But this distinction begs the real question.<sup>106</sup> When the Law Court acknowledged that there are situations in which it is important to society to have a therapist act in favor of a third party at the risk of harming his relationship with the patient, it

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98. *Id.*

99. 529 A.2d 1364 (Me. 1987).

100. *Id.* at 1366.

101. *Flanders v. Cooper*, 1998 ME 28, ¶ 6, 706 A.2d at 590.

102. *See, e.g., Emerich v. Philadelphia Ctr. for Human Dev.*, 720 A.2d 1032, 1037 (Pa. 1996).

103. 551 P.2d 334 (Cal. 1976).

104. *Id.* at 340.

105. *Flanders v. Cooper*, 1998 ME 28, ¶ 7, 706 A.2d at 591.

106. The court added a footnote that stated as follows:

We recognize that a therapist's disclosure of the danger posed by a patient would disrupt the patient's relationship with the therapist, thereby impairing the therapist's ability to continue treating the patient. This disruption, however, is an incidental effect of a course of action taken by the therapist extraneous to the treatment of the patient.

*Id.* n.4.



necessarily agreed that there are fact situations in which therapists and other professionals owe a duty to third parties.

Given the fact-driven nature of these questions, perhaps the fact finder is the best body to decide whether, *under the unique circumstances of a particular case*, balancing the foreseeability of harm to the plaintiff, the relationship of the parties, the potential magnitude of the harm, and the burden that would be imposed on the defendant, there is a duty of reasonable care. The *Flanders* court simply did not make this analysis. The only factor the court explicitly considered in deciding that there was no duty was the potential harm to the therapist-client relationship which would result from imposing a duty to a third party.<sup>107</sup>

The court also ignored the very close relationship among the three relevant parties. Given the radical nature of the “therapy” the defendant was using, injury to the patient’s father resulting from the treatment was not only foreseeable but likely. It was foreseeable that the negligence of an untrained “therapist” using “scream therapy” to “unlock” repressed memories of parental abuse of a susceptible young person would harm the patient’s father if the memories were false.

In *Flanders*, the Law Court once again substituted its judgment on an issue of policy for that of the fact finder, resulting in the elimination of an entire class of claims which should have been considered on their individual merits. It appears that the court was again more concerned about “unlimited” tort liability than about providing a remedy for every wrong.<sup>108</sup>

### 3. Recent Cases

Both before and after deciding *Flanders*, the Law Court has continued to use incomplete duty analysis to reduce the scope of negligence liability in Maine. In *Denman v. Peoples Heritage Bank, Inc.*,<sup>109</sup> for example, the court found that, although owners of land adjacent to a public sidewalk were required by city ordinance to keep it free of snow and ice, that duty did not translate into a duty to the public using the sidewalk to do the same.<sup>110</sup> The court, relying solely on a policy it had reaffirmed in a 1936 case, *Ouelette v. Miller*,<sup>111</sup> stated without further analysis that “no duty arises from acts performed in compliance with the law.”<sup>112</sup> The court rejected plaintiff’s argument that, by undertaking to keep the sidewalk cleared, the adjacent owners had begun a task which they then had to carry out with due care.<sup>113</sup> The longstanding policy of protecting businesses against liability for slips and falls on adjacent public sidewalks was the court’s only concern in this case.<sup>114</sup>

The Law Court’s decision in *Gafner v. Down East Community Hospital*<sup>115</sup> is an excellent example of the court’s current duty analysis. In *Gafner*, the plaintiffs sought recovery from a hospital for medical malpractice on the novel theory of

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107. In analyzing *Flanders*, it must be remembered that the defendant was not a licensed psychotherapist. See *Flanders v. Cooper*, 1998 ME 28, ¶ 2, 706 A.2d at 589.

108. ME. CONST. art. I, § 19.

109. 1998 ME 12, 704 A.2d 411.

110. *Id.* ¶¶ 5-6, 704 A.2d at 413-14.

111. 134 Me. 162, 183 A. 341 (1936).

112. *Denman v. Peoples Heritage Bank, Inc.*, 1998 ME 12, ¶ 10, 704 A.2d 411, 415.

113. *Id.*

114. See generally, *id.*

115. 1999 ME 130, 735 A.2d 969.

corporate liability.<sup>116</sup> The plaintiffs specifically alleged that the hospital should be liable for having failed to adopt a written policy requiring mandatory consultation for high risk births.<sup>117</sup> Justice Saufley's opinion is thoughtful and thorough on the issue of whether it would be good public policy to adopt such a rule of liability, but it completely ignores the factual circumstances presented.<sup>118</sup>

As always, the court was overly concerned with "the daunting specter of potentially limitless liability,"<sup>119</sup> and again cited the *Trusiani* quotation from *Palsgraf Revisited*.<sup>120</sup> The court's discussion of the reasons why the Legislature should decide whether there was a duty in these circumstances was intelligent but entirely devoid of any mention of the relationship of the parties or reasonable foreseeability. Again, the court was totally unwilling to commit to a jury the control of possibly limitless liability. Again, an entire theory of liability, which has been judicially adopted in "many other states," was eliminated as a remedy for Maine plaintiffs unless the Legislature takes up the torch.<sup>121</sup>

#### IV. FORESEEABILITY AND DUTY: THE FINAL QUESTIONS

##### A. Facts and Foreseeability

In every case analyzed in this Article, the Law Court has ignored foreseeability as a factor in determining whether the defendant owed a duty of care to the plaintiff. In *Cameron*, the court stated that whether a duty exists "necessarily involves considerations *beyond the factual determination that a particular injury was a foreseeable consequence of some particular conduct.*"<sup>122</sup> But the court has gone further, simply rejecting foreseeability as a criterion for duty altogether.

One basis for the court's taking foreseeability out of the duty equation is its view that any injury that occurs is necessarily reasonably foreseeable and thus would create a duty of care. Under this analysis, the presence or absence of reasonable foreseeability would not be one of several factors to be considered, but would become *the* sole litmus test for duty. In *Cameron*, for example, the court discussed reasonable foreseeability at some length, but, instead of taking it into account in reaching its decision on duty, it dismissed it by stating that duty "is not entirely a question of the foreseeable risk of harm but is . . . *dependent* on recog-

116. *Id.* ¶ 1, 735 A.2d at 971.

117. *Id.* ¶ 32, 735 A.2d at 976.

118. *Id.* ¶¶ 31-44, 735 A.2d at 976-80.

119. *Id.* (quoting David H. Rutchik, Note, *The Emerging Trend of Corporate Liability: Courts' Uneven Treatment of Hospital Standards Leaves Hospitals Uncertain and Exposed*, 47 VAND. L. REV. 535, 566 (1994)).

120. *Id.* ¶ 33, 735 A.2d at 977.

121. The fact that the court has not resolved all of its recent duty cases on the basis of social policy, *see, e.g.*, *Bryan R. v. Watchtower Bible & Tract Society of New York, Inc.*, 1999 ME 144, ¶ 32, 738 A.2d 839, 849 (holding that court cannot impose duty on church to prevent member from suffering emotional distress without improperly inquiring into ecclesiastical matters); *Colvin v. A R Cable Services-ME, Inc.*, 1997 ME 163, ¶ 7, 697 A.2d 1289, 1290 (basing duty on reasonable foreseeability), does not undercut the argument made in this Article. More important, the court continues to cite *Trusiani* and its progeny and *Palsgraf Revisited* and the policy analysis applied in those cases continues to have a strong influence on the Court in resolving duty issues. *See, e.g.*, *Mastriano v. Blyer*, 2001 ME 134, ¶ 15, 779 A.2d 951, 955 (common carrier does not have "*in loco parentis* oversight responsibilities" for intoxicated passengers).

122. *Cameron v. Pepin*, 610 A.2d 279, 282 (Me. 1992) (emphasis added).

nizing and weighing relevant policy implications.”<sup>123</sup> This analysis is wrong.

In *Cameron*, the court should have recognized that the injury, a person seeing another person getting hit by a car, was a reasonably foreseeable consequence of our driving practices and that that factor therefore favored finding a duty. It should then have *balanced* against that factor the burden that finding a duty would place on the defendant (possible liability to a new set of plaintiffs), the relationship of the parties (driver-pedestrian, a relationship that traditionally has created a duty of care, and driver-relative of pedestrian, perhaps insufficiently close to create a duty), and whatever other factors were relevant in order to determine whether a duty existed.

In making this analysis, moreover, the court need not assume that simply because an accident has happened its consequences are reasonably foreseeable for purposes of negligence liability. Foreseeability for the purpose of determining whether a duty exists should not be analyzed in hindsight. The court must take the conditions and the parties and their relationships as they were at the time of the accident and determine whether the person who was injured was a foreseeable plaintiff given his relationship to the defendant and whether the injury he ultimately sustained was reasonably foreseeable.<sup>124</sup> While the court recognized this view of duty in *Cameron*, it again appeared to assume that if it found the accident reasonably foreseeable, it must find that a duty existed.

In place of the balancing analysis, in several cases involving duty,<sup>125</sup> the court has used the same language from *Palsgraf Revisited* to justify deciding duty solely as an issue of policy: “We have repeatedly recognized that [i]n the decision of whether or not there is a duty, many factors interplay: the hand of history, our ideals of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall.”<sup>126</sup> This key passage was never intended to support the proposition that whether to impose a duty was solely a policy question. It was intended, rather, as a critique of the idea that “[t]here is a duty if the court says there is a duty . . . . Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question.”<sup>127</sup>

Prosser’s observation precisely describes what the Law Court has done in the cases analyzed in this article. The “essential question” to which Prosser refers is whether there is a duty *in the specific case*, and that can only be decided based on “a relation to be found between the parties. It is the relation of close proximity in time, space, and direct causal sequence, between a negligent defendant and the person he injures.”<sup>128</sup> Thus, while Prosser recognizes that duty cannot be determined based solely on foreseeability, he is aware that it must be a primary concern

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123. *Id.* (emphasis added).

124. As the *Cameron* court recognized, analyzing foreseeability for purposes of determining duty is slightly different from looking at it in terms of proximate causation. *Cameron v. Pepin*, 610 A.2d at 281-82. The former analysis is somewhat more theoretical than the latter.

125. *Bryan R. v. Watchtower Bible & Tract Soc’y of New York, Inc.*, 1999 ME 144, ¶ 11, 738 A.2d 839; *Gafner v. Down East Cmty. Hosp.*, 1999 ME 130, ¶ 33, 735 A.2d 969, 977; *Flanders v. Cooper*, 1998 ME 28, ¶ 4, 706 A.2d 589, 590; *Williams v. Inverness Corp.*, 664 A.2d 1244, 1246 (Me. 1995); *Cameron v. Pepin*, 610 A.2d 279, 282 (Me. 1992); *Trusiani v. Cumberland & York Distrib., Inc.*, 538 A.2d 258, 261-62 (Me. 1988).

126. *Trusiani v. Cumberland & York Distributors, Inc.*, 538 A.2d 258 (Me. 1988).

127. Prosser, *Palsgraf Revisited*, *supra* note 36, at 15.

128. *Id.*

and cannot be totally ignored.<sup>129</sup> There must be “some reasonably close connection between the harm threatened and the harm done. If the connection clearly exists, as where the man with the weak heart drops dead after a slight blow, quite unforeseeable consequences are readily recoverable.”<sup>130</sup>

Removing the elements of foreseeability and relationship between the parties from duty analysis makes duty an empty vessel that can be filled only by a court’s own ideas of public policy, uninformed by the specific facts of the case and wholly without guidance from the public or the legislature. Prosser asked, “[d]oes the railroad . . . owe a duty to Mrs. Palsgraf not to injure her in this way?” He answered, “Why, yes, *if the court finds that it does.*”<sup>131</sup>

But that is no way to run a railroad. Permitting a state appellate court uncontrolled discretion in determining whether a cause of action does or does not exist without reference to the facts of the case, the foreseeability of the injury, or the relationship of the parties makes that court the sole arbiter of public policy and the sole distributor of the risk of loss, a result that is inconsistent with the role of the jury and the legislature in our judicial system.

### *B. The Limits of Judicial Power*

The exercise of such unlimited power without reference to the facts of the individual case is also inconsistent with the very basic notion that courts can only decide the individual cases before them and that a judicial decision is necessarily limited in scope to the facts of the individual case it decides. While appellate decisions are intended to have precedential effect under a common law system such as ours, the controlling effect of a single decision is generally limited to cases with similar facts. When the Law Court decides cases without reference to their specific facts, however, it invests its decisions with far more scope than the ordinary appellate opinion and cuts the judicial power loose from its traditional grounding in the facts of the individual case. The result is that the rules established in such cases are too broad and extend judicial power beyond the scope it should have in our constitutional system.

In the cases I have described, the Law Court has exercised its power to decide whether a duty exists in a given case in a way that is inimical to negligence liability by deciding, as a matter of law and without reference to the specific facts of the cases, that no duty exists. These decisions prevent entire categories of cases from reaching a factfinder, irrespective of the reasonable foreseeability of harm or the relationship of the parties in any individual case. The only common principle one can discern in these cases is that, by concluding that no duty exists, the court reduces the possibility of “unlimited liability” and closes the “floodgates” of litigation. These decisions also betray a fundamental lack of trust in juries. Decisions about access to the courts to redress negligence, a constitutionally-protected right,<sup>132</sup> should not be made without considering foreseeability, the parties’ relationship,

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120. *Id.* at 19.

130. *Id.* at 27.

131. *Id.* at 15 (emphasis added).

132. *E.g.*, *Webb v. Haas*, 1999 ME 74, ¶ 10, 728 A.2d 1261, 1265 (“The right of access to the courts ‘is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution.’” (citing *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983))).

the burden that will be imposed on defendant, and the potential seriousness of the injury in the context of the individual case.

### C. Proposed Solutions

The best way to remedy the problem described in this Article is simply for the Law Court to return to first principles of duty analysis by considering all of the required factors in determining whether a duty exists, including, most importantly, reasonable foreseeability of harm and the nature of the parties' relationship. The court must keep in mind that, even if it finds that a duty exists, it does not mean that the particular plaintiff will automatically recover. The court must place more of the judicial power in the hands of the trial judge and the jury and let them separate valid claims from invalid ones based on the guidelines the court establishes.

A second approach to the issues raised herein would be simply to eliminate duty as an element of negligence as proposed by Professor Winfield.<sup>133</sup> Winfield describes many of the same conceptual problems touched upon herein and traces them to the problematic nature of the reasonable person in the duty context as "a person partly abstract, partly concrete."<sup>134</sup> Winfield demonstrates that the troublesome theoretical aspects of duty can be reduced to the single, wholly factual question of reasonable conduct.<sup>135</sup> Moreover, eliminating duty analysis will not open the litigation floodgates. As Winfield observes:

I doubt whether there is much in [duty]. I am inclined to think that judges would be in just the same position for preventing a jury from getting premature control of a case. If the foregoing analysis of what the plaintiff must show is correct, it would seem that the sum total of facts which must be put before the court in order to determine whether the case is to go to the jury is the same whether the duty element is present or not.<sup>136</sup>

Applying this idea would significantly reduce the appellate court's role as a considerer of policy in determining whether a duty exists in the first place.

Perhaps the most radical approach of all to this issue would be to make duty a fact issue to be decided by the jury with appropriate instructions. If duty comprises or even merely includes "the mores of the community," what better body is there to determine what those mores are than the jury, the conscience of the community?

## V. CONCLUSION

The Law Court has improperly arrogated to itself significant power to define the scope of the tort of negligence by using the element of duty to inject broad considerations of policy that are better left to the legislature or the jury. The court should return to traditional principles of duty by considering foreseeability and the parties' relationship, as well as policy, in determining whether a duty exists. Otherwise, it will continue to substitute its own policy judgments for the "mores of the community," to the ultimate damage of our judicial system as a whole.

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133. Winfield, *Duty in Tortious Negligence*, *supra* note 1, at 60-64.

134. *Id.* at 62.

135. *Id.* at 63.

136. *Id.* at 64.