Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of the Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations

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Negligence law is the central focus of modern tort law.[1] Duty is the most fundamental aspect of a negligence problem.[2] Paradoxically, however, the nature of "duty" has been subject to substantial historical

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1. *See* Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992).

2. *See, e.g.*, Graveman v. Wind Drift Owner's Ass'n Inc, 607 So. 2d 199, 203 (Ala. 1992) ("The existence of a duty to the plaintiff is fundamental to a negligence claim."); Ontiveros v. Borak, 667 P.2d 200, 204 (Ariz. 1983) ("[a negligence action may be maintained only if there is a] duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks."); First Insurance Co. of Haw., Ltd. v. International Harvester Co., 659 P.2d 64, 67 (Haw. 1983) ("Fundamental in any determination of liability for negligence is 'the existence of a duty owed by the . . . [putative tortfeasor] to the . . . [injured person].'") (citation omitted); Jacoves v. United Merchandising Corp., 9 Cal. App. 4th 88, 114, 11 Cal. Rptr. 2d 468, 484 (1992) ("To establish liability in negligence, it is a fundamental principle of tort law that there must be a legal duty owed to the person injured . . . .").

confusion and debate.[3] Nonetheless, in the last few decades American Courts have formed a significant consensus on basic meanings of duty as used in common law negligence cases.[4] Given the rapid rise in the last few decades of the negligence standard and its paradigm of reasonable behavior,[5] duty has been pressed into service as never before and has become the focal point of novel, abstract as well as general questions regarding liability—a focal point that was far less necessary in an era dominated by no-liability rules.[6] The current leading hornbook on Torts, *Prosser and Keeton On Torts,* asserts that "there is little analysis of the problem of duty in the courts[.]"[7] This assertion is no longer true.[8] Moreover, the *Restatement (Second) of Torts'* featherlight treatment of duty as an abstract or general concept has been superseded and eclipsed by modern decisional law.[9] These two leading authorities do not capture adequately the recent rapid evolution of duty in American decisional law. Current law review articles which discuss duty issues typically focus upon particular problems of duty such as affirmative duty,[10] duties owed by universities to their students,[11] premises liabili-

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3. The term duty means several things simultaneously, *see infra* notes 112-23 and accompanying text, and has been subject to problems of equivocation in the courts. As the leading authority, Prosser, has pointed out since his first edition, "There is little analysis of the problem of duty in the courts. Frequently, it is dealt with in terms of what is called 'proximate cause,' usually with resulting confusion." WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS 180 (1st ed. 1941) [hereinafter PROSSER ON TORTS (1st ed.)].

4. Duty can have many sources including statutory sources, but in this Article I focus upon common law duty issues.

5. *See* Schwartz, *supra* note 1.

6. *See* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981).

7. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 358 (5th ed. 1984) [hereinafter PROSSER ON TORTS (5th ed.)]. This assertion appears in the first to fourth editions of Prosser as well. *See* PROSSER (1st ed.), *supra* note 3, at 180; WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS (2d ed. 1955) [hereinafter PROSSER ON TORTS (2d ed.)]; WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS (3d ed. 1964) [hereinafter PROSSER ON TORTS (3rd ed.)]; WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS (4th ed. 1971) [hereinafter PROSSER ON TORTS (4th ed.)].

8. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976) (en banc) (engaging in extensive analysis of the nature and source of duty to reach the landmark determination that a psychotherapist owes a duty to protect others from a patient's expressed violent intention).

9. *See infra* note 26 and accompanying text.

10. *See, e.g.*, John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867 (1991); James P. Murphy, *Evolution of the Duty of Care: Some Thoughts*, 30 DEPAUL L. REV. 147 (1980).

11. *See, e.g.*, Robert D. Bickel & Peter F. Lake, *Reconceptualizing the University's Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of In Loco Parentis and the Restatement (Second) of Torts,* 20 J.C. & U.L. 261 (1994); Brian A.

ty,[12] or the standard of conduct,[13] but do not focus as such upon the important developments in questions of duty, generally or in the abstract.[14] Duty, as a general or abstract topic, has been a neglected topic in the secondary literature, although American courts have been very active in recent times.

In this Article, I focus upon the recent explosion of general and abstract analysis of duty in modern American courts. Although the evolution of "duty" is still in progress, it is now fair to say that an overwhelming majority of American jurisdictions treat questions of duty in negligence law substantially in terms which I will refer to as the Prosser (Green) approach.[15] The Prosser (Green) approach often appears in American decision law via the policy-based, multi-factor balancing tests made popular largely through several critical California Supreme Court decisions, particularly *Tarasoff v. Regents of the University of California*,[16] *Rowland v. Christian*,[17] *Dillon v. Legg*,[18] and *Biakanja v. Irving*.[19] American courts have had little use for the relevant sections of the *Restatement (Second) of Torts* when dealing with general or abstract questions of duty; American courts basically prefer Prosser's professed approach (since the first edition of his treatise which itself relies heavily on positions taken by Green[20]), although one would not necessarily detect this from the 1984 edition of the Prosser treatise

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Snow & William E. Thro, *Redefining the Contours of University Liability: The Potential Implications of* Nero v. Kansas State University, 90 EDUC. L. REP. 989 (1994).

12. *See, e.g.*, Carl S. Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions*, 1981 UTAH L. REV. 15 (1981).

13. *See*, Schwartz, *supra* note 1 (pointing to the consolidation of the paradigm of reasonableness).

14. *See, e.g.*, Murphy, *supra* note 10, at 165-67 and n.126.

15. *See infra* text following note 129.

16. *See* 551 P.2d 334 (Cal. 1976) (en banc). In a previous Article, I argued that *Tarasoff* is the most significant ambassador of what I refer to here as a variation of the Prosser (Green) approach. *See* Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 98 (1994) (regarding psychotherapists' duty to warn).

17. 443 P.2d 561 (Cal. 1968) (regarding landowners).

18. 441 P.2d 912 (Cal. 1968) (regarding negligent infliction of emotional distress).

19. 320 P.2d 16 (Cal. 1958).

20. *See, e.g.*, PROSSER (1st ed.), *supra* note 3, at 180 & n.69, 181 & n.76. White correctly observes that Prosser drew heavily upon "the insights of Realism" and that "Prosser's philosophical conception of Torts was derivative of those of early twentieth-century reformist scholars, especially Green." G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 157 (1980). White also points out that pre-treatise Prosser originally criticized Green, but came full circle to agreement with him. *Id.* at 157, 270 n.52.

itself.[21] This consolidation of a majority position on duty has occurred, largely speaking, in the last few decades, and reflects a major, if surprisingly conservative,[22] jurisprudential development in the field of tort law.

In Section I, I provide a brief history of duty as generally conceived in negligence law, leading up to and including important post World War II developments (and including a discussion of the *Restatement (Second) of Torts* approach). In Section II, I discuss various meanings of the term duty and important clarifications thereof in American decisional law which have occurred largely in the last few decades. In Section III and the Appendix, I present in a fifty-state analysis the approaches of modern American courts to general and/or abstract questions of duty. In Section IV, I conclude with some jurisprudential observations on the evolution of American decisional law. I call upon the American Law Institute to revise the topic of duty in negligence law and American courts to become conscious of the consensus they have formed.

I. DUTY: A BRIEF HISTORY

A. Murky and Not So Distant Beginnings

It is commonly accepted that negligence—as a distinct mode of proceeding to gain redress for accidentally caused harms—and its fundamental aspect, duty, are relative newcomers to the common law scene,[23] even though terms like "negligence" and notions of duty did appear early in the common law.[24] Rowe and Silver point out:

> As the eighteenth century gave way to the nineteenth, the word negligence assumed legal significance and began to forge an action destined to replace trespass on the case. But the word made its debut without overt connection to anything called "duty." Toward the mid-nineteenth century, the word "duty" sounded its first cries.[25]

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21. The current edition sticks to Prosser's assertion in his first edition that courts provide "little analysis." PROSSER ON TORTS (5th ed.), *supra* note 7, at 358.

22. One might expect a correlation between the expansion of analysis and use of policy factors with a liberal expansion of tort doctrine. Yet, the evidence from recent cases suggests that expanded analysis and policy considerations have been used to *curtail* the growth of liability.

23. *See*, Jean E. Rowe & Theodore Silver, *The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth Through the Twentieth Centuries*, 33 DUQ. L. REV. 807, 828 & n.91, 832 (1995).

24. *See id.* at 828 & n.91. As Prosser asserted "In the early English law, there was virtually no consideration of duty." PROSSER ON TORTS (1st ed.), *supra* note 3, at 178.

25. Rowe & Silver, *supra* note 23, at 832-36.

Negligence and duty, as we might recognize them, emerged and congealed from a conceptually different system of liability for accidentally caused harms based on the old forms of action, primarily, trespass and trespass on the case.[26] These protozoan moments of negligence and duty are typically associated with the mid-to-late-nineteenth century.[27]

B. Duty as a Prerequisite To Liability: No-Duty and a No-Liability System

Although it is tempting to hail landmark nineteenth century decisions like *Brown v. Kendall*[28] as the birthplace of modern fault-based negligence liability, Rabin has observed that the nineteenth century featured a strong no-liability paradigm, one in which no-duty (and, thus, no-liability) rules factored prominently. Prosser recognized a relationship between the rise of a duty analysis and no (or limited) liability results: "The period during which [duty] developed was that of the industrial revolution, and there is good reason to believe that it was a means by which the courts sought, perhaps more or less unconsciously, to limit the responsibilities of growing industry within some reasonable bounds."[29] Whether duty operated as a way to protect fledgling industry,[30] or merely occurred in the context of a generally limited liability system,[31] two propositions about duty in negligence law became unmistakably clear by the late nineteenth century.

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26. *Id.* at 832.
27. *Id.* at 832-36.
28. 60 Mass. (6 Cush.) 292 (1850); *see* Rabin, *supra* note 6.
29. PROSSER ON TORTS (1st ed.), *supra* note 3, at 179; *see* Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41 (1934).
30. Prosser's suggestion has become more than just history; it is the *ratio decendi* of some caselaw. The concept of duty during the late nineteenth century was a "legal device . . . designed to curtail the feared propensities of juries towards liberal awards." Dillon v. Legg, 441 P.2d 912, 916 (Cal. 1968); *see also*, JOHN G. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 47 (1967).
31. *See* Rabin, *supra* note 6.

First, cases like *Winterbottom v. Wright*[32] established that the existence of a duty owed to a given party was a prerequisite to establishing actionable negligence. In *Winterbottom*, a postman sued the party responsible in contract for keeping the Postmaster's coaches in good repair when the coach he was operating failed (allegedly from neglect of repair) and caused him terrible injury.[33] The injured coachman, however, lacked privity of contract with the defendant, and, hence, no duty was owed by the defendant to the injured coachman:[34] No duty, no liability.

Second, no-liability results and no-duty conclusions were often used interchangeably. No duty rules factored heavily into a system of no-liability, and it became easy to confuse the proposition that there is no liability in negligence without duty with the proposition that if there is no actionable negligence, then there is no duty. Thus, *Winterbottom* largely became a kind of no-duty or immunity-by-privity rule,[35] whereby those without privity of contract could avoid actionable negligence. And, as Prosser pointed out, courts would often confuse issues of causation (and, sometimes, no-liability rules) and duty with little helpful analysis.[36] Therefore, the problems of duty and liability became confusingly intertwined and much of what is considered essential analytical clarity in modern negligence law would have been mostly unnecessary in that era.

While today there has been a general trend away from no duty rules,[37] by no means has modern caselaw completely eradicated the problem of lack of clarity, although, it has clearly diminished in the last thirty years in that courts recognize that no-liability results arise from the

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32. 152 Eng. Rep. 402 (Exch. FL. 1842); *see also*, Degg v. Midland Ry. Co., 156 Eng. Rep. 1413, 1416-17 (Exch. 1857). In modern terms, it is understood that duty is an essential element of a prima facie case of negligence. *See* PROSSER ON TORTS (1st ed.), *supra* note 3, at 175, 177.

33. *Winterbottom,* 152 Eng. Rep. at 402-03.

34. *Id.* at 406-09.

35. Cases like *Thomas* v. *Winchester*, 6 N.Y. 396 (1852), involving mislabeled poisons, etc., defied the *Winterbottom* privity rule and later became precedent for Cardozo's landmark decision in *McPherson* v. *Buick Motor Co.*, 111 N.E. 1050 (N.Y. Ct. App. 1916), which signaled the demise of the *Winterbottom* rule.

36. Frequently [duty] is dealt with in terms of what is called 'proximate cause,' usually with resulting confusion. In such cases, the question of what is 'proximate' and that of duty are fundamentally the same: whether the interests of the plaintiff are to be protected against the particular invasion by the defendant's conduct.

PROSSER ON TORTS (1st ed.), *supra* note 3, at 180.

37. *See* Schwartz, *supra* note 1; Joseph W. Little, *Erosion of No-Duty Negligence Rules in England, The United States, and Common Law Commonwealth Nations*, 20 HOUS. L. REV. 959 (1983).

distinct issues of causation, breach, affirmative defenses and immunity.[38] Consider, for example, the infamous "no duty to rescue" case, *Yania v. Bigan*,[39] or how some courts have accepted the proposition that universities owe "no duty" to protect their students from certain violent situations.[40]

In *Yania v. Bigan*, a business invitor enticed an invitee to jump into a ditch filled with water, and the invitee, who voluntarily jumped, drowned.[41] The Pennsylvania Supreme Court ruled, *inter alia*, that "[t]he mere fact that Bigan [the invitor] saw Yania [the invitee] in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position."[42] Whereas *Yania* is often associated with no-duty-to-rescue rules,[43] *Yania*, like so many common law cases before it, confuses and conflates duty with liability and no duty with no-liability. *Yania*, in modern terms, could be explained as a causation case (invitee who in full mental capacity chooses to jump is sole proximate cause of injury or even sole cause in fact), an assumption-of-risk case (one who tries an experiment bears its consequences[44]), and/or as a no-breach-of-duty case (given the geometry of the ditch as described in the opinion, one must wonder whether someone would be crazy to risk jumping after a

38. The notion that duty means liability has reemerged in some contexts with telling rhetorical effect. In *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979), the court ruled that no duty was owed by a university to its students arising from alcohol related, injury-causing conduct of other students. In reasoning to its no-duty conclusion (a conclusion a number of courts have also reached, following *Bradshaw*, *see* Bickel & Lake, *supra* note 11), the court put particular emphasis on the idea that to impose a duty would make a university an "insurer" of student safety. *Bradshaw*, 612 F.2d at 138. However, the mere recognition of a duty owed does not necessarily mean that liability will follow; a plaintiff must show breach of that duty, causing compensable damage, and avoid affirmative defenses.

39. 155 A.2d 343 (Pa. 1959).

40. *See* Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979); Beach v. University of Utah, 726 P.2d 413 (Utah 1986); Rabel v. Illinois Wesleyan Univ., 514 N.E.2d 552 (Ill. Ct. App. 1987). *But see* Nero v. Kansas State Univ., 861 P.2d 768 (Kan. 1993); Furek v. University of Del., 594 A.2d 506 (Del. 1991).

41. *See Yania*, 155 A.2d at 344.

42. *Id.* at 346.

43. *See, e.g.*, Vermont v. Joyce, 433 A.2d 271, 273 (Vt. 1981); Miller v. Arnal Corp., 632 P.2d 987, 990 (Ariz. Ct. App. 1981).

44. Herr v. Booten, 580 A.2d 1115 (Pa. Sup. Ct. 1990) (a subsequent and recent case from the Pennsylvania intermediate appellate court viewing *Yania* in light of assumption of risk analysis).

drowning coal miner in such a ditch). *Yania* intermingles "no duty" in a no-liability sense with other prima facie and affirmative defense concepts.

Alternatively, consider in recent times that certain cases like *Beach v. University of Utah*[45] have held that no duty is owed to protect students from certain violent situations, because a university is not a "babysitter" or insurer of the safety of its students.[46] These cases seek to absolve the university of liability and to do so choose a no-duty rationale which has the advantage of ending a case as a matter of law, usually early on in the proceedings. However, other courts[47] and commentators[48] question a no-duty rationale, when the true issues may be breach of duty, causation, and affirmative defenses.

C. Cardozo on Duty

It might have been almost anyone,[49] but commentators and history helped to make Justice Cardozo critical to the evolution of duty in American decisional law.[50] Cardozo's role was critical, but he did not clarify all of the problems of duty. Instead Cardozo's opinions on duty set the stage for many pre-modern open questions of duty. Cardozo became an intermediate figure in the history of duty; his central importance has been to cement the question of duty to issues of foreseeability.[51]

Two recent commentators assert that "[i]n America, the notion of duty as relevant to negligence matured largely through a line of opinions penned by Justice Cardozo."[52] Judge Posner, a great expositor on tort issues, devoted a book to the topic of Cardozo.[53] Posner refers

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45. 726 P.2d 413 (Utah 1986).
46. *See* Snow & Thro, *supra* note 11, at 993.
47. Nero v. Kansas State Univ., 861 P.2d 768 (Kan. 1993); Furek v. University of Del., 594 A.2d 506 (Del. 1991); Johnson v. State, 894 P.2d 1366 (Wash. Ct. App. 1995).
48. Bickel & Lake, *supra* note 11; Snow & Thro, *supra* note 11.
49. But it was not. Judge Posner has emphasized that Cardozo had the ability to elevate an ordinary case to greater levels of significance. RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 45-47 (1990).
50. WHITE, *supra* note 20, at 114-38.
51. As White observes:

> [I]nquiries were made by the judge about whether a given defendant owed a duty to protect a given plaintiff from the risk of the particular injury that had occurred. In Cardozo's analysis judge-controlled standards such as 'reasonable foreseeability' and 'ambit of risk' replaced ambiguous standards such as 'proximity' of causation.

Id. at 125.
52. Rowe & Silver, *supra* note 23, at 836.
53. POSNER, *supra* note 49. Posner has showed great interest in Cardozo in other writings as well. *See, e.g.*, RICHARD A. POSNER, LAW & LITERATURE (1988).

prominently to Cardozo's most famous tort duty cases.[54] Posner links these cases to Cardozo's powerful reputation as a judge and to the attainment of what he refers to as "omnisignificance."[55] According to Posner, these cases were Cardozo's "most famous line of opinions."[56]

Paradoxically, Posner also asserts that these cases are inconsistent.[57] Omnisignificance (the something for everyone flavor) according to Posner arises, *inter alia*, from the broad generality of the rationales of the decisions *and* from the inconsistencies and ambiguities in the opinions: "Cardozo wrote opinions that can be invoked by judges and scholars who want to broaden the scope of liability, and also opinions that can be invoked by judges and scholars who want to limit or reduce that scope."[58] Thus, in *Palsgraf*, Cardozo limited duty to *foreseeable* plaintiffs in the scope of duty.[59] And in *Moch*, echoing concerns of extended liability,[60] he limited the zone of duty to those parties to whom a duty was assumed and/or to those who had begun performance such that "[i]f conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively involving an injury, there exists a relation out of which arises a duty to go forward."[61] Yet in *MacPherson*, Cardozo crushed the privity rule of *Winterbottom*, opening the door to modern negligence-based product liability actions.[62] *Glanzer*, also, suggests the expansion of liability.[63]

Cardozo's efforts at analyzing duty at a general, even abstract, level caught the attention of Prosser, the leading doctrinal academic expositor

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54. Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y. Ct. App. 1931); H.R. Moch Co. v. Rennselaer Water Co., 159 N.E. 896 (N.Y. Ct. App. 1928); Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. Ct. App. 1928); Glanzer v. Shepard, 135 N.E. 275 (N.Y. Ct. App. 1922); MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. Ct. App. 1916).

55. Peter F. Lake, *Posner's Pragmatist Jurisprudence*, 73 NEB. L. REV. 545, 606-08 (1994).

56. POSNER, *supra* note 49, at 107.

57. POSNER, *supra* note 49, at 113; *see* Lake, *supra* note 55, at 607-08.

58. POSNER, *supra* note 49, at 113.

59. *Palsgraf*, 162 N.E. at 99-101.

60. POSNER, *supra* note 49, at 109-13 (see discussion of Cardozo's opinion in *Ultramares*).

61. H.R. Moch Co. v. Rennselaer Water Co., 159 N.E. 896 (N.Y. Ct. App. 1928).

62. MacPherson v. Buick Motor Co., 111 N.E. 1050, 1054-55 (N.Y. Ct. App. 1916). According to Posner, "*MacPherson* is Cardozo's most important opinion in terms of impact on the law." POSNER, *supra* note 49, at 109.

63. POSNER, *supra* note 49, at 109-13.

of tort and negligence law in the twentieth century. Prosser's classic articles on Cardozo's most celebrated opinions *Palsgraf* and *MacPherson*, *(Palsgraf Revisited*[64] and *The Assault Upon the Citadel & The Fall of the Citadel*[65]), did much, along with Prosser's prominent use of Cardozo's cases in his casebooks[66] and treatises,[67] to focus attention on Cardozo's views of duty, foreseeability and proximate causation.

Cardozo's scope of duty decisions and Prosser's secondary literature on them formed much of the received wisdom about duty in negligence law in the period leading up to the *Restatement (Second) of Torts* and, to a large extent, even after. Several duty points were either reaffirmed and/or established. First, the existence of duty was a prerequisite to negligence liability, and the foremost question to be answered as a matter of law by the court.[68] Second, duty was critical in the assessment of the scope of liability: duty determinations would either expand or contract the scope of liability.[69] Third, duty came to be viewed as relative, relational, mutable and subject to a variety of factors, particularly foreseeability,[70] some directly adverted to by decisional law, others not.[71]

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

65. William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

66. See WILLIAM PROSSER ET AL., CASES AND MATERIALS ON TORTS (7th ed. 1982); *see also* DAN B. DOBBS ET AL., TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY (2d ed. 1993).

67. *See supra* notes 3 & 7 and accompanying text.

68. Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. Ct. App. 1928).

69. H.R. Moch Co. v. Rennselaer Water Co., 159 N.E. 896, 899 (N.Y. Ct. App. 1928) ("We are satisfied that liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty.").

70. Cardozo's repeated emphasis on foreseeability may have influenced some courts to put prominent, even nearly exclusive, emphasis on foreseeability. *See, e.g.*, Hansen v. Friend, 824 P.2d 483, 487 (Wash. 1992). Many courts consider foreseeability to be a prominent concern. *See, e.g.*, McCain v. Florida Power, 593 So. 2d 500 (Fla. 1992); Division of Corrections v. Neakok, 721 P.2d 1121, 1125 (Ala. 1986); Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976). Recently, many courts have affirmed that the prominence of foreseeability in considering a duty question does not mean that other considerations are always outweighed. *See, e.g.*, Hawks v. State Dept. of Public Safety, 908 P.2d 1013 (Alaska 1995); Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (Ill. 1977).

71. Duty is a relative concept. *Palsgraf*, 162 N.E. at 101. Prosser explained that as ideas of relations change, duties change with them. Prosser, *supra* note 64, at 13. Prosser, commenting on *Palsgraf* and duty generally, pointed to the balancing of factors in the analysis of duty: "In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall." *Id.* at 15.

Cardozo, and Prosser's commenting on Cardozo, made duty issues central to the development of modern tort law. Paradoxically, Cardozo left open many questions of duty and, thus, emphasized the open-endedness of duty analysis. This set the predicate for the development of the analysis of duty that has occurred in modern American decisional law.

D. The Restatement (Second) of Torts (1965)

At the time of the *Restatement (Second) of Torts*, American courts had not widely accepted the general or abstract methodology for the analysis of duty that courts commonly accept today,[72] although Cardozo's views on the zone or orbit of duty had captured the attention of many courts and the *Restatement of Torts*, which accepted *Palsgraf*[73] (again, aided by Prosser's commentary).[74] The *Restatement (Second) of Torts* reflects the fact of its formation during an intermediate pre-modern phase in the analysis of general or abstract matters of duty.

Recognizing the importance of the term duty to tort law generally, and to negligence law particularly, the *Restatement (Second) of Torts* set forth the denotation of "duty" in Chapter 1, Section 4 of that Restatement.[75] Noting that the most common use of the term duty was in negligence law analysis, that Restatement stated the *meaning of duty*:

> § 4. Duty
> The word "duty" is used throughout the Restatement of this Subject to denote the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor's conduct is a legal cause.[76]

"Duty" as used in the *Restatement (Second) of Torts*, features at least three key points: duty as it relates to negligence law, duty as it relates to a standard of conduct, and duty as it relates to interests that are legally protected. First, duty is primarily used in conjunction with the

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72. *See* Appendix, *infra.*
73. *See* RESTATEMENT (SECOND) OF TORTS § 281(b) cmt. c, illus. 3 (1965).
74. The *Restatement of Torts* continues to use Cardozo's zone of duty notions. *See* RESTATEMENT (SECOND) OF TORTS § 281 cmt. b, illus. 1 (1977) (note that "Illustration 1" is Palsgraf).
75. RESTATEMENT (SECOND) OF TORTS § 4 cmt. b.
76. RESTATEMENT (SECOND) OF TORTS § 4 cmts.

law of negligence, and less frequently used in other, non-negligence based tort contexts.[77] Second, duty is "useful to describe the requirement that the actor, if he acts at all, must exercise reasonable care to make his acts safe for others."[78] Thus, duty is useful in describing the governing standard of conduct: reasonable care. And, according to the *Restatement (Second) of Torts*, the term duty denotes what reasonable care in a particular circumstance means as well.[79] One is said to have a duty of reasonable care and, for example, to have a duty to stop at a stop sign before proceeding. Duty means a general standard of care as well as what is determined to be reasonable in a particular set of circumstances (the specification of the general standard of care). Third, the *Restatement (Second) of Torts* makes legally protected interests critical to the assessment of tort responsibility[80] and links legal protection to duty. "If society recognizes a desire as so far legitimate as to make one who interferes with its violation civilly liable, the interest is given legal protection, generally against all the world, so that everyone is under a duty not to invade the interest . . . ."[81]

Duty, therefore, in the *Restatement (Second) of Torts* has a derivative function. Duty is a way of speaking of or about other, more immediate concerns, such as the definition of negligence,[82] the determination of the applicable standard of care in particular contexts,[83] and legally protected interests, which give rise to negligence liability.[84] Thus, in the

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77. *See* RESTATEMENT (SECOND) OF TORTS § 4 cmt. b (emphasis added).

78. RESTATEMENT (SECOND) OF TORTS § 4 cmt. b.

79. "'Duty,' as the word is used in all the [s]ubjects of the Restatement, is a duty to conduct one's self in a particular manner." RESTATEMENT (SECOND) OF TORTS § 4 cmt. c (1965). This was a position which Prosser endorsed. *See* PROSSER ON TORTS (3d ed.), *supra* note 7, at 331. Over time, Prosser moved away somewhat from this definition of duty, recognizing that it resulted in the use of the term duty as a substitute for standard or standard of care as determined in a particular context. PROSSER ON TORTS (4th ed.), *supra* note 7, at 324. Although still defining duty in his traditional way, Prosser stated:

> It is quite possible, and not at all uncommon, to deal with most of the questions which arise in a negligence case in terms of "duty." Thus, the standard of conduct required of the individual may be expressed by saying that the driver of an automobile approaching an intersection is under a duty to moderate his speed . . . . But the problems of "duty" are sufficiently complex when subdividing it in this manner . . . .

Id.

80. *See* RESTATEMENT (SECOND) OF TORTS §§ 1, 281.

81. *Id.* § 1 cmt. d.

82. *See id.* § 282 cmt a.

83. *See, e.g., id.* §§ 282, 284, 285 cmts. e, h; PROSSER ON TORTS (4th ed.), *supra* note 7, at 324.

84. *See* RESTATEMENT (SECOND) OF TORTS §§ 1, 281.

Restatement (Second) of Torts, duty dissolves into the larger analysis of negligence law, only crystalizing here and there.[85]

Thus, under the *Restatement (Second) of Torts*' approach to negligence, unlike for Prosser[86] and Cardozo, duty is not an element of the cause of action for negligence.[87] Moreover, the *Restatement (Second) of Torts* delves deeply into the analysis and types of negligence and the determination and particularization of the governing standard of care,[88] but does not devote any section to the analysis of duty as such.[89] Duty is integrated into the identity of other primary concepts.[90] If one were to pick up the *Restatement (Second) of Torts* as a visitor from another legal system, duty would appear to be almost irrelevant and fading away. Yet modern caselaw analyzes general or abstract questions of duty in great detail and provides a framework of analysis that cannot be located easily, if at all, in the *Restatement (Second) of Torts*.[91] As history would have it, the analysis of duty in American decisional law took an important leap forward, following certain critical developments occurring shortly after the promulgation of the *Restatement (Second) of Torts*.

E. Biakanja, Dillon, Rowland *and* Tarasoff: *The Power of Prosser (Green)*

The effects of the decisions of the California Supreme Court during the period of the 1960's - 1970's cannot be (and have not been)

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85. *See, e.g., id.* § 281 cmt. e. "In other words the duty established by law to refrain from the negligent conduct is established in order to protect the other from the risk of having his interest invaded harm . . . ." *Id.*

86. *See* PROSSER ON TORTS (1st ed.), *supra* note 3, § 30, at 175; PROSSER ON TORTS (2d ed.), *supra* note 7, § 35, at 165; PROSSER ON TORTS (3d ed.), *supra* note 7, § 30, at 146; PROSSER ON TORTS (4th ed.), *supra* note 7, § 30, at 148; PROSSER ON TORTS (5th ed.), *supra* note 7, § 30, at 164.

87. *See* RESTATEMENT (SECOND) OF TORTS § 281.

88. *See id.* §§ 282-309.

89. Unless one treats the *Restatement (Second) of Torts* § 4, as such an instance.

90. Modern first year students of torts are often baffled by the *Restatement (Second) of Torts* because of this. A prima facie case of negligence consists of the demonstration by plaintiff of duty, breach, causation and damage. *See* PROSSER ON TORTS (1st ed.), *supra* note 3, § 30; PROSSER ON TORTS (2d ed.), *supra* note 7, § 35; PROSSER ON TORTS (3d ed.), *supra* note 7, § 30. Yet the *Restatement (Second) of Torts* went with a different conceptual scheme. *See supra* note 87, § 281.

91. *See infra* notes 124-29 and accompanying text.

underestimated.[92] Cases like *Dillon v. Legg*,[93, 94] *Rowland v. Christian*,[95] *Greenman v. Yuba Power Products, Inc.*,[96] *Biakanja v. Irving*,[97] and *Tarasoff v. Board of Regents*,[98] have altered the landscape of American tort law by either becoming the majority rule, the basis of the majority rule, the modern trend, or the baseline from which we judge the development of the law, including tort reform.[99] These cases did a great deal to expand the reach of tort law, particularly

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92. *See, e.g.*, John L. Diamond, Dillon v. Legg *Revisited: Toward A Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984); David A. Fischer, *Tort Law: Expanding the Scope of Recovery Without Loss of Jury Control*, 11 HOFSTRA L. REV. 937 (1983); Shlomo Twerski, Note, *Affirmative Duty After Tarasoff*, 11 HOFSTRA L. REV. 1013 (1983). I focus here on some of the more obvious major influences. There are many others. *See, e.g.*, Brown v. Merlo, 506 P.2d 212 (Cal. 1973) (California Supreme Court makes California the first state to reject an automobile guest statute as unconstitutional).

93. 441 P.2d 912 (Cal. 1968) (expanding the class of individuals who might state a viable cause of action for negligent infliction of emotional distress, even beyond that set forth in the *Restatement (Second) of Torts*).

94. *See* RESTATEMENT (SECOND) OF TORTS §§ 306, 312-13, 436A (1965).

95. 443 P.2d 561 (Cal. 1968) (abolishing traditional landowner entrant status classification in favor of a general duty of reasonable care).

96. 377 P.2d 897 (Cal. 1963) (establishing strict liability in tort for dangerously defective products).

97. 320 P.2d 16 (Cal. 1958) (extending tort liability with regard to non privy parties).

98. 551 P.2d 334 (Cal. 1976) (requiring psychotherapists to warn foreseeable victims of their patients' expressed violent intentions).

99. Simply stated, the basic ideas of *Greenman* and *Tarasoff* are clear majority favorites. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402A; Peter F. Lake, *Virginia is Not Safe for "Lovers": The Virginia Supreme Court Rejects Tarasoff in* Nasser v. Parker, 61 BROOK. L. REV. 1285 (1995). *Dillon*'s impact on the law of negligent infliction of emotional distress has been complex, but pervasive. And *Rowland*, which has not captured a majority of states as such, has factored prominently in American decisional law not willing to accept it. *See* JOSEPH PAGE, THE LAW OF PREMISES LIABILITY § 6.4 (1976); *see also*, Carl S. Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions*, 1981 UTAH L. REV. 15 (1981) (arguing that many cases emphasizing the *Rowland* rule would have been resolved the same way under traditional landowner entrant status category analysis). Moreover, *Rowland*-type rules are effective in whole or in part in California, New York, Florida, Illinois, Massachusetts, among others, making them disproportionately important in terms of population. *See* Heins v. Webster County, 552 N.W.2d 51, 54-59 (Neb. 1996). *Rowland* is not a majority rule as such, although roughly half of all Americans live under some form of *Rowland* rules. The following states have abolished outright entrant status classifications: California, Hawaii, Colorado, New York, New Hampshire, Louisiana, Alaska, Illinois, Montana, and Nevada, (Rhode Island presents a special problem). *See id.* Many other states have abolished status categories in part (often abolishing distinctions between inviters and licensers). *Id.* Adding the population of these states (Florida, for example) to the population of *Rowland* states demonstrates that a majority of Americans live under *Rowland*-inspired rules. *See* MICHAEL KANTOR, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1995: THE NATIONAL DATA BOOK (regarding calculations of population).

negligence law and its paradigm of reasonableness,[100] and may have created their own backlash in the more conservative and tort-reform oriented moments of the 1980's and 1990's.[101] These cases have an unmistakable liability expanding potential and are often evaluated from that frame of reference.[102] New standards of care (or new particularizations of the general reasonable standard of care) were introduced; new duties in *that* sense.

As set forth in the Appendix, *Dillon, Rowland, Biakanja* and particularly *Tarasoff*[103] have become famous and widely cited for several foundational points with respect to duty. The analysis of questions of duty generally espoused by these cases has become in one form or another, the single most dominant approach in American decisional law, and is an analysis that drew heavily from Cardozo and Prosser (Green).

Dillon, Rowland, Biakanja and *Tarasoff* are now commonly relied upon in support of one or some combination of the following propositions:[104]

(1) analysis of negligence liability begins with the question of duty[105]
(2) duty is not sacrosanct; it is a changeable concept[106]
(3) a statement that a duty is owed is a conclusion that given these circumstances and conditions liability should (or should not attach)[107]

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100. *See* Schwartz, *supra* note 1.
101. *See id.*
102. *See, e.g.*, Donaca v. Curry County, 734 P.2d 1339 (Or. 1987).
103. *See* Lake, *supra* note 16, at 114-15 & n.93.
104. *See id.* at 115 & n.93, 119.
105. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976); Dillon v. Legg, 441 P.2d 912, 916 (Cal. 1968); Biankanja v. Irving, 320 P.2d 16, 17 (Cal. 1958). *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928); *see also* PROSSER ON TORTS (1st ed.), *supra* note 3, § 30(a), at 175.
106. Since the first edition of *Prosser on Torts* in 1941, Prosser has maintained "that 'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." PROSSER ON TORTS (1st ed.), *supra* note 3, at 180. "These are shifting sands, and not fit foundation. There is a duty if the court says there is a duty . . . ." Prosser, *supra* note 64, at 15. *See Tarasoff*, 551 P.2d at 342; *Dillon*, 441 P.2d at 916.
107. "[Duty] is a shorthand statement of a conclusion, rather than an aid to analysis itself." PROSSER ON TORTS (1st ed.), *supra* note 3, at 180; PROSSER ON TORTS (2d ed.), *supra* note 7, at 167; PROSSER ON TORTS (3d ed.), *supra* note 7, at 332; PROSSER ON TORTS (4th ed.), *supra* note 7, at 325; PROSSER ON TORTS (5th ed.), *supra* note 7, at 358. *See Dillon*, 441 P.2d at 916; Leon Green, *The Duty Problem in Negligence Cases*, 28 COL. L. REV. 1014, 1021 (1928) ("[W]hen we say in a particular case that . . . defendant was under a duty . . . this but means that we have already passed judgment.").

(4) the determination of duty is based upon consideration of a number of factors (often, but not necessarily, called "policy" factors)[108]

(5) such "major considerations" include (1) foreseeability; (2) degree of certainty that plaintiff's injury occurred; (3) closeness of conduct and injury; (4) moral blame; (5) the policy of preventing future harm; (6) burden and consequences of imposing a duty on defendant and community; (7) insurance cost, availability and prevalence.[109]

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108. *See Tarasoff*, 551 P.2d at 342; Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968); PROSSER ON TORTS (1st ed.), *supra* note 3, at 180; PROSSER ON TORTS (2d ed.), *supra* note 7, at 167; PROSSER ON TORTS (3d ed.), *supra* note 7, at 323-33; PROSSER ON TORTS (4th ed.), *supra* note 7, at 325-26; Prosser, *supra* note 64, at 15 & n.15 (citing Leon Green, *The Duty Problem in Negligence Cases*, 28 COL. L. REV. 1014; Leon Green, *The Duty Problem in Negligence Cases: II*, 29 COL. REV. 255 (1929)); Lake, *supra* note 16; Green, *supra* note 107, at 1034.

109. *See Tarasoff*, 551 P.2d at 342; *Biakanja*, 320 P.2d at 19; *Rowland*, 443 P.2d at 564. *See also* Lake, *supra* note 16, at 119 & nn.115-16, 118. As is indicated in the Appendix, many U.S. courts have adopted this particular list of considerations more or less as such. Actually, it would be surprising if U.S. courts were to universally set upon a single, standard set of policy considerations.

Professor Murphy has argued that the list of considerations "may be traced, by one route or another, to two influential articles in tort law," written by Leon Green. James P. Murphy, *Evolution of the Duty of Care: Some Thoughts*, 30 DEPAUL L. REV. 147, 166 n.126 (1980). "Green originated the enumeration and consideration of policy factors which have come to be considered a legitimate step in the resolution of the duty question." *Id.* Green himself recognized that any list of factors would be subject to dispute: "I realize that to name these factors is to encourage disputes as to the proper terminology . . . . There is neither hope nor need for a standardized terminology which will suffice for longer than the hour." Green, *supra* note 107, at 1034. Even in enumerating the following factors "of most significance in influencing the determination of duties," Green stated unequivocally, "[t]here are doubtless others . . . ." *Id.* Green's factors, not the *Tarasoff, Biakanja, Rowland* lists as such, were:

1. the administrative factor;
2. the ethical or moral factor;
3. the economic factor;
4. the prophylactic factor;
5. the justice factor.

Id.

Prosser likewise has consistently taken the position that there is no universal test for duty. PROSSER ON TORTS (1st ed.), *supra* note 3, at 180; PROSSER ON TORTS (2d ed.), *supra* note 7, at 167; PROSSER ON TORTS (3d ed.), *supra* note 7, at 332; PROSSER ON TORTS (4th ed.), *supra* note 7, at 335; PROSSER ON TORTS (5th ed.), *supra* note 7, at 358. Yet, beginning with the first edition, Prosser, following Green explicitly, has argued that "[v]arious factors undoubtedly have been given . . . weight, including convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, the moral blame attached to the wrongdoer, and many others." PROSSER ON TORTS (1st ed.), *supra* note 3, at 181 (citing Leon Green, *The Duty Problem in Negligence Cases*, 28 COL. L. REV. 1014 (1928); Leon Green, *The Duty Problem in Negligence Cases: II*, 29 COL. L. REV. 255 (1929)); PROSSER ON TORTS (2d ed.), *supra* note 7, at 168 (citing same); PROSSER ON TORTS (3d ed.), *supra* note 7, at 334 (citing same). In the fourth edition, Prosser reiterated the same language and again cited Green. PROSSER ON TORTS (4th ed.), *supra* note 7, at 326-27 & n.22. But now Prosser cited as "particularly good statements as to the factors affecting duty" three opinions of the California Courts, including *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513 (Cal. 1963), *overrruled in part*, 441 P.2d 912 (Cal. 1968). That opinion was vindicated in

Propositions (1) through (4) are predominantly propositions that were asserted by Prosser (Green) and hence reflect what I refer to as the Prosser (Green) approach to questions of duty. These propositions in whole or in part form the basis of an overwhelming consensus on the analysis of duty which has congealed in American courts in the last few decades. Although the prominence of the questions of duty itself and the foreseeability factor can be traced also to Cardozo, Prosser was critical of Cardozo's typical unwillingness to explicitly analyze the factors underlying his duty determinations.[110]

These propositions are also typically cited in California and courts following California. The approaches espoused by the California Supreme Court in *Dillon, Rowland, Biakanja* and *Tarasoff* are a type of Prosser (Green) analysis—a specific instantiation of a more general approach. In fact, specific California factors represent the single most popular set of policy factors used by American courts. In its explicit form, proposition (5), while California based, does not enjoy the overwhelming consensus which propositions (1) - (4) enjoy, although it is equally easy to trace the roots of proposition (5) to Prosser (Green).

Dillon v. Legg, 441 P.2d 912 (Cal. 1968) (en banc) (including Tobriner, J., author of *Tarasoff*). *See* Raymond v. Paradise Unified Sch. Dist. of Botte Cty., 31 Cal. Rptr. 847 (Cal. 1963); Wright v. Arcade Sch. Dist., 40 Cal. Rptr. 812 (Cal. 1964). The fifth edition of the Prosser treatise also repeats the same language, again citing Green (and now others). *See* PROSSER ON TORTS (5th ed.), *supra* note 7, at 359 & n.23. But the fifth edition supports Prosser's perennial assertion with the *Tarasoff* factors, among others, by way of citation to that case and *Vu v. Singer, Co.*, 538 F. Supp. 26, 29 (N.D. Cal. 1981). PROSSER ON TORTS (5th ed.), *supra* note 7, at 359 n.24.

There is an aspect of evolution in the final *Tarasoff* seven factors, but it is easy to spot Green's concerns, Prosser's concerns, Cardozo's (and Andrews's) intense interest in foreseeability questions, and even a bit of Hand's approach. *See* United States v. Carrol Towing, Co., 159 F. 2d 169 (2d Cir. 1947).

Other courts have emphasized other, sometimes overlapping factors. *See, e.g.*, Wright v. Webb, 362 S.E.2d 919, 921 (Va. 1987); Winn v. Gilroy, 681 P.2d 776, 784 n.9 (Or. 1984) (critical of use of insurance as a factor). Even California has adjusted the list of factors in cases raising different issues. *See, e.g., Raymond*, 31 Cal. Rptr. at 852 (using additional factors when a public entity is defendant); *Biakanja*, 320 P.2d at 19 (using certain factors, some overlapping with the *Tarasoff* seven, to analyze economic loss problems). Courts also acknowledge that appropriate policy factors may be set by the legislature.

110. *See* Green, *supra* note 107, at 1021 ("[i]t is a rare thing that an opinion acknowledges the forces which must have impelled the judgment pronounced."); Prosser, *supra* note 64.

As I note, this is to be expected.[111] Nonetheless, the California approach has become the most recognizable Prosser (Green) variation and may continue to grow in importance.

II. VARIOUS MEANINGS OF DUTY IN NEGLIGENCE LAW

"Duty" as the word has been used by courts in this century has had several meanings. It is a curious feature of modern tort law that the most fundamental concept has been so fundamentally equivocated.[112] As Prosser pointed out, "It is quite possible, and not at all uncommon, to deal with most of the questions which arise in a negligence case in terms of 'duty[:]'"[113] "the problem of duty is as broad as the whole of the law of negligence."[114] In this century, at least four meanings of the term "duty" have been frequently used in regard to the law of negligence.

A. Duty as Liability

Duty has been used to refer to negligence *liability*.[115] Thus, one might say that one has a duty not to run over a very young child with a vehicle, meaning that one has a duty of reasonable care while operating a vehicle, which is breached if a young child is hit and physically in fact and proximately injured by the vehicle, and is a child against whom the defenses of contributory fault and/or assumption of risk did not apply. In other words, the term duty is often used to state the conclusion of the calculation of various aspects of the prima facie case of negligence and its defenses and the interplay of non-doctrinal considerations or policy concerns. This use of the term duty is sometimes imprecise and can cause confusion.[116] At common law, for example, one could easily assert that no duty is owed to a faulty plaintiff. Today, we might prefer to say that a faulty plaintiff was

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111. *See supra* note 109.

112. At times Prosser could be heard to make assertions such as "[duty] means, of course, an obligation, to which the law will give recognition and effect, to conform to some standard of conduct toward another." Prosser, *supra* note 64, at 12. But Prosser was no stranger to the perplexities of the term duty, and to its open endedness. *See id.* at 13.

113. PROSSER ON TORTS (4th ed.), *supra* note 7, at 324; PROSSER ON TORTS (5th ed.), *supra* note 7, at 356.

114. PROSSER ON TORTS (4th ed.), *supra* note 7, § 53, at 326; PROSSER ON TORTS (5th ed.), *supra* note 7, § 53, at 357-58.

115. As Prosser has pointed out since the first edition, duty is often a "shorthand statement of a conclusion" about liability. PROSSER ON TORTS (1st ed.), *supra* note 3, at 180; *see* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976).

116. *See* Yania v. Bigan, 155 A.2d 343 (Pa. 1959).

unable to assert an actionable claim of negligence at common law. From the first edition of Prosser's text, he noted this type of problem in a more prominent permutation: duty v. proximate causation.[117] In this sense, duty, as Prosser pointed out, is everywhere in negligence law, yet defies a universal list.

B. Duty as Standard of Care, General or Particular

A more precise way to conceive of duty has been in terms of a general standard of conduct. In this sense, "the duty is always the same, to conform to the legal standard of reasonable conduct in light of the apparent risk."[118] In this sense, the term duty and the phrase "general standard of conduct (care)" become synonymous. Duty is also sometimes used to refer to the particularization of a more general standard of care.[119] Thus, it is possible to subdivide the matter of duty "to cover an endless series of details of conduct."[120]

C. Duty as Negligent Conduct: Standard of Conduct and Breach

Another way (perhaps two) to conceive of the term duty is as an expression of negligent conduct, meaning duty (in modern terms of a standard of care) and breach thereof. Thus, a driver speeding through a school zone is engaging in negligent conduct: the driver has a duty to exercise reasonable care, and it is unreasonable to speed in a school zone (breach of duty). That is negligent conduct,[121] but not necessarily actionable negligence, which would require proof of, among other elements, causation. Duty used in this sense combines at least three aspects: general standard of care, particularization thereof (if necessary)

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117. PROSSER ON TORTS (1st ed.), *supra* note 3, at 180.

118. PROSSER ON TORTS (2d ed.), *supra* note 7, at 166; PROSSER ON TORTS (3d ed.), *supra* note 7, at 146; PROSSER ON TORTS (4th ed.), *supra* note 7, at 324; PROSSER ON TORTS (5th ed.), *supra* note 7, at 356. One might build into that sense of "duty," as Prosser did, the idea that duty is "a question of whether the defendant is under any obligation for the benefit of the particular plaintiff . . . ." PROSSER ON TORTS (2d ed.), *supra* note 7, at 166.

119. *See* PROSSER ON TORTS (2d ed.), *supra* note 7, at 166.

120. *Id.*

121. Prosser pointed out that some courts call this "negligence," *see* PROSSER ON TORTS (1st ed.), *supra* note 3, at 177, and also described this as "negligent conduct." *Id.* at 178.

and breach of duty in the general and particular sense (the failure to use the appropriate amount of care).

D. Duty as First Element of Prima Facie Case

Increasingly, today's courts, where appropriate, distinguish duty from negligent conduct (although, again, the term duty is still used to refer to the latter). Doctrinally, duty is most often identified as the first element of a prima facie case of negligence and is distinguished from the second element, breach.[122] When the term duty is used in this sense (often combined with the "standard of care" sense of the term duty) it is used in a very precise, modern way. While in this century the term duty has been used loosely to refer to most issues of liability in negligence law, modern courts use the term in an increasingly more precise way. One of the most important developments in the law of negligence in recent times has been the increasing clarification of the use of the term duty and the recognition that many precedent cases, some from just a generation ago, lacked clarity with respect to the basic doctrinal notion of duty. Even though courts continue to use the term duty in multiple ways, today's courts are more careful to set out the sense in which they are using the term in a given instance.[123] Thus, even when courts use duty in the first sense, they tend to clarify that that is a slightly different sense than this fourth sense.

III. ANALYSIS OF DUTY IN THE 50 STATES[124]

A survey of recent case law in the fifty states reveals that in the last few decades (primarily the 1970's, 1980's and 1990's), American jurisdictions have overwhelmingly reached and discussed questions of

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122. In the first edition, Prosser stated what is now considered to be axiomatic—that a prima facie case of negligence consists of duty, breach, causation (in fact, proximate) and damage. *See* PROSSER ON TORTS (1st ed.), *supra* note 3, at 175-78. The *Restatement of Torts* and *Restatement (Second) of Torts* elected a different formulation. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1965); RESTATEMENT OF TORTS § 281 (1934). Modern courts do not track that formulation as such, but typically follow the Prosser approach. *See* PROSSER ON TORTS (1st ed.), *supra* note 3, at 177 & n.53. This feature of the *Restatement (Second)* could use updating.

123. *Tarasoff* is an excellent example of this. Justice Tobriner first speaks of duty in terms of a conclusion about the liability, and then formulates duty as a standard of care, at first general, then more particular. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).

124. My research is presented here largely through recent state Supreme Court decisions. Typically, I do not focus on the federal courts primarily applying state law under *Erie* or an *Erie "guess"* nor upon lower state court decisions, or decisions in the District of Columbia.

duty in general and even abstract terms and have converged strongly on several key points that can be traced specifically to Prosser (Green) and, in many cases, to the California cases which have adopted and adapted that approach. Other states—now a noticeable minority[125] —analyze duty questions in ways that are compatible with certain key Prosser (Green) notions, without overtly relying on Prosser (Green) or California decisions. Principally, American courts overwhelmingly adhere to the idea that duty—not sacrosanct, but a conclusion—must be analyzed in terms of public policy, social considerations and/or other such factors. With regard to general and/or abstract questions of duty, American courts overwhelmingly disregard the *Restatement (Second) of Torts*[126] and are much more likely to refer to a Restatement section regarding a particular standard of conduct (duty in that sense). Only a tiny number of states (mostly also small by population) remain in the posture of "limboanalysis" first described by Prosser many years ago.[127] No major jurisdiction, except perhaps Virginia, has avoided the clear movement of American common law tort law. In matters of negligence law, American common law courts have formed an important jurisprudential consensus, which in orientation is neither inherently liberal (defined here merely as increasing potential negligence responsibility) or conservative (defined here merely as either maintaining status quo negligence responsibility or retreating from status quo negligence responsibility).

Not surprisingly, general and/or abstract discussions of duty occur primarily in highly contested cases revolving around "hot" issues of liability, such as infliction of emotional distress on bystanders, landowner duties, duties to warn about or control the behavior of dangerous

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125. Among these states are jurisdictions like Massachusetts and New York which have been analyzing questions of duty in general and/or abstract terms in decisional law which significantly predates the period of the expansion of the concept of duty that occurred from the 1970's onward. These jurisdictions tend to follow their own drummer and have been doing so for some time. Nonetheless, the analysis they use is very compatible with what Prosser and Green promoted. *See* Appendix, *infra.*

126. Prosser and the *Restatement (Second) of Torts* considered the question of negligence liability in terms of legally protected interests. *See* PROSSER ON TORTS (5th ed.), *supra* note 7, § 30; RESTATEMENT (SECOND) OF TORTS § 281. Many times, U.S. courts make reference to this type of thinking, *see* Appendix, *infra*, but they rarely expound upon it as such, mainly turning their attention instead to discussion of considerations of policy, etc. and they do *not* adopt the cause of action/elements formulation which the *Restatement (Second) of Torts* § 281 proposes.

127. *See, e.g.*, Appendix, *infra,* South Carolina.

individuals, or economic loss. Thus, one might have the impression that the question(s) of duty in a general or abstract sense are now a live issue in *all* cases of negligence law. But in a very practical sense, most cases present no difficult general or abstract questions of duty. As the New Jersey Supreme Court (known to some as an activist court[128]) observed:

> In most cases the justice of imposing such a duty is so clear that the cause of action in negligence is assumed to exist simply on the basis of the actor's creation of an unreasonable risk of foreseeable harm resulting in injury. In fact, however, more is needed, 'more' being the value judgment, based on an analysis of public policy, that the actor owed the injured party a duty of reasonable care.[129]

In the Appendix, I address the fifty states in alphabetical order. Citations to and quotation from important recent decisions provide support for the following conclusions:

(1) Overwhelmingly, U.S. jurisdictions now clearly and strongly support the Prosser (Green) approach to general and/or abstract questions of duty—the largest plurality of the states follow the California model of that approach;

(2) Most remaining states follow approaches which are highly compatible with the Prosser (Green) approach;

(3) A very few states have not clearly joined the majority—none of these states (and no other state) has *rejected* the Prosser (Green) approach as such;

(4) Most cases involving an expanded analysis of questions of duty generally or in the abstract have occurred in the last three decades;

(5) Overwhelmingly, American jurisdictions put little emphasis upon the *Restatement (Second) of Torts* for general or abstract questions of common law duty: for example, American courts follow the prima facie case (cause of action) format Prosser espoused, not the one contained in *Restatement (Second) of Torts* § 281;

(6) Foreseeability, as Cardozo, Prosser (Green) and the California courts agree, has become prominent in questions of duty (and other questions of liability)—however, foreseeability is not the only determinant of liability;

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128. Phil Weiser, *What's Quality Got to Do With It?: Constitutional Theory, Politics and Education Reform,* 21 N.Y.U. REV. L. & SOC. CHANGE 745, 773 & n.178 (1994-1995).

129. Kelly v. Gwinnell, 476 A.2d 1219, 1222 (N.J. 1984) (citations omitted).

(7) American courts now often turn to an expanded analysis of duty to reach "conservative results"—those that are liability-limiting.

IV. SOME JURISPRUDENTIAL OBSERVATIONS REGARDING DUTY: THE TRIUMPH OF AMERICAN LEGAL REALISM AND THE RETURN OF DUTY AS LIABILITY LIMITING TOOL

I credit the two principal historical accounts relating to the role of duty in the nineteenth century—duty as a liability limiting tool protecting nascent industry and duty as part of a greater no-liability milieu (Rabin's notion)—as recognizing the same basic point: duty existed in the context of a general private law consensus that non-contractual liability should be very limited, except when an invasion of tangible property occurred. Nothing like today's system of widespread accountability for unreasonable behavior causing personal injury existed in the Nineteenth Century.[130] Duty, therefore, had little abstract or general work to do because of a widespread, if tacit, agreement upon the goals of tort law. However, particularly since World War II, the tort system has steadily eroded the no-liability paradigms of an earlier era, illustrated by Rabin.[131] Concomitant with that steady erosion has been the rise of the explanatory power of the paradigm of reasonable behavior and its negligence (duty) focus, as pointed out by Schwartz.[132] Duty (somewhat erroneously or overbroadly) was associated historically with no-liability results; it was natural to look to duty as the tort liability system took a broad turn toward expanded liability. Paradoxically, while duty was essential at mid-twentieth century, as Prosser correctly asserted at that time, it had suffered little analysis in the courts.

Early in the twentieth century, Leon Green pursued the legal realist notion that duty was a function of policy.[133] The idea was correct, but functionally premature in the sense that at that time, given the tacit consensus on a largely no-liability system, the idea was, practically speaking, banal. There were few occasions to turn to the abstract and general questions of duty in a system that often held that a personal

130. *See* Rabin, *supra* note 6; Schwartz, *supra* note 1.
131. Rabin, *supra* note 6.
132. Schwartz, *supra* note 1.
133. Green, *supra* note 107.

injury plaintiff without privity lost. At first, even Prosser was critical of Green's basic idea.

Cardozo, who documented the final moments of the no-liability regime, fostered the idea that duty and a meta-determinant of liability, foreseeability,[134] were essential to the calculation of liability. In this vein, Cardozo fired the ambiguous messages of this threshold period in tort history—e.g., *McPherson* opening the door to product liability, *Palsgraf* limiting liability. In a time when cracks were appearing in a no-liability system, the concerns over the potential of hemorrhaging liability were strong. Cardozo was the general of another era; the continued reference to the Cardozo/Andrews debate today draws upon a historically significant moment in the evolution of duty, but heavy reliance now is like the deployment of the Polish Cavalry in September 1939, in that the arsenals of duty have evolved.

Post World War II America saw a dramatic shift, doctrinally, towards an active system of personal injury liability founded in negligence. If Schwartz is right, the rise of liability insurance, the booms in the post-war economy and the distrust of many beneficiaries of no-liability paradigms (corporations, governments, families, landowners, etc.), contributed to allaying Cardozian fears with respect to widespread duty. Duty became the centerpiece of a much bigger show, but it lacked sufficient analytical development in the courts to support the role it was being asked to perform. Thus, a paradox of the 1960's and early 1970's emerged in that there were duties everywhere, but the leading scholarship gave little attention to general or abstract questions of duty.

Prosser, it seems, had a sixth sense about the future of duty (made easier because he played such a prominent role in bringing about the future of duty) and anticipated its development with pithy aphorisms in the hornbook editions and with pre-modern analysis in the famous (and

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134. Cardozo viewed duty as essential to liability and foreseeability as critical in determining duty. Foreseeability was a meta-determinant or criterion with respect to liability. *See* Lake, *supra* note 16. This simple jurisprudential insight, prominent in legal realism and H.L.A. Hart's positivist position, that there are determinants of liability that are themselves not *immediate rules* of decision in a case (as Hart notes that *can* be rules, but special rules in that they create other rules), confused some courts, largely because Cardozo was not precise in the way he discussed duty and liability. *See* H.L.A. HART, THE CONCEPT OF LAW (1961). Thus, some courts have adopted foreseeability rules of liability in tort. But as the research in the Appendix discloses, a number of courts have now come to realize that a rule of liability based on foreseeability alone puts too much weight upon foreseeability as a determinant of liability. *See* Appendix, *infra*. Thus, I could adopt a rule, "I eat when I am hungry," based upon the most important factor in determining when I am to eat—if I am hungry. But my experience is that the rule is too broad and must give way to other factors (or I surely will be indescribably corpulent).

oft cited) *Palsgraf Revisited.* As the leading torts scholar, and the most prominent academic analyst of questions of duty, Prosser's works have been a natural place to which courts have turned for guidance in developing approaches to duty. Prosser's foundational notions of duty were reflected in the California Supreme Court during the heyday of its expansion of tort doctrine. Yet, California crafted and exported its own Prosser-inspired, specific policy-based approach. Many American jurisdictions have adopted or been influenced by the specific approach of California. When they differ with California, most courts nonetheless accept Prosser (Green) axioms.

Particularly in light of the California experience (and Prosser's prominent role in strict product liability), duty conceived in terms of policy or other factors was identified with the liberal expansion of tort doctrine. Duty, which had a more traditional function of liability *limitation*, became a tool of liability *expansion* in the California cases of the 1950's to the 1970's.

The relatively recent consolidation of consensus on Prosser (Green) notions of duty (many cases coming in the 80's and 90's) has, however, featured an intriguing turn. Prosser (Green) notions, and even California-influenced variants, have been used to *limit* liability and/or *curtail* the growth of liability law. Duty has thus been used in conservative ways. Consider, for example, the recent Alaska Supreme Court decision in *Hawks v. State Department of Public Safety.*[135] Alaska adopts California factors in its analysis of duty,[136] and in *Hawks* the Alaska Supreme Court reached a no-duty determination in light of those factors citing concerns of opening judicial floodgates in the process.[137] The Alaska Supreme Court appeared to be influenced by some modern concerns expressed by tort reformers, and relied upon an expanded analysis of duty to incorporate this reasoning in its decisions.

The expanded analysis of questions of duty proposed by Prosser (Green) is neither *necessarily* liberal nor conservative (as I defined those terms herein), but is compatible with doctrinal and liability expansion or contraction (or stasis). Expanded analysis can serve to deepen justifications for decisions, even those which preserve the status quo. Expanded analysis also facilitates legislative initiatives, because it clarifies the

135. 908 P.2d 1013 (Alaska 1995).
136. *Id.* at 1016-17.
137. *Id.*

bases for decision in the courts. Court decisions which rest upon unpopular policy balancing will be at risk of reversal in the legislature. Those which are popular may be codified.

The recent consolidation of a consensus on basic Prosser (Green) axioms of duty represents an unusually poignant triumph of a particular jurisprudential viewpoint. American courts have elected to follow a moderate type of legal realism. American courts believe that duty turns on considerations of policy or other considerations (thus, the legal realism), but have not adopted anything like an extreme rule (a skeptical approach to tort law). Expanded analysis of duty has not been a *substitute* for rule-based adjudication, but has been a *complement* to that approach.

H.L.A. Hart wrote that candor "is a sovereign virtue in jurisprudence"[138] and argued for courts to recognize the "open texture of rules" and the existence of rule creating norms (in his terms, "secondary rules").[139] Hart attacked jurisprudential extremists such as rule skeptics (those who would deny all validity to rules as such)[140] and rule formalists (those who would refuse to recognize the open texture of rules, *inter alia*).[141] American courts, in adopting the Prosser (Green) approach appear to have formed a tacit agreement with Hart on these points. American courts recognize the need for the expanded analysis of duty, but typically do not simply discard rules in favor of multi-factor balancing hither and thither. American courts have tacitly rejected rule formalism (except perhaps in a few southeastern states which have not joined the consolidation of consensus on basic meanings of the term duty). Prosser's greatest legacy may be in his unprecedented success in facilitating this consensus.

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138. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 593 (1958).
139. HART, *supra* note 134, ch. VII, at 103.
140. *Id.*
141. *Id.*

APPENDIX

1. ALABAMA

Alabama considers "the key factor [to be] whether the injury was foreseeable by the defendant." *Smitherman v. McCafferty*, 622 So. 2d 322, 324 (Ala. 1993); *see also Keebler v. Winfield Carraway Hospital*, 531 So. 2d 841, 844 (Ala. 1988). Although foreseeability is important, it is not always decisive. *See Tittle v. Giattina*, 597 So. 2d 679, 680 (Ala. 1992). Alabama tort law accepts the proposition that "[i]n determining whether a duty exists in a given situation . . . courts should consider a number of factors, including public policy, social considerations, and foreseeability." *Smitherman*, 622 So. 2d at 324 (citing 57A AM. JUR. 2D *Negligence* § 87, at 143 (1989)); *see also Patrick v. Union State Bank*, 681 So. 2d 1364, 1368 (Ala. 1996); *Carrio v. Denson,* 689 So. 2d 121 (Ala. 1996); *Thompson v. County of Alameda*, 614 P.2d 728 (Cal. 1980) (citing *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976)); 574 AM. JUR. 2D *Negligence* § 87, n.62. In determining duty, the Alabama Supreme Court has relied upon foreseeability as well as five other factors in transactional/tort cases, traceable to *Biankaja v. Irving*, 320 P.2d 16, 19 (Cal. 1958):

> [T]he extent to which the transaction was intended to affect the other person; (2) the foreseeability of harm to him; (3) the degree of certainty that he suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm.

Tittle, 597 So. 2d at 680; *see also North Carolina Mut. Life Ins. Co. v. Holley*, 533 So. 2d 497, 501 (Ala. 1987); *Berkel & Co. Contractors, Inc. v. Providence Hospital*, 454 So. 2d 496, 502-03 (Ala. 1984); *Howe v. Bishop*, 446 So. 2d 11, 15 (Ala. 1984) (Torbert, C.J. concurring) (quoting *United Leasing Corp. v. Miller*, 263 S.E.2d 313, 318 (N.C. App. 1980)); *Rudolph v. First Southern Federal Savings and Loan Association*, 414 So. 2d 64, 68 (Ala. 1982).

As do some other states, Alabama asserts that "[t]he essential question is 'whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.'" *Smitherman*, 622 So. 2d at 324 (quoting W.

PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 357 (5th ed. 1984)); *see Patrick,* 681 So. 2d at 1368-69.

In citing *American Jurisprudence*, Alabama follows the basic Prosser (Green) idea that duty involves the calculation of various factors. Heavy reliance on Prosser occurs in several Alabama cases raising issues of tort liability arising out of contractual reliance. *See, e.g., Pope v. McCrory*, 575 So. 2d 1097, 1099 (Ala. 1991); *Harris v. Board of Water & Sewer Commissioners of The City of Mobile*, 320 So. 2d 624, 628 (Ala. 1975). Alabama also relies on foreseeability, however, in calculating duty. Alabama is a Prosser (Green) or Prosser (Green)/compatible jurisdiction. California decisional law has indirectly influenced Alabama tort jurisprudence on duty.

2. ALASKA

Alaska clearly follows the Prosser (Green) and California approaches. At least since *Division of Corrections v. Neakok*, 721 P.2d 1121 (Alaska 1986), Alaska has clearly aligned itself with a fundamental Prosser (Green) axiom: "The concept of duty is not a legal talisman on which the court lays hands to decide novel questions, 'but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.' " *Hawks v. State Department of Public Safety*, 908 P.2d 1013, 1016 (Alaska 1995) (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS (4th ed. 1971)); *Neakok,* 721 P.2d at 1125 (quoting same). It is worth noting that the *Hawks* case determined that no duty was owed by the state to a mother who brought suit for emotional distress allegedly incurred because the state took many years to identify the remains of her deceased daughter who was killed by a serial killer. *Hawks* reached this conservative result following the California list of "considerations" adopted by Alaska in *D.S.W. v. Fairbanks N. Star Borough School District*, 628 P.2d 554, 555 (Alaska 1981).

> [The] court adopted a list of considerations [set forth by the California Supreme Court] to aid in deciding when, as a matter of policy, a particular plaintiff is entitled to protection. These considerations include the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered an injury, the closeness of the connection between the defendant's conduct and the plaintiff's injury, the moral blame attached to the defendant's conduct, the policy of preventing further harm, the extent of the burden to the defendant and consequences to the community of imposing a duty of care, and the availability, cost and prevalence of insurance for the risk involved.

Hawks, 908 P.2d at 1016; *see also Waskey v. Anchorage*, 909 P.2d 342, 343-44 (Alaska 1996) (finding it unnecessary to consider the factors when previous cases are so similar to the facts in question); *Day v.*

Willis, 897 P.2d 78, 81 (Alaska 1995); *Neakok,* 721 P.2d at 1125; *D.S.W.,* 628 P.2d at 555.

Alaska, following *Tarasoff,* also believes that "[t]he most important single criterion for imposing a duty of care is foreseeability." *Neakok,* 721 P.2d at 1125; *see also Maddox v. River & Sea Marine, Inc.* 925 P.2d 1033, 1037 (Alaska 1996); *R.E. v. State*, 878 P.2d 1341, 1346 (Alaska 1994). Nonetheless, it is clear that even where foreseeability weighs in favor of imposing a duty, Alaska is willing to allow other considerations to outweigh foreseeability, if appropriate. *Hawks,* 908 P.2d at 1017 (placing emphasis on concerns of opening the "judicial floodgates" in imposing a duty and noting that "[d]ecisions regarding the allocation of limited [investigative] resources are better left to the executive branch.").

3. ARIZONA

In recent times, the Arizona Supreme Court has emphasized, following Cardozo, the importance of foreseeability. "As Chief Judge Cardozo stated in *Palsgraf*. . . , '[t]he risk reasonably to be perceived defines the duty to be obeyed.'" *Alhambra School District v. County of Maricopa*, 796 P.2d 470, 473 (Ariz. 1990) (quoting *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99, 100 (N.Y. 1928)). Arizona accepts that duty does not equal specification of a standard of conduct; duty and breach of duty are to be distinguished. *Martinez v. Woodmar IV Condos Homeowners Ass'n*, 941 P.2d 218 (Ariz. 1997); *Markowitz v. Arizona Parks Board*, 706 P.2d 364, 367 (Ariz. 1985).

The Arizona Supreme Court has specifically adopted Prosser's policy-based notion of duty, that it is not sacrosanct, but is policy-based and relational. *See Ontiveros v. Borak*, 667 P.2d 200, 208 (Ariz. 1983) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 42, at 244 (5th ed. 1984)). But the court has not followed California's lead on a list of factors. While certain intermediate appellate court decisions feature Prosser and *Tarasoff* policy factors, see *Newman v. Maricopa County*, 808 P.2d 1253, 1257 n.3 (Ariz. Ct. App. 1991) and *Cooke v. Berlin*, 735 P.2d 830, 835 (Ariz. Ct. App. 1987), *overruled by Dunn v. Carruth*, 784 P.2d 684 (Ariz. 1989) (but policy factors remain fine), the Supreme Court of Arizona refers to the use of "policy" in terms of common law development and stare decisis:

> [T]he common law, which is judge-made and judge-applied, can and will be changed when changed conditions and circumstances establish that it is unjust or has become bad public policy . . . . " Inherent in the common law is a dynamic principle which allows it to grow and to tailor itself to meet changing needs within the doctrine of stare decisis, which, if correctly understood was not static . . . ."

Id. (quoting *Lewis v. Wolf*, 596 P.2d 705, 706 (Ariz. App. 1979)). Arizona accepts important Prosser (Green) postulates that duty is not sacrosanct, but is policy based and duty is relational. *Id.* at 208.

4. ARKANSAS

Citing Prosser and Keeton, the Arkansas Supreme Court stated recently that "[t]he existence of a duty depends upon whether a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other." *Register v. Oaklawn Jockey Club Inc.*, 811 S.W.2d 315, 317 (Ark. 1991); *see Shannon v. Wilson*, 947 S.W.2d 349 (Ark. 1997); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 235 (5th ed. 1984). Such Prosser-like, duty-is-relational language has not been complemented with other such Prosser (Green) assertions. However, in a very recent case involving a question of landowner duties, the Arkansas court did admit to "policy reasons in favor of the common law" and cited to and quoted from two cases in which explicit policy-factor balancing occurred. *Driggers v. Locke*, 913 S.W.2d 269, 273 (Ark. 1996). In that case, one of the dissenters asserted:

> In determining whether a duty exists, a court should consider the foreseeability of harm, the degree of certainty of damages, the closeness of connection between defendant's conduct and the damage, the moral blame for the conduct, who could have best prevented the damage, the policy of preventing future damage, and the overall consequence to the state for imposing a duty.

Id. at 276 (Newbern, J., dissenting). This dissenter did not support his assertion with citation or authority, but its kinship to the California policy factors is unmistakable.

Arkansas has shown glimpses of the Prosser (Green) and California approaches, yet has rejected relying on public policy factors to create a new common law rule, instead deferring questions to the legislature regarding new common law rights. *See Lewis v. Rowland*, 701 S.W.2d 122, 124 (Ark. 1985). However, the Arkansas Supreme Court has still relied upon conclusory assertions such as, "under our well established principles of common law duty and the facts before us, we find that duty existed . . . ," even in a case presenting a novel problem of duty, for example, the extent of economic loss rule. *Register,* 811 S.W.2d at 317

(plaintiff asserts duty against racetrack arising from failure of the betting machines to accurately place bet, costing plaintiff a share of the prize). And in *Lewis,* which explicitly left open the question of whether to recognize a child's action for loss of consortium of an injured parent to the legislature, the Arkansas Supreme Court nonetheless engaged in an extensive explicit discussion of a variety of policy factors, including insurances, burden on a tortfeasor, multiplicity of claims and opening the floodgates of litigation. *Lewis*, 701 S.W.2d at 123.

5. CALIFORNIA

The heyday of the liberal California Supreme Court is over, but the California Supreme Court still adheres to the basic Prosserism that duty is a conclusion, not sacrosanct, and expresses the sum of considerations of policy. *See Bily v. Arthur Young & Co.*, 834 P.2d 745, 761 (Cal. 1992). The more recent, and conservative, California Supreme Court has emphasized that duty can serve to limit liability, a view of duty close to Cardozo's in *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928) and *H.R. Moch Co. v. Rennselaer Water Co.*, 159 N.E. 896 (N.Y. 1928)). *See Bily,* 834 P.2d at 761; *Thompson v. County of Alameda*, 614 P.2d 728, 732 (Cal. 1980); *Dillon v. Legg,* 441 P.2d 912, 916 (Cal. 1968). California has demonstrated that a policy-based Prosser like approach to general and/or abstract questions of duty is compatible with liability limiting decisions. *See, e.g., Bily v. Arthur Young & Co.*, 834 P.2d 745 (Cal. 1992) (investors unable to recover under a negligence theory against auditor).

California has developed one of the most sophisticated policy/consideration balancing approaches of any American jurisdiction. California typically tailors the appropriate list of considerations to the type of case presented.[1] *See Parsons v. Crown Disposal Co.*, 936 P.2d 70, 80 (Cal. 1997) (adding factors in cases involving deliberative conduct). One set of policy factors typically appears in questions of general negligence. *See Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976); *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968). Another similar set of factors will be used in cases involving questions of contract and economic loss issues. *See Bily,* 834 P.2d at 761; *Biakanja v. Irving*,

1. Adler, *supra* note 10, at 904-02 & n.154.

320 P.2d 16, 19 (Cal. 1958). Yet another set of factors will be used in questions of governmental or public liability. *See Raymond v. Paradise Unified School District*, 31 Cal. Rptr. 847, 852 (Cal. 1963). The root of the California policy consideration approach is *Biakanja*:

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

320 P.2d at 19 (regarding contract/tort matters). *Biakanja* specifically created this list of factors with Prosser (Green) in mind. Over time this list has been repeated and/or modified to fit other fact patterns. *See, e.g., Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968); *Tarasoff v. Regents of the University of California,* 551 P.2d 334 (Cal. 1976).

6. COLORADO

Colorado strongly relies upon its own version of multi-factor analysis in questions of duty, a position heavily influenced by California law. The Colorado Supreme Court has repeatedly asserted Prosser's position that, "A court's conclusion that a duty does or does not exist is 'an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is [or is not] entitled to protection.'" *University of Denver v. Whitlock*, 744 P.2d 54, 57 (Colo. 1987) (quoting W. PAGE KEETON ET. AL, PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 358 (5th ed. 1984)); *see also Greenberg v. Perkins*, 845 P.2d 530, 536 (Colo. 1993); *Casebolt v. Cowan*, 829 P.2d 352, 356 (Colo. 1992).

Since *Smith v. County of Denver*, 726 P.2d 1125, 1127 (Colo. 1986), the Colorado Supreme Court has "set forth several factors to be considered in determining the existence of duty in a particular case." *Whitlock*, 744 P.2d at 57. As stated in *Smith*:

> Whether the law should impose a duty requires consideration of many factors including, for example, the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden upon the actor.

Smith, 726 P.2d at 1127; *see also Greenberg,* 845 P.2d at 536; *see Casebolt,* 829 P.2d at 356; *Peterson v. Halsted*, 829 P.2d 373, 379 (Colo. 1992); *Whitlock*, 744 P.2d at 57. The list of factors used by Colorado significantly overlaps with factors used in California, but is

most similar to a list of the factors important in determining the standard of conduct set forth in the *Restatement (Second) of Torts* §§ 289-293 (1977).

In addition, Colorado has pointed out that "this list was not intended to be exhaustive and does not exclude the consideration of other factors that may become relevant based upon the competing individual, public and social interests implicated in the facts of each case." *Whitlock*, 744 P.2d at 57; *see also Taco Bell v. Lannon*, 744 P.2d 43, 46 (Colo. 1987). Relying upon the current edition of Prosser, Colorado has made favorable reference to factors referred therein, *Whitlock*, 744 P.2d at 57 (citing and quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 358, 359 & n.24 (5th ed. 1984)), and to factors used specifically by the California courts. *Id.* at 57 & n.2 (citing, *inter alia*, *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3d Cir. 1979) (relying upon California factors); *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 359 n.24 (5th ed. 1984) (itself citing to and quoting to California factors)). Colorado duty jurisprudence follows Prosser and has strong affinities with California's approach. In addition, Colorado, as many other jurisdictions, has used multi-factor balancing to reach no duty results, *see, e.g., Whitlock,* 744 P.2d 54, as well as pro-duty results, *see, e.g., Greenberg*, 845 P.2d 530.

7. CONNECTICUT

The Connecticut Supreme Court has adopted and applied Prosser's position on duty. In *RK Constructors v. Fusco Corp.*, 650 A.2d 153 (Conn. 1994), the Supreme Court of Connecticut "recognize[d] 'that "duty" is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.'" *Id.* at 156 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984)); *see also Jaworski v. Kiernan,* 696 A.2d 332 (Conn. 1997); *Zamstein v. Marvasti*, 692 A.2d 781, 786 (Conn. 1997); *Clohessy v. Bachelor*, 675 A.2d 852, 859-60 (Conn. 1996); *Waters v. Autuori*, 676 A.2d 357, 361 (Conn. 1996). In the context of considering an attorney's duty to a non-client, the Connecticut Supreme Court has considered the policy factors emphasized by the California Supreme Court after *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958). *See Krawczyk v. Stingle*, 543 A.2d 733, 735-

36 (Conn. 1988) (citation omitted). Connecticut traditionally has placed great emphasis on foreseeability as a major determinant of duty, *see Clohessy,* 675 A.2d at 859; *R.K. Constructors*, 650 A.2d at 155-56; *Frankovitch v. Burton*, 440 A.2d 254 (Conn. 1981); *Noebel v. Housing Authority of the City of New Haven*, 148 A.2d 766 (Conn. 1959); *Orlo v. Connecticut Co.*, 21 A.2d 402 (Conn. 1941). However, in recent times especially, Connecticut has emphasized that, "[a]simple conclusion that the harm to the plaintiff was foreseeable, however, cannot by itself mandate a determination that a legal duty exists. Many harms are quite literally 'foreseeable,' yet for pragmatic reasons, no recovery is allowed." *R.K. Constructors*, 650 A.2d at 156; *see also Waters,* 676 A.2d 357 (professional organization promulgating professional accounting standards owes no duty to unknown third party relying upon opinion of C.P.A. who claimed to use these standards); *Fraser v. United States*, 674 A.2d 811 (Conn. 1996) (declining to impose duty on psychotherapist to control dangerous outpatient with respect to unidentifiable victims); *Maloney v. Conroy*, 545 A.2d 1059 (Conn. 1988) (limiting bystanders' rights to recover emotional distress damages).

8. DELAWARE

Although Delaware's jurisprudence of duty at the abstract and/or general level is not as developed as some jurisdictions, the Delaware Supreme Court has made favorable reference to Prosser's notion that duty is a policy consideration. In *Furek v. University of Delaware*, 594 A.2d 506 (Del. 1991), the Delaware Supreme Court relied upon a balancing of policy factors in determining that a university owes a duty to its students to protect them against fraternity hazing injuries:

> As noted by [*Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3rd Cir. 1979)] . . . , "duty is not sacrosanct in itself, but only the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection."

Furek, 594 A.2d at 522 (quoting *Bradshaw*, quoting WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS § 333 (3d ed. 1964)). Many courts, like the Delaware Supreme Court, which have acknowledged Prosser (Green) multi-factor balancing, deal openly with their roles vis-a-vis the legislature. In *McCall v. Villa Pizza, Inc.*, 636 A.2d 912 (Del. 1994), the Delaware Supreme Court specifically deferred consideration of a question of tavern owner liquor liability to the legislature on policy grounds. "[T]he determination of whether to impose liability on tavern owners for injuries caused by intoxicated patrons involves significant public policy considerations and is best left

to the General Assembly." *Id.* at 913 (citing *Wright v. Moffitt*, 437 A.2d 554, 556 (Del. 1981)).

9. FLORIDA

In the last two decades or so in particular, Florida has begun to consider and discuss problems of duty in more general and abstract ways. Florida's approach to such questions of duty is eclectic and refers to Prosser (Green) notions of duty, California policy factors, and the *Restatement (Second) of Torts*. Florida has also developed a notable approach to the question of foreseeability as it relates to duty and proximate causation.

In *Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982), an action involving student injuries arising from a hazing incident, the Florida Supreme Court relied upon a Prosser (Green) approach to delineate a duty. *Id.* at 666-67. Describing that approach as "pragmatically and socially oriented," *Rupp* quoted from Prosser's fourth edition for the proposition that duty is not sacrosanct, but the sum of policy considerations. *Id.* at 667. *Rupp* went on to consider the interplay of various policy factors. *Id.* at 667-68.

In two cases involving transactional harm/economic loss, the Florida Supreme Court has referenced California factors used in *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958). *See First Florida Bank v. Max Mitchell & Co.*, 558 So. 2d 9, 12 (Fla. 1990) (considering accountant's liability regarding preparation of financial statements); *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397, 401 (Fla. 1973) (general contractor can sue architect or engineer even in absence of privity); *see also Casa Clara Condominium Ass'n v. Topino*, 620 So. 2d 1244 (Fla. 1993) (limiting *A.R. Moyer, Inc.* to its facts).

Florida has also turned to the *Restatement (Second) of Torts* in recognizing the sources of duty. *See McCain v. Florida Power Corp.*, 593 So. 2d 500, 503 & n.2 (Fla. 1992); *see* RESTATEMENT (SECOND) OF TORTS § 285 (1977).

Most notably, Florida has recently taken great care in focusing upon foreseeability and how foreseeability plays out in the prima facie case. Blending aspects of Cardozo's and Andrews' visions of the role of foreseeability, Florida has asserted that foreseeability plays a legal role in the calculation of duty and a factual role with respect to proximate causation. *McCain*, 593 So. 2d at 500, 502-03.

10. GEORGIA

Currently, the Georgia Supreme Court comports with Prosser's "little analysis of duty" observations, at least in terms of general or abstract duty analysis. Cases like *Bradley Center, Inc. v. Wessner*, 296 S.E.2d 693 (Ga. 1982), are typical in that the Georgia Supreme Court is content to recite or rely upon the four standard elements of a cause of action in negligence, of which duty is the first element, to state a general standard of care and then move to a discussion of the more particular specification of the general standard of care. *See City of Rome v. Jordan*, 426 S.E.2d 861 (Ga. 1993); *Bradley*, 296 S.E.2d at 695; *Lee Street Auto Sales, Inc. v. Warren*, 116 S.E.2d 243, 245 (Ga. App. 1960). Georgia's intermediate appellate courts have made passing reference to notions of policy in calculating duty. *See, e.g., Dupree v. Keller Industries, Inc.*, 404 S.E.2d 291, 294 (Ga. App. 1991).

11. HAWAII

For over twenty years Hawaii has repeatedly adopted the basic Prosser (Green) notion that duty is not sacrosanct, but the expression of policy considerations. *See Kelley v. Kokua Sales & Supply, Ltd.*, 532 P.2d 673, 675 (Haw. 1975); *see also Hays v. City and County of Honolulu*, 917 P.2d 718, 725 (Haw. 1996); *Waugh v. University of Hawaii*, 621 P.2d 957, 970 (Haw. 1980). The Hawaii Supreme Court has favorably cited similar assertions in *Tarasoff*. *See Waugh*, 621 P.2d at 970.

Hawaii has recognized that new duties constantly arise in light of changing social conditions. *See Hays*, 917 P.2d at 725 (quoting *Johnston v. KFC National Management Co.*, 788 P.2d 159, 161 (Haw. 1990) (itself quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 53, at 359 (5th ed. 1984))). However, Hawaii has also noted from the beginning that policy considerations can limit liability as well. *Waugh*, 621 P.2d at 970; *Kelley*, 532 P.2d at 675.

The Hawaii Supreme Court has not adopted California policy factors as such. *But see Lee v. Corregedore*, 925 P.2d 324 (Haw. 1996) (engaging in extensive policy based analysis of duty including factors used in California). Rather, the Hawaii Supreme Court has expressed its own, similar list of considerations. In a recent decision synthesizing several lines of authority, *Hao v. Campbell Estate*, 869 P.2d 216 (Haw. 1994), the Hawaii Supreme Court stated that questions of the analysis of duty are guided by three basic principles:

(1) duty is relational and relates to protecting interests, *vel non*, of plaintiff.

(2) whether duty exists is a question of fairness that involves a weighing of the nature of the risk, the magnitude of the burden of guarding against the risk, and the public interest in the proposed solution.
(3) the court "will not 'impose a new duty upon members of our society without any logical, sound, and compelling reasons taking into consideration the social and human relationships of our society[.]'"

Id. at 219 (citations omitted).

Hawaii features a highly developed [and developing] jurisprudence of general questions of duty, which follows Prosser (Green) axioms and is compatible with, although different from, the California policy factors. Hawaii also features Restatement-like/Prosser-like interests analysis and relational analysis.

12. IDAHO

Idaho follows the California, Prosser inspired, policy balancing approach, but only in certain circumstances. According to Idaho's highest court, "We only engage in a balancing . . . in those rare situations when we are called upon to extend a duty beyond the scope previously imposed, or when a duty has not previously been recognized." *Rife v. Long*, 908 P.2d 143, 148 (Idaho 1995). Following a long line of California precedent, including *Thompson v. County of Alameda*, 614 P.2d 728 (Cal. 1980) and *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), the Idaho court has asserted:

> Determining whether a duty will arise in a particular instance involves a consideration of policy and the weighing of several factors which include . . . [t]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Id. (citing *Isaacs v. Huntington Memorial Hospital*, 695 P.2d 653 (Cal. 1985)); *see also Toner v. Lederle Laboratories*, 732 P.2d 297, 317 (Idaho 1987) (Bakes, J., specially concurring in part).

In *Rife*, Idaho applied this approach to reach a conservative result. *Rife*, 908 P.2d at 149 (declining to extend common law duty so as to protect a student, injured off of school premises, after school adjourned for the day and the student was released).

13. ILLINOIS

The Illinois Supreme Court has repeatedly cited and relied upon Prosser (Green) for the notion that duty is not sacrosanct but a determination of policy and other social considerations: "[A] court's determination of duty reflects the policy and social requirements of the time and community." *Kirk v. Michael Reese Hospital & Medical Center*, 513 N.E.2d 387, 396 (Ill. 1987); *see also Lee v. Chicago Transit Authority*, 605 N.E.2d 493, 501 (Ill. 1992); *Nelson v. Commonwealth Edison Co.*, 465 N.E.2d 513 (Ill. 1984); *Renslow v. Mennonite Hospital*, 367 N.E.2d 1250 (Ill. 1977); *Mieher v. Brown*, 301 N.E. 2d 307, 310 (Ill. 1973).

In Illinois, foreseeability is prominent in the analysis of duty, yet "the imposition of a duty does not depend upon foreseeability alone." *Rowe v. State Bank of Lombard*, 531 N.E.2d 1358, 1369 (Ill. 1988). Illinois looks to other policy considerations "such as the likelihood of injury, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden upon the defendant . . . ." *Lee,* 605 N.E.2d at 501; *see also Deibert v. Bauer Brothers Construction Co.*, 566 N.E.2d 239, 243 (Ill. 1990); *Rowe*, 531 N.E.2d at 1370. When appropriate, Illinois also looks to public policy as expressed in the legislature. *See Kirk*, 513 N.E.2d at 396-97. Although there are some overlapping factors between Illinois's and California's approaches, Illinois has followed its own path in developing appropriate considerations and has declined the opportunity to adopt specific California factors. *See Pelham v. Griesheimer*, 440 N.E.2d 96, 100 (Ill. 1982) (preferring an alternative approach to that used in *Biakanja* regarding attorney duties to non-client third parties[2]).

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2. In choosing not to use the multi-factor liability test, the *Pelham* court nonetheless pointed out that under that test, the "predominant inquiry has generally resolved to one criterion"—the one adopted as the basis of rule in *Pelham*, 440 N.E.2d at 100. Jurisprudentially, one could easily view *Pelham* not as a rejection of *Biakanja*, but as a final determination, in terms of a rule of the balancing process. The California Supreme Court has done this sort of thing. Thing v. La Chusa, 771 P.2d 814 (Cal. 1989) (*Dillon's* open-ended inquiry reduced to a distinct set of rules). Illinois, not clearly distinguishing between meta-criteria and rules, *see infra* at IV, hesitated to reject a balancing test in favor of a specific rule. One tell tale sign that this may have been the case is that the *Pelham* court does not refer to its own, typically cited, balancing act.

14. INDIANA

Recently, Indiana has taken significant steps in focusing its jurisprudence of duty, which has been heavily influenced by Prosser. In *Gariup Construction Co. v. Foster*, 519 N.E.2d 1224 (Ind. 1988), the Supreme Court of Indiana recognized that a "determination [of duty, vel non] is not without difficulty," and quoted extensively from PROSSER ON TORTS (5th ed.), *supra* note 7, to the effect that duty is an expression of policy considerations. *Id.* at 1227 (quoting the factors listed in the text of that edition of the Prosser treaties,[3] W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 53, at 357-59 (5th ed. 1984)). *Gariup* emphasized the role of the legislature in developing public policy and, in light of that, chose a conservative rule (deciding whether to change the common law rule which did not extend liquor liability to a primarily social host). *Id.* at 1228.

Indiana shortly revisited the question of duty and concluded, in light of *Gariup,* "that three factors must be balanced, viz. (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns." *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991); *see also Blake v. Calumet Construction Corp.*, 674 N.E.2d 167 (Ind. 1996). With respect to the third factor, public policy, the Indiana Supreme Court reaffirmed its kinship to Prosser by relying upon Prosser's notion that duty is not sacrosanct but an expression of policy considerations. *Webb*, 575 N.E.2d at 997 (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 53 (5th ed. 1984)).

Since *Webb*, the Indiana Supreme Court has settled on this Prosser inspired (but not the California variant) approach to questions of duty. *See Hooks Superx, Inc. v. McLaughlin*, 642 N.E.2d 514, 519 (Ind. 1994); *Mullin v. Municipal City of South Bend*, 639 N.E.2d 278, 283 (Ind. 1994); *Erie Insurance Co. v. Hickman By Smith*, 622 N.E.2d 515, 518 (Ind. 1993). Unlike in California, the Indiana Supreme Court prefers to discuss public policy factors (other than foreseeability and relational matters) that are relevant to the specifics of the case presented (as such, there are fewer general public policy factors in Indiana). *See, e.g.*,

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3. The court did not advert to n.2 on p. 359 of Prosser's text, which references California factors. *See Gariup*, 519 N.E.2d at 1227.

Webb, 575 N.E.2d at 997 (deciding that public policy factors weigh "against imposing a duty on physicians to consider unknown third persons in deciding whether or not to prescribe a course of drug therapy for a patient."). In addition, the Indiana Supreme Court, when considering governmental liability, distinguishes between public and private duties. *Mullin*, 639 N.E.2d at 283.

15. IOWA

As in many jurisdictions, economic loss/transactional negligence issues in Iowa have generated abstract and general inquiries into the nature of duty in negligence law. Recently, the Iowa Supreme Court acknowledged Prosser's position that duty is not sacrosanct, but the expression of policy considerations in that particular case. *Teunissen v. Orkin Exterminating Co.*, 484 N.W.2d 589, 591 (Iowa 1992). In the context of a case where a home pest exterminator was sued by a non-privy subsequent owner of the home for negligence in performing the pest extermination contract, the Iowa Supreme Court refused to extend liability so as to legally protect the interests of the subsequent homeowner. *Id.* at 592. Discussing a previous decision, *Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969), in which privity requirements were relaxed in favor of imposing liability, the *Teunissen* Court said:

> Considerations of policy led to the requirement of privity in the first place. Considerations of policy led to the relaxation of the privity requirement in *Ryan*. But we drew the line in *Ryan* . . . [to the effect that, here, plaintiff's] interests are not entitled to legal protection.

484 N.W.2d at 592.

16. KANSAS

Kansas has stated and reaffirmed the following basic notions of duty:

1. As Prosser and the *Restatement (Second)* would agree, duty relates to "the invasion of a legally protected interest." *Blackmore v. Auer*, 357 P.2d 765, 771 (Kan. 1960); *see also Boulanger v. Pol*, 900 P.2d 823, 829 (Kan. 1995).
2. Duty is relational: as in *Palsgraf*, apprehension of risk, foreseeability, is critical in determining duty. *Boulanger v. Pol*, 900 P.2d 823 (Kan. 1995); *Durflinger v. Artiles*, 673 P.2d 86 (Kan. 1983); *Blackmore v. Auer*, 357 P.2d 765 (Kan. 1960) (citing *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928)).

In addition, Kansas has adopted and relied upon California factors in determining duty owed. *See Pizel v. Zuspann*, 795 P.2d 42, 49 (Kan. 1990) (adopting California liability tests in legal malpractice case brought by potential beneficiaries of inter vivos trust and following *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958), as well as *Lucas v. Hamm*,

364 P.2d 685 (Cal. 1961)); *see also Nero v. Kansas State University*, 861 P.2d 768, 777-79 (1993) (discussing California factors and imposing duty upon university which assigned accused rapist to co-ed dorm who then sexually assaulted another student in that dorm).

17. KENTUCKY

The Supreme Court of Kentucky has asserted, in a *Heaven v. Pender* vein, that, "[t]he requirement of a 'duty to all' is a beginning point for any duty analysis." *Fryman v. Harrison*, 896 S.W.2d 908, 909 (Ky. 1995). Although Kentucky emphasizes foreseeability in analyzing duty ("we have determined that the major issue is the question of foreseeability"), Kentucky has pointed out that "consideration must be given to public policy, statutory and common law theories in order to determine whether a duty existed in a particular situation." *Id.* at 909.

Kentucky has been sensitive to the artificial character of conclusions of duty/no duty, and has followed and applied Prosser's idea that duty is a conclusion regarding policy. *See Gas Service Co. v. City of London,* 687 S.W.2d 144, 148 (Ky. 1985) (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 853, at 357-58 (5th ed. 1984) and paraphrasing G. E. WHITE, TORT LAW IN AMERICA, AN INTELLECTUAL HISTORY 17-18 (1980)); *see also Perry v. Williamson*, 824 S.W.2d 869, 875 (Ky. 1992); *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328, 330 (Ky. 1987). In *Perry*, the Kentucky Supreme Court, in discussing landowner duties, noted the conclusory, label-like quality of the categories of entrant status. 824 S.W.2d at 875. Holding that entrant status categorization is an important factor in analyzing landowner liability, *Perry* nonetheless held that,

> such status is by no means the end of the inquiry. An enlightened legal system does not reason backward from labels, to decide whether a duty of reasonable care exits [sic]. It reasons forward from circumstances, using foreseeability, the gravity of the potential harm, and the possessor's right to control his property, to decide what is reasonable conduct in the circumstances and what is negligence.

Perry, 824 S.W.2d at 875 (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 53 (5th ed. 1984)).

18. LOUISIANA

Louisiana, which follows its own jurisprudential path, has been influenced by Prosser's notion that duty is an expression of policy concerns. In a negligence action, Louisiana follows what it refers to as a "duty-risk" analysis, which consists of a familiar, if unusually ordered, prima-facie case (cause in fact, duty, breach, and a proximate cause equivalent). *Fox v. Board of Supervisors of Lousiana State University*, 576 So. 2d 978, 981 (La. 1991). Louisiana views duties as relational and in terms of public and social policy. *Id.* at 981 (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 53 (5th ed. 1984)); *see also LeJeune v. Rayne Branch Hospital*, 556 So. 2d 559, 566 (La. 1990).

> The court must make a policy determination in light of the unique facts of the case. Thus, the duty-risk analysis requires the court to take into account the conduct of each party as well as the particular circumstances of the case . . . . In determining whether to impose a duty in a particular situation, the court may consider various moral, social, and economic factors, including whether the imposition of a duty would result in an unmanageable flow of litigation; the ease of association between the plaintiff's harm and the defendant's conduct; the economic impact on society as well as the economic impact on similarly situated parties; the nature of the defendant's activity; moral considerations, particularly victim fault; and precedent as well as the direction in which society and its institutions are evolving.

Meany v. Meany, 639 So. 2d 229, 233 (La. 1994); *see also Pitre v. Opelousas General Hospital*, 530 So. 2d 1151, 1156-57, 1161 (La. 1988). *Pitre* acknowledged that duty is "more apt to direct attention to the policy issues[,]" is a "mere[] verbal expression[] of [a] policy decision[,]" and cautioned that "[a]llusions to policy should not be made a substitute for more determinate legal principles when they may be utilized." *Pitre*, 530 So.2d at 1155-56. "Policy considerations do indeed shape one's sense of the right decision, but whenever possible these should be given effect through the indispensable minimum of principles of liability in negligence, nebulous though they may be in themselves." *Id.* Louisiana tort (delict) jurisprudence features a heavy helping of policy analysis, with its own flavor.

19. MAINE

The hand of Prosser has been evident in recent Maine decisions. Maine sees duty in terms of policy, and as relational. And although Maine places great emphasis on foreseeability in determining duty, *Cameron v. Pepin*, 610 A.2d 279, 282 (Me. 1992), the Maine Supreme Judicial Court has stated that duty "is not entirely a question of the

foreseeable risk of harm but is in turn dependent on recognizing and weighing relevant policy implications . . . . Foreseeability . . . is one consideration among many that must be taken into account when courts engage in a duty analysis."[4]

In determining which policy factors, other than foreseeability, to rely upon, the Maine Supreme Judicial Court has turned to Prosser: "We have observed that many factors can influence the duty determination, including '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.'" *Williams v. Inverness Corp.*, 664 A.2d 1244, 1246 (Me. 1995) (quoting William Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953)); *see also Cameron*, 610 A.2d at 282; *Trusiani v. Cumberland and York Distributors, Inc.*, 538 A.2d 258, 261 (Me. 1988). Maine has recognized that these Prosser factors can include others as well. *See Gammon v. Osteopathic Hospital of Maine*, 534 A.2d 1282, 1286 (Me. 1987). Thus, in *Hughes v. Beta Upsilon Building Ass'n*, 619 A.2d 525 (Me. 1993), the Supreme Judicial Court stated: "Just as control and foreseeability are factors in a duty analysis, so is the relationship of the parties." *Id.* at 527. And in *Cameron*, that court emphasized "the necessity of avoiding both unlimited liability and liability out of all proportion to culpability." 610 A.2d at 283.

20. MARYLAND

Maryland, which has considered the question of duty in great depth, follows Prosser and has specifically adopted California factors in determining duty. Following Prosser, the Maryland Supreme Court has repeatedly held that duty is not sacrosanct but is an expression of the balancing of policy considerations to determine whether a plaintiff's interests are entitled to protection. *See Jacques v. First National Bank of Maryland*, 515 A.2d 756, 759 (Md. 1986); *see also Rosenblatt v. Exxon*, 642 A.2d 180, 189 (Md. 1994); *Village of Cross Keys, Inc. v. U.S. Gypsum, Co.* 556 A.2d 1126, 1131 (Md. 1989); *Ashburn v. Anne Arundel County*, 510 A.2d 1078, 1083 (Md. 1986).

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4. *Cameron* did not adopt specific California factors as such but the court did cite and refer to California decisional law with respect to its duty as "policy" and "foreseeability if not all" conclusions. 610 A.2d at 282-85.

Following California's *Tarasoff*, Maryland has repeatedly relied upon the factors stated therein as "among the variables to be considered in determining whether a tort duty should be recognized." *Village of Cross Keys, Inc.*, 556 A.2d at 1131; *see also Southland Corp. v. Griffith*, 633 A.2d 84, 88 (Md. 1993); *Eisel v. Board of Education of Montgomery County*, 597 A.2d 447, 452 (Md. 1991). Maryland also considers other factors where appropriate, including "the relationships of the parties and the nature of the actual or foreseeable harm." *Village of Cross Keys*, 556 A.2d at 1131; *Jacques*, 515 A.2d at 759.

Foreseeability is prominent, *Eisel*, 597 A.2d at 452, and in some cases the Maryland Supreme Court has spoken of a foreseeability of harm test. *Rosenblatt*, 642 A.2d at 189; *Henley v. Prince George's County*, 503 A.2d 1333, 1340 (Md. 1986). Maryland has linked the prominence of foreseeability - especially as a liability limiting tool - to *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928). *See Hartford Insurance Co. v. Manor Inn of Bethesda*, 642 A.2d 219, 226 (Md. 1994); *Henley,* 503 A.2d at 1341.

21. MASSACHUSETTS

Massachusetts follows its own beat. The Supreme Judicial Court of Massachusetts has determined "that a duty finds its 'source in existing social values and customs.'" *Mullins v. Pine Manor College*, 449 N.E.2d 331, 335 (Mass. 1983) (noting *Schofield v. Merrill*, 435 N.E.2d 339 (Mass. 1982)); *see also Mosko v. Raytheon Corp.*, 622 N.E.2d 1066, 1070 (Mass. 1993); *Pridgen v. Boston Housing Authority*, 308 N.E.2d 467, 477 (Mass. 1974); *Mounsey v. Ellard*, 297 N.E.2d 43, 52 (Mass. 1973).

22. MICHIGAN

Michigan is a Prosser (Green) jurisdiction and has relied explicitly upon California factors in its jurisprudence, although emphasizing mostly relational and foreseeability factors. The Michigan Supreme Court agrees with Prosser (Green) that duty is an expression of policy concerns and is not sacrosanct. *See Groncki v. Detroit Edison Co.,* 557 N.W.2d 289, 296 (Mich. 1996); *Buczkowksi v. McKay*, 490 N.W.2d 330, 333 (Mich. 1992); *Antcliff v. State Employees Credit Union*, 327 N.W. 2d 814, 817 (Mich. 1982); *Friedman v. Dozorc*, 312 N.W.2d 585, 590-91 (Mich. 1981). In determining what factors count, Michigan has looked to sister jurisdictions, *see, e.g., Buczkowski*, 490 N.W. 2d at 333 & nn.6,

7, and Prosser (Green) and California factors.[5] *Id.* at 333 n.4; *see also Schultz v. Consumers Power Co.*, 506 N.W.2d 175, 185 (Mich. 1993) (Griffin, J., dissenting). The Michigan Supreme Court appears to place greatest emphasis upon the factors of the parties' relationship and foreseeability. *Schultz*, 506 N.W.2d at 178.

23. MINNESOTA

Following Prosser, Minnesota accepts the idea that "[n]o duty is owed . . . unless the plaintiff's interests are entitled to legal protection against the defendant's conduct." *M.H. v. Caritas Family Services*, 488 N.W.2d 282, 287 (Minn. 1992) (citing *L&H Airco v. Rapistan Corp.*, 446 N.W.2d 372, 378 n.3 (Minn. 1989) (itself citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 53, at 357 (5th ed. 1984))). In Minnesota, public policy determines which interests are entitled to legal protection. *M.H.*, 488 N.W.2d at 287; *see also Vaughn v. Northwest Airlines,* 558 N.W.2d 736, 742 (Minn. 1997); *L&H Airco*, 446 N.W.2d at 378. In the context of determining duties owed by attorneys to non-clients, the Minnesota Supreme Court has followed California's lead by relying upon *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961), and the California factors stressed therein. *See Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 266 (Minn. 1992); *Marker v. Greenberg*, 313 N.W.2d 4, 5-6 (Minn. 1981).

24. MISSISSIPPI

Although the Mississippi Supreme Court has not extensively developed its analysis of duty, in *Foster by Foster v. Bass*, 575 So. 2d 967 (Miss. 1990), the court devoted a large section of its opinion to the question, "What is duty?," and another section to the analysis of

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5. *Buczkowski* asserted that "Dean Prosser described the several variables that consistently go to the heart of a court's determination of duty as including [the factors adopted in *Tarasoff*, etc., by the California courts]." 490 N.W.2d at 333 n.4. For that proposition, *Buczkowski* cited to W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 359 n.24 (5th ed. 1984). 490 N.W.2d at 333 n.4. The treatise itself cites the *Tarasoff* California factors. The note in which the *Tarasoff* California factors appear was not Prosser's personal handwork as it first appears after Prosser's death, and the California factors are not precisely those Prosser the person advocated.

foreseeability. *Id.* at 972-76. In addition to emphasizing foreseeability and the difference between the general and concrete issues of duty, *id.* at 973 n.7, the Mississippi Supreme Court also extensively reviewed and quoted decisions from other jurisdictions, including *Richard P. v. Vista Del Mar Child Care Services*, 165 Cal. Rptr. 370, 373-74 (Cal. App. 1980), a case using California policy factors. *See Foster by Foster*, 575 So. 2d at 979. In *Foster by Foster*, the Mississippi Supreme Court was sensitive to a variety of factors and to decisions by other jurisdictions using a variety of factors. *Id.* at 981.

25. MISSOURI

The Missouri Supreme Court recently affirmed that "[a]ny question of duty depends upon a calculus of policy considerations." *Lough v. Rolla Women's Clinic*, 866 S.W.2d 851, 854 (Mo. 1993). In recent times the Missouri Supreme Court has been heavily influenced by California factors, which it has tailored for its own use.

The Missouri Supreme Court has stated that the appropriate policy considerations

> include "the social consensus that the interest is worthy of protection; the foreseeability of harm and the degree of certainty that the protected person suffered injury; moral blame society attaches to the conduct; the prevention of further harm; considerations of cost and ability to spread the risks of loss; the economic burden upon the actor and the community."

Lough, 866 S.W.2d at 854 (quoting *Hyde v. City of Columbia*, 637 S.W.2d 251, 257 (Mo. App. 1982) (modifying California factors)); *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426, 432 (Mo. 1985). In addition, "a relationship between the parties where one is acting for the benefit of another also plays a role." *Lough*, 866 S.W.2d at 854 (citing *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426, 432 (Mo. 1985); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 42, at 274 (5th ed. 1984)). With respect to an attorney's legal duty to third party nonclients, a balancing test consisting of modified California factors (taken from *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958) and *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961)) is appropriate.[6] *See Donahue v.*

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6. The six factors recognized by Missouri in this context are:
(1) the existence of a specific intent by the client that the purpose of the attorney's services were to benefit the plaintiffs.
(2) the foreseeability of the harm to the plaintiffs as a result of the attorney's negligence.
(3) the degree of certainty that the plaintiffs will suffer injury from attorney misconduct.

Shughart, Thompson & Kilroy, P.C., 900 S.W.2d 624, 628-29 (Mo. 1995); *Westerhold v. Carroll*, 419 S.W.2d 73, 81 (Mo. 1967) (balancing test applied to determine architect's duty to third party surety).

Missouri typically considers foreseeability to be "the paramount factor in determining the existence of a duty[.]" *Lough,* 866 S.W.2d at 854. Nonetheless, foreseeability is not the only factor; foreseeability has not been defined as coextensive with duty. *See Asaro v. Cardinal Glennon Memorial Hospital*, 799 S.W.2d 595, 598 (Mo. 1990).

26. MONTANA

The Montana Supreme Court, following Cardozo and California case law, believes that "foreseeability is of prime importance in establishing the element of duty . . . ." *Mang v. Eliasson*, 458 P.2d 777, 781 (Mont. 1969) (citing *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928)); *see also Busta v. Columbus Hospital Corp.*, 916 P.2d 122, 134 (Mont. 1996); *Estate of Strever v. Cline*, 924 P. 2d 666, 670 (Mont. 1996); *Sacco v. High Country Independent Press, Inc.*, 896 P.2d 411, 422-23 (Mont. 1995) (citing *Versland v. Caron Transportation*, 671 P.2d 583, 585 (Mont. 1983) (itself citing *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968))). The Montana Supreme Court has devoted a great deal of analysis to questions raised in the Cardozo/Andrews debate regarding the role of foreseeability in negligence law. *See Busta*, 916 P.2d at 131-42.

The Montana Supreme Court has been influenced by multi-factor balancing tests, especially California inspired tests. In one recent case, *Contreraz v. Michellotti-Sawyers*, 896 P.2d 1118, 1122-23 (Mont. 1995), the court adopted the reasoning applied in *Christensen v. Superior Court*, 820 P.2d 181 (Cal. 1991), quoting and making favorable reference to the California factors used in that California case. Further, in *Phillips v. City of Billings*, 758 P.2d 772, 774-75 (Mont. 1988), the Montana Supreme Court made favorable reference to several California factors regarding the alleged duty of the police with respect to protection of

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(4) the closeness of the connection between the attorney's conduct and the injury.
(5) the policy of preventing further harm.
(6) the burden on the profession of recognizing liability under the circumstances.

Donahue v. Shughart, Thompson, & Kilroy, P.C., 900 S.W.2d 624, 629 (Mo. 1995).

third parties from a potentially dangerous intoxicated motorist. Then, *In Estate of Strever*, the Montana Supreme Court adopted these factors:

> The existence of a duty of care depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against the impostion of liability . . . . The policy considerations to be weighed in determining whether to impose a duty include: (1) the moral blame attached to the defendant's conduct; (2) the desire to prevent future harm; (3) the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (4) the availability, cost and prevalence of insurance for the risk involved.

924 P.2d at 670 (citing *Maguire v. State*, 835 P.2d 755, 762 (Mont. 1992); *Phillips v. City of Billings*, 758 P.2d 772, 775 (Mont. 1988)). *See Jackson v. State of Montana*, 956 P.2d 35 (Mont. 1998) (citing *Singleton v. L.P. Anderson Supply Co.*, 943 P.2d 968 (Mont. 1997) and using a renumbered list of functionally similar factors).

27. NEBRASKA

Until very recently the Nebraska Supreme Court has not engaged in highly sophisticated analyses of duty. That court considers duty in terms of relevant factors. The principal factor in imposing duty is foreseeability. *See S.I. v. Cutler*, 523 N.W.2d 242, 244 (Neb. 1994) (citing and quoting Cardozo in *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99, 100 (N.Y. 1928)) and *see also Anderson v. Nebraska Department of Social Services*, 538 N.W.2d 732, 738 (Neb. 1995) and *Schmidt v. Omaha Public Power District*, 515 N.W.2d 756, 763 (Neb. 1994). In a case involving the question of whether to impose a duty upon a landlord to protect a tenant from the criminal acts of a third person, the Nebraska Supreme Court stated:

> Factors to consider in imposing a duty on a landlord include weighing the relationship of the parties[7] against the nature of the risk and the public interest in the proposed solution, the likelihood of injury, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on a defendant.

S.I. v. Cutler, 523 N.W.2d 242, 244 (Neb. 1994) (citing *C.S. v. Sophir*, 368 N.W.2d 444 (Neb. 1985)). And in a recent case abolishing entrant status categories, the Nebraska Supreme Court determined that a landowner's duty would turn on a variety of factors, which are similar

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7. In other cases, Nebraska has emphasized that duty is relational as well. *See Anderson*, 538 N.W.2d at 738 (citing Schmidt v. Omaha Pub. Power Dep't, 515 N.W.2d 756 (Neb. 1994) (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 53 (5th ed. 1984))).

to those used in California. *Heins v. Webster County,* 552 N.W.2d 51, 57 (Neb. 1996).

Nebraska has also repeatedly turned to the notion that "'[a] duty in negligence cases may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.'" *Schmidt*, 515 N.W.2d at 763 (quoting W. PAGE. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53 (5th ed.)); *see also Critchfield v. McNamara*, 532 N.W.2d 287, 292 (Neb. 1995); *S.I. Cutler*, 523 N.W.2d at 244.

In a very recent case, *Popple v. Rose*, 573 N.W.2d 765, 768-69 (Neb. 1998), the Nebraska Supreme Court extensively discussed duty following *Tarasoff* and Prosser/Green. The court acknowledged the prominence of foreseeability and risk/utility considerations.

28. NEVADA

Explicitly following Prosser, Nevada takes the view that "[t]he concept of legal duty necessarily reflects considerations of social policy . . . ." *Wiley v. Redd*, 885 P.2d 592, 596 (Nev. 1994); *see also Ashwood v. Clark County*, 930 P.2d 740 (Nev. 1997); *Turpel v. Sayles*, 692 P.2d 1290, 1292-93 (Nev. 1985) (quoting *Clarke v. O'Connor*, 435 F.2d 104, 106 (D.C. Cir. 1970) (quoting Prosser's assertion that duty is not sacrosanct but an expression of policy considerations)).

In a recent case, the Nevada Supreme Court used policy considerations in a conservative way and declined to impose a duty upon an alarm company on the grounds that to impose a burden on the defendant (and similar defendants) would not work "a sound advancement in social policy." *Wiley*, 885 P.2d at 596.

29. NEW HAMPSHIRE

The New Hampshire Supreme Court acknowledges that duty "is an exceedingly artificial concept." *Libbey v. Hampton Water Works Co.*, 389 A.2d 434, 435 (N.H. 1978); *see also Walls v. Oxford Management Co.*, 633 A.2d 103, 105 (N.H. 1993). And, following Prosser, New Hampshire recognizes that duty is not sacrosanct but the expression of policy considerations. *Williams v. O'Brien*, 669 A.2d 810, 813 (N.H. 1995); *Stillwater Condominium Ass'n v. Town of Salem*, 668 A.2d 38, 40 (N.H. 1995); *Walls*, 633 A.2d at 105; *Island Shores Estates Condominium Ass'n v. City of Concord*, 615 A.2d 629, 632 (N.H. 1992).

Duty as a policy matter focuses attention upon the relationship between the parties and upon whether plaintiff's interests deserve legal protection. *See Stillwater*, 668 A.2d at 40; *Walls*, 633 A.2d at 105; *Doucette v. Town of Bristol*, 635 A.2d 1387, 1391 (N.H. 1993); *Libbey*, 389 A.2d at 435. Foreseeability is important in determining, particularly limiting, duty. *See Walls*, 633 A.2d at 105; *Goodwin v. James*, 595 A.2d 504, 507 (N.H. 1991).

30. NEW JERSEY

New Jersey has a long tradition of evaluating questions of duty. Although the New Jersey Supreme Court has recognized that, "[i]n most cases the justice of imposing a duty is so clear that the cause of action in negligence is assumed to exist simply on the basis of the actor's creation of an unreasonable risk of foreseeable harm resulting in injury." *Kelly v. Gwinnell*, 476 A.2d 1219, 1222 (N.J. 1984). At times more analysis is required, "'more' being the value judgment, based on an analysis of public policy, that the actor owed the injured party a duty of reasonable care." *Id.* at 1222 (citing *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928)).

The New Jersey Supreme Court has repeatedly relied upon the following or similar[8] formulations of duty: "whether a *duty* exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk ['that is its foreseeability and severity'[9]] and the public interest in the proposed solution." *Goldberg v. Housing Authority of the City of Newark*, 186 A.2d 291, 293 (N.J. 1962); *see also Wang v. Allstate Insurance Co.*, 592 A.2d 527, 534 (N.J. 1991); *Strachan v. John F. Kennedy Memorial Hospital*, 538 A.2d 346, 349 (N.J. 1988); *Kelly*, 476 A.2d at 1222. In very recent cases, the New Jersey Supreme Court, recognizing that "the scope of a duty depends generally on the foreseeability of the consequences of a negligent act, as limited by policy considerations and concerns for fairness," *Carey v. Lovett*, 622 A.2d 1279, 1286 (N.J. 1993), has noted that, "[a]lthough a foreseeable risk is the indispensable cornerstone of any formulation of a duty of care, not all foreseeable risks give rise to duties." *Dunphy v. Gregor*, 642 A.2d 372, 376 (N.J. 1994).

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8. "The imposition of a duty is the conclusion of a rather complex analysis that considers the relationship of the parties, the nature of the risk—that is, its foreseeability and severity—and the impact the imposition of a duty would have on public policy." Dunphy v. Gregor, 642 A.2d 372, 376 (N.J. 1994); *see also* Crawn v. Campo, 643 A.2d 600, 604 (N.J. 1994).

9. *Id.*

The New Jersey approach is compatible with the Prosser (Green) approach, and is influenced by *Palsgraf* and its emphasis on foreseeability. Although New Jersey has used its approach to the analysis of duty to acknowledge new duties, *see, e.g.*, *Dunphy,* 642 A.2d at 385 (allowing "significant other" to recover as a bystander for negligent infliction of emotional distress), New Jersey has also very candidly used this approach to *immunize* defendants. In *Crawn*, the New Jersey Supreme Court observed:

> Anytime a court raises the standard of care that defines the legal duty that is owed for the safety of others, it implicitly immunizes a part of the conduct that otherwise would be considered tortious and actionable." In that case, relying upon a "multi-faceted analysis," the Court concluded that "liability arising out of mutual, informal, recreational sports activity should not be based on a standard of ordinary negligence but on the heightened standard of recklessness or intent to harm.

Crawn, 643 A.2d at 605. In one very recent case, dissenting Justice Garibaldi made use of California factors as they had been stated in an intermediate appellate court in New Jersey. *See Petrillo v. Bachenberg*, 655 A.2d 1354, 1366 (N.J. 1995).

31. NEW MEXICO

According to the New Mexico Supreme Court,

> The determination of duty in any given situation involves analyzing the relationship of the parties, the plaintiff's injured interests and the defendant's conduct; it is essentially a policy decision based on these factors that the plaintiff's interests are entitled to protection.

Calkins, Jr. v. Cox Estates, 792 P.2d 36, 40 (N.M. 1990) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53 (5th ed. 1984)); *see also Coleman v. Eddy Potash, Inc.*, 905 P.2d 185, 190 (N.M. 1995) ("The recognition of a duty in any given situation is essentially a legal policy determination that the plaintiff's injured interests are entitled to protection . . . . The process involves an implicit balancing of interests . . . .") (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53 (4th ed. 1971); *Calkins,* 792 P.2d at 39; *Leyba v. Whitley*, 907 P.2d 172, 176 (N.M. 1995) ("For reasons of public policy, the common law of torts also recognizes an attorney's duty to provide professional services with the skill, prudence and diligence of attorneys of ordinary skill and capacity."); *Solon v. Wek Drilling Co., Inc.*, 829 P.2d 645, 648 (N.M. 1992) ("[T]he problem is

one of social policy: where to draw the line against otherwise unlimited liability.") (citing and quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43 (5th ed. 1984)). Foreseeability is critical in duty analysis in New Mexico. In one recent opinion, the New Mexico Supreme Court engaged in an intense analysis of the Cardozo/Andrews debate in reaffirming the stance that duty is owed to foreseeable, not unforeseeable plaintiffs. *See Romero v. Byers*, 872 P.2d 840, 843-44 (N.M. 1994); *Solon*, 829 P.2d at 648-49.

The New Mexico Supreme Court has been willing to employ multi-factor balancing tests to determine when a duty is owed, and has turned to California factors and a California-hybrid set of factors. In *Steinberg v. Coda Roberson Construction Co.*, 440 P.2d 798, 800 (N.M. 1968), the New Mexico Supreme Court adopted the California factors stated in *Stewart v. Cox*, 362 P.2d 345, 348 (Cal. 1961), to determine a contractor's liability to successive homeowners. *See Leyba*, 907 P.2d at 178-79. In *Leyba v. Whitley*, 907 P.2d 172, 179-80, a case involving the duties of an attorney in a wrongful death action, the New Mexico Supreme Court chided its Courts of Appeals for rejecting balancing tests to resolve the case at hand, and therein adopted the multi-factor balancing test used by the Washington Supreme Court in *Trask v. Butler*, 872 P.2d 1080, 1084 (Wash. 1994). The Washington Supreme Court uses a test that is a hybrid of California's test. *See* Washington, *infra.*

32. NEW YORK

New York has a rich and distinguished history of engaging in in-depth analysis of duty. Influences of Prosser, the California Courts, and of course Cardozo are evident, but New York follows a venerable and unique path.

New York's highest court has recently summarized a long line of authority regarding duty in *Palka v. Servicemaster Management Services., Corp.*, 634 N.E.2d 189, 192, 193 (N.Y. 1994). According to *Palka*, the

> scope of an alleged tortfeasor's duty is usually a legal, policy-laden declaration reserved for Judges to make prior to submitting anything to fact-finding or jury consideration . . . . Common-law experience teaches that duty is not something derived or discerned from an algebraic formula. Rather, it coalesces from vectored forces including logic, science, weighty competing socioeconomic polices and sometimes contractual assumptions of responsibility. These sources contribute to pinpointing and apportioning of societal risks and to an allocation of burdens of loss and reparation on a fair, prudent basis.

634 N.E.2d at 192 (citations omitted); *see also Bocre Leasing Corp. v. General Motors Corp.*, 645 N.E.2d 1195, 1197 (N.Y. 1995); *Trombetta v. Conkling*, 626 N.E.2d 653, 655 (N.Y. 1993); *Sommer v. Federal*

Signal Corp., 593 N.E.2d 1365, 1368 (N.Y. 1992) (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 92, at 613 (4th ed. 1972), for the propositions that duty is social policy and that tort law is based upon social policy and protects various interests); *Victorson v. Bock Laundry Machine Co.*, 335 N.E.2d 275, 277 (N.Y. 1975) (quoting Prosser for same); *Tobin v. Grossman*, 249 N.E.2d 419, 422 (N.Y. 1969) (referencing California factors).

New York, of course, puts great emphasis on foreseeability, but that is not the end of the inquiry. Other factors are relevant as well:

> [T]he boundaries of duty are not simply contracted or expanded by the notion of foreseeability . . . . Courts traditionally and as part of the common-law process fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.

Palka, 634 N.E.2d at 193 (citations omitted); *see also Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 36 (N.Y. 1985).

New York has shown great concern to ensure that liability will be circumscribed by fixing the "orbit of duty." *Trombetta*, 626 N.E.2d at 655; *see also Eaves Brooks Costume Co. Inc., v. Y.B.H. Realty Corp.*, 556 N.E.2d 1093, 1096 (N.Y. 1990). New York has also come to recognize that duty - traditionally conceived in terms of defendant's perspective - "correspondingly necessitates an examination of an injured person's reasonable expectation of the care owed and the basis for the expectation and the legal imposition of a duty." *Palka*, 634 N.E.2d at 192; *see also Turcotte v. Fell*, 502 N.E.2d 964 (N.Y. 1986) (holding that some assumed risk is actually a question of duty, not an affirmative defense). Duty in New York, in other words, has often served its more historic role of a liability-limiting tool, and this function has been explicitly policy based.

33. NORTH CAROLINA

Although the North Carolina Supreme Court, following Prosser, acknowledges that duty is relational, *Pinnix v. Toomey*, 87 S.E.2d 893, 897 (N.C. 1955), that Court has not embraced a Prosser (Green) policy consideration approach. And, in one recent case, that Court rejected the balancing test set forth in *Biakanja*. *Raritan River Steel Co. v. Cherry,*

Bekaert & Holland, 367 S.E.2d 609, 617 (N.C. 1988) ("[T]he *Biakanja* test is difficult to apply. It requires that the 'moral blame' of the defendant and 'the policy of preventing future harm' be considered in determining whether the defendant should be held liable. These factors are not capable of precise application and seem to add little to an assessment of whether a defendant violated a particular duty of care."). Yet even in rejecting *Biakanja*, that court engaged in a balancing process of its own. *Id.* at 617-18.

34. NORTH DAKOTA

North Dakota considers foreseeability to be important to discerning the existence of a duty. *Sime v. Tvenge Associates Architects & Planners, P.C.*, 488 N.W.2d 606, 610 n.7 (N.D. 1992) ("The modern approach to discerning whether or not a duty exists generally rests on questions of foreseeability of harm . . . . ") (citing 65 C.J.S. *Negligence* § 4 (1966); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 93 (5th ed. 1984)); *accord McLean v. Kirby Co.*, 490 N.W.2d 229, 234 (N.D. 1992) (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 71, at 510 (5th ed. 1984)).

35. OHIO

Following Prosser, the Ohio Supreme Court has stated:

> There is no formula for ascertaining whether a duty exists. Duty "is the court's 'expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection' . . . . Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall . . . ."

Mussivand v. David, 544 N.E.2d 265, 270 (Ohio 1989) (citations omitted) (quoting *Weirum v. RKO General, Inc.*, 539 P.2d 36, 39 (Cal. 1975) (itself quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS, at 325-26 (4th ed. 1972) and citing William Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953))); *see also Estates of Morgan v. Fairfield Family Counseling Center.*, 673 N.E.2d 1311 (Ohio 1997). Moreover, in Ohio duty depends upon foreseeability and upon the relationship of the parties. *See Simmers v. Bentley Construction Co.*, 597 N.E.2d 504, 507 (Ohio 1992); *Huston v. Konieczny*, 556 N.E.2d 505, 508 (Ohio 1990).

36. OKLAHOMA

Oklahoma has been inspired by Prosser and to a certain extent by California factors. Oklahoma accepts "that the existence of a duty depends on the relationship between the parties and the general risks involved in the common undertaking." *Wofford v. E. State Hospital*, 795 P.2d 516, 519 (Okla. 1990); *see also Delbrel v. Doenges Bros. Ford Inc.*, 913 P.2d 1318, 1320 (Okla. 1996). In *Wofford,* a case following *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976), the Oklahoma Supreme Court quoted extensively from PROSSER & KEETON ON THE LAW OF TORTS. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS (3d ed. 1964), and adopted the notion that duty is a question of whether a plaintiff's interests are entitled to protection. And, further, that duty is not sacrosanct, but the expression of considerations of policy. 795 P.2d at 519; *see also Delbrel*, 913 P.2d at 1320-21. Specifically following *Tarasoff* on this point, the Oklahoma Supreme Court has determined that "[t]he most important consideration in establishing duty is foreseeability." *Delbrel*, 913 P.2d at 1321; *see also Wofford*, 795 P.2d at 519. However, the Oklahoma Supreme Court has not adopted (or rejected) the other factors used by the California Supreme Court in *Tarasoff.*

37. OREGON

In recent times Oregon has extensively analyzed questions of duty and negligence liability. The status of duty and negligence liability in Oregon is unusually complex and has been heavily discussed. *See, e.g., Buchler v. Oregon Corrections Division*, 853 P.2d 798 (Or. 1993); Kenneth J. O'Connell, *Ruminations on Oregon Negligence Law*, 24 WILLAMETTE L. REV. 385 (1988); Robert E. Lawrence-Berry, Note, *The Proper Judicial Role in Negligence Actions: The Fazzolari Trilogy Redefines "Negligence,"* 24 WILLAMETTE L. REV. 443 (1988); Caroline A. Forell, *Replacing Pragmatism and Policy with Analysis and Analogy: Justice Linde's Contribution to Oregon Tort Law*, 70 OR. L. REV. 815 (1991). The discussion continues to evolve, particularly with respect to the proper role of the judge and jury. *See Buchler v. Oregon Corrections Division*, 853 P.2d 798 (Or. 1993) (determining that as a matter of law a harm did not result from any risk of harm unreasonably created by defendant); *Fuhrer v. Gearhart-By-the-Sea, Inc.*, 760 P.2d 874 (Or.

1988) (holding that with no knowledge or reason to know of a dangerous condition, defendant could not foresee unreasonable risk of harm and, therefore, claim was dismissed as a matter of law).

In 1987 the Oregon Supreme Court decided three cases which have since provided the starting point for the analysis of duty, foreseeability and liability in negligence. *Fazzolari v. Portland School District No. 1J*, 734 P.2d 1326 (Or. 1987); *Kimbler v. Stillwell*, 734 P.2d 1344 (Or. 1987), *overruled by Buchler v. Oregon Corrections Division*, 853 P.2d 798 (Or. 1993); *Donaca v. Curry County*, 734 P.2d 1339 (Or. 1987). After extensively reviewing the development of Oregon negligence law and secondary sources on duty and negligence liability, *see, e.g.*, *Fazzolari*, 734 P.2d at 1332-36, the Oregon Supreme Court placed heavy emphasis on foreseeability in determining liability and noted the largely negative use of "duty" to limit liability. As such, that court

> held that the concept of duty was not always a useful tool with which to analyze common-law negligence. There may be specific duties established by statute, status or relationship, but the absence of such duties does not insulate a defendant from liability. In the absence of a duty arising from a source of that kind, a defendant may be liable for conduct which is unreasonable in the circumstances if that conduct results in harm to a plaintiff and the risk of harm to the plaintiff or the class of persons to whom the plaintiff belongs was foreseeable.

Fuhrer, 760 P.2d at 877. A critical feature of the Oregon approach is that it reshapes the role of the factfinding process in determining liability: "duty," as such, is in general not a liability limiting tool.[10] Thus,

> [t]he role of the court is what it ordinarily is in cases involving the evaluation of particular situations under broad and imprecise standards: to determine whether upon the facts alleged or the evidence presented no reasonable factfinder could decide one or more elements of liability for one or the other party.

Id. at 1336; *see also Buchler*, 853 P.2d at 809. Judge Linde's opinion in *Fazzolari* viewed this in light of giving "a wide leeway" to the jury. *Fazzolari*, 734 P.2d at 1336 (quoting *Stewart v. Jefferson Plywood Co.*, 469 P.2d 783, 785 (Or. 1970)). Further, Justice Peterson has described

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10. This is not to say that Justice Linde did not forsee some liability limiting role of duty:

> [U]nless the parties invoke a status, a relationship, or a particular standard of conduct that creates, defines, or limits the defendant's duty, the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff.

Fazzolari v. Portland Sch. Dist. No. 1J, 734 P.2d 1326, 1336 (Or. 1987).

this approach as "limiting the role of the judge in controlling the submission to a jury of questions concerning foreseeability." *Buchler*, 853 P.2d at 809 (Peterson, J., concurring) (criticizing *Fazzolari*). Nonetheless, in recent cases, the Oregon Supreme Court has demonstrated its willingness to consider matters of negligence in ways that limit the role of the jury. *See Buchler v. Oregon Corrections Division,* 853 P.2d 798 (Or. 1993); *Fuhrer v. Gearhart-By-the-Sea, Inc.,* 760 P.2d 874 (Or. 1988).

In crafting its unique approach to negligence law, Oregon was specifically aware of Prosser (Green)'s positions on duty (and thus the idea that duty is based upon a calculus of considerations), *Fazzolari*, 734 P.2d at 1335, and California policy factors, *Donaca*, 734 P.2d at 1342 & n.4. Although, Oregon rejects the Prosser (Green) approach at least in part,[11] its practice must be seen in context. As Justice Linde stated:

> There is nothing new in the observation that "duty" is only a conclusion embodying policies making a defendant civilly liable for failure to protect a plaintiff against an injury . . . . This is self-evident when "duty" is used in its primary and meaningful sense of obligations imposed or defined by sources of law external to the common law of negligence itself . . . . And, of course, negligence law itself like all law is a part of a state's public policy. Some courts and theorists therefore have taken the further step that in the absence of statutory sources of public policy, a court should articulate and justify rules of law in terms of policy (described a bit self-servingly as "public" or "social" policy), in other words, adopt a legislative mode of making policy rather than a judicial search for policy made by others or for the implications of existing principles . . . . [W]e have not embraced free wheeling judicial "policy declarations" . . . .

Donaca, 734 P.2d at 1342 (citations omitted). As such Justice Linde noted a variety of factors which the Oregon Supreme Court had refused to consider in recent cases, including the burden on the courts and liability insurance. *Id.* at 1342-43. Justice Linde's explicit rejection of "freewheeling" policy declarations in favor of a search for "principles," however Dworkin-like,[12] should not be confused with judicial conservatism or rule formalism. Indeed, Justice Linde's approach - allowing most or more cases to go to a jury - is one which would systematically expose defendants to greater liability. Specifically, Justice Linde's anti-judicial policy statements expressed in *Donaca* were made in the context

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11. Oregon continues to look to legislative policy in some decisions. *See* Buchler v. Oregon Corrections Division, 853 P.2d 798, 809 (Or. 1993).

12. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY ch. 6 (1977).

of rejecting policy analysis which would have *limited* liability. *Donaca*, 734 P.2d at 1342-44.

38. PENNSYLVANIA

The Pennsylvania Supreme Court has looked to Prosser and case law for guidance with respect to the "nebulous" concept of duty. *See Mindala v. American Motors Corp.*, 543 A.2d 520, 524 (Pa. 1988) (quoting *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3d Cir. 1979); William Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953)). According to that court: "The concept of duty amounts to no more than 'the sum total of those considerations of policy which led the law to say that the particular plaintiff is entitled to protection' from the harm suffered." *Majestic by Majestic v. Commonwealth of Pennsylvania*, 641 A.2d 295, 297 (Pa. 1994) (Montemuro, J., dissenting) (quoting *Gardner v. Consolidated Rail Corp.*, 573 A.2d 1016, 1020 (Pa. 1990)). Pennsylvania has also acknowledged that duty is relational: "Duty in any given situation is predicated on the relationship between the parties at the relevant time . . . ." *Majestic by Majestic,* 641 A.2d at 298; *Mindala*, 543 A.2d at 524; *Morena v. South Hills Health System*, 462 A.2d 680, 684 (Pa. 1983).

The Pennsylvania Supreme Court, quoting Prosser, acknowledges that duty exists when a court says it does, *Gardner*, 573 A.2d at 1020, *Sinn v. Burd,* 404 A.2d 672, 681 (Pa. 1979), and has looked to Prosser's *Palsgraf Revisited, supra*, for the factors which influence duty: "'[t]he hand of history, our ideas 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 . . . .'" *Sinn,* 404 A.2d at 681 (quoting William Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 14-15 (1953)); *see also Gardner*, 573 A.2d at 1020. Similarly, the Supreme Court of Pennsylvania has stated that "in reviewing whether a duty exists the court must determine the relationship between the parties and balance the various competing interests and costs involved in providing the requested protection. This requires a determination of the probability of harm in conjunction with the inconvenience of acting to prevent that harm." *Mindala,* 543 A.2d at 524. One justice, sitting by designation and dissenting, noted factors other courts have emphasized and also made reference to a list of factors which are derivative of factors used in California cases. *Majestic by Majestic*, 641 A.2d at 298 (Montemuro, J., dissenting) (citing 57 AM. JUR. 2d *Negligence* § 87 (1989) and citations in support thereof, including *Thompson v. County of Alameda*, 614 P.2d 728 (Cal. 1980)).

39. RHODE ISLAND

In analyzing questions of duty, the Rhode Island Supreme Court has been influenced by several Prosser (Green) notions and by Andrews' dissent in *Palsgraf*. First, the Rhode Island Supreme Court "has recognized the difficulty of crafting a workable test to determine whether a duty exists in a particular case." *Ferreira v. Strack*, 636 A.2d 682, 685 (R.I. 1994); *see also Marchetti v. Parsons*, 638 A.2d 1047, 1050 (R.I. 1994); *D'Ambra v. United States*, 338 A.2d 524, 527 (R.I. 1975). Since *D'Ambra*, that court has acknowledged that

> the problem of duty is as broad as the whole law of negligence and that no universal test for it has ever been formulated. It is a shorthand statement of a conclusion, rather than an aid to analysis in itself . . . '[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.

D'Ambra, 338 A.2d at 527 (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 53 (4th ed. 1971)); *see also Marchetti,* 638 A.2d at 1050. The Rhode Island Supreme Court is also influenced by Justice Andrews' dissent in *Palsgraf* to the effect that public policy plays a strong hand in determining duty/proximate causation and liability. *See Marchetti*, 638 A.2d at 1050; *D'Ambra*, 338 A.2d at 527.

Second, the Rhode Island Supreme Court has specifically determined to retain an open-ended approach to which factors to use in a given instance. In *Ferreira*, the court stated that it "has avoided 'definitely commit[ting] itself to [a specific] . . . analytical approach' and has instead adopted an ad hoc approach of considering all relevant factors." 636 A.2d at 685 (quoting *D'Ambra v. United States*, 338 A.2d 524, 527, 528 (R.I. 1975)). Thus, *D'Ambra*, in a moment obviously influenced by Green, looked to "three basic categories [of policy issues]: moral, economic and administrative." *D'Ambra*, 338 A.2d at 528. And although the Rhode Island Supreme Court stated five factors in *Banks v. Bowen's Landing Corp.*, 522 A.2d 1222, 1225 (R.I. 1987) (an unusual case involving landowner duties), it later clarified that "those factors were case specific and should not be taken or construed to limit the scope of factors that we shall consider in future cases involving different factual situations." *Ferreira*, 636 A.2d at 685 n.2. The court has deliberately chosen to keep the use of factors open to ad hoc determina-

tion, and has not chosen to follow a repeating pattern or patterns of factors.

40. SOUTH CAROLINA

Apart from acknowledging that duty is an essential element in a negligence case, *see, e.g., Rogers v. South Carolina Department. of Parole and Community Corrections*, 464 S.E.2d 330, 332 (S.C. 1995), and discussions of particular "duties" owed, *see id.* (discussing duty to control or warn of another's dangerous conduct) and *Degenhart v. Knights of Columbus*, 420 S.E.2d 495, 496 (S.C. 1992) (discussing employer's duty to act and protect), there has been little analysis of abstract or general matters of duty in South Carolina to date.

41. SOUTH DAKOTA

South Dakota has recognized that duty can arise from various sources, including public policy: "A noncontractual duty may be imposed by common law, statute, implication or operation of law, public policy, or from a failure to exercise that care which a reasonable person would exercise under like circumstances." *F & M Agency v. Dornbush*, 402 N.W.2d 353, 356-57 (S.D. 1987) (citing 65 C.J.S. *Negligence* § 4(7) (1966); 2 RESTATEMENT (SECOND) OF TORTS § 285 (1965). Citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 56, at 374 (5th ed. 1984), the South Dakota Supreme Court acknowledges that "social policy" may justify liability for non-feasance. *F & M Agency*, 402 N.W.2d at 357.

In addition to being influenced by Prosser's notion that duty involves social policy, the South Dakota Supreme Court has chosen to define duty in light of a particular standard of conduct. *Id.* at 356 (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 53, at 356 (5th ed. 1984)).

42. TENNESSEE

Tennessee has been heavily influenced by Prosser in its analysis of duty and has looked to the *Restatement (Second) of Torts* for factors determining whether or not a risk is unreasonable. In Tennessee, duty is an "essential element in all negligence cases," *see McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995), even though it was not so in early English common law. *Id.*; *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993). Following Prosser on the point that duty is not sacrosanct, but reflecting considerations of policy, the Tennessee Supreme Court has held that "the imposition of a legal duty reflects society's contemporary

policies and social requirements concerning the right of individuals and the general public to be protected from another's act or conduct." *Bradshaw*, 854 S.W.2d at 870 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 358 (5th ed. 1984); William Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953)); *see also Bain v. Wells*, 936 S.W.2d 618, 625 (Tenn. 1997); *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 894 (Tenn. 1996). In addition, following Prosser, the Tennessee Supreme Court has considered duty in terms of the relation between the parties and in light of interests which may be entitled to legal protection. *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 428 (Tenn. 1994) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 37, at 236 (5th ed. 1984)); *Bradshaw*, 854 S.W.2d at 869-70.

Because Tennessee considers duty in light of unreasonable and foreseeable risk of harm, *McCall*, 913 S.W.2d at 153, it has analyzed factors determining whether a risk is unreasonable. *Id.* In that analysis, the Tennessee Supreme Court has looked to factors set forth in the *Restatement (Second) of Torts* for guidance. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 291, 292, 293 (1964)).

43. TEXAS

Texas has not expressly turned to California for guidance on questions of duty, but its approach to questions of duty is compatible with a Prosser (Green) approach and shares some familiar features with California. As Prosser (Green) asserted, the Texas Supreme Court states that "[d]eciding whether to impose a new common-law duty involves complex considerations of public policy." *Graff v. Beard*, 858 S.W.2d 918, 920 (Tex. 1993); *see also Smithkline Beecham Corp. v. Doe*, 903 S.W.2d 347, 351 (Tex. 1995) (also acknowledging that Texas will look to other jurisdictions and respected authorities and restatements for guidance in duty questions); William W. Kilgarlin & Sandra Sterba-Boatwright, *The Recent Evolution of Duty in Texas*, 28 S. TEX. L. REV. 241, 245 (1986).

Texas considers a variety of factors in determining duty, although (as in California) foreseeability remains the most significant. *Mitchell v. Missouri-Kansas-Texas Railroad Co.*, 786 S.W.2d 659, 662 (Tex. 1990); *Genell, Inc. v. Flynn*, 358 S.W.2d 543, 546-47 (Tex. 1990). Among the factors considered by the Texas courts are "'social, economic, and

political questions,' and their application to the particular facts at hand." *Mitchell*, 786 S.W.2d at 662 (quoting 1 TEXAS TORTS AND REMEDIES § 1.03[2] (1989)); *see also Graff*, 858 S.W.2d at 920. In addition, the Texas Supreme Court has considered "the extent of the risk involved, 'the foreseeability and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant.'" *Graff*, 858 S.W. 2d at 920 (quoting *Greater Houston Transportation Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990)); *see also Mitchell*, 786 S.W.2d at 662. Although Texas does not adopt California factors as such, the factors it has relied upon significantly overlap those used by California courts.

44. UTAH

In recent cases the Utah Supreme Court has followed the Prosser (Green) position that duty is an expression of considerations of policy. Utah has considered a variety of factors, but has not looked specifically to California factors.

The Utah Supreme Court asserts that

> it is meaningless to speak of . . . "duties" in the abstract. These terms are only labels which the legal system applies to defined situations to indicate that certain rights and obligations flow from them; they are "an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection."

Beach v. University of Utah, 726 P.2d 413, 418 (Utah 1986) (quoting WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS § 333 (3d ed. 1964)) (citations omitted); *accord Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3d. Cir. 1979) (quoting same); *see also Higgins v. Salt Lake County*, 855 P.2d 231, 237 (Utah 1993); *Debry v. Valley Mortgage Co.*, 835 P.2d 1000, 1003 (Utah Ct. App. 1992) (citing and quoting *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976) (on duty)); *Rollins v. Petersen*, 813 P.2d 1156, 1160 (Utah 1991).

Utah has looked at a variety of factors, often specific to the issue at hand, *see Beach*, 726 P.2d at 418-20, including, in cases involving a duty to control a dangerous person or to warn or protect a potential victim, "the identity and character of the actor, the victim, and the victimizer, the relationship of the actor to the victim and the victimizer, and the practical impact that finding a special relationship would have." *Higgins*, 855 P.2d at 237. Generally, the Utah Supreme Court has been concerned with the

> consequences of imposing that duty for the parties and for society . . . [and has been] loath to recognize a duty that is realistically incapable of performance or fundamentally at odds with the nature of the parties' relationship.

Higgins, 855 P.2d at 237 (citations omitted); *see also Beach*, 726 P.2d at 418.

Utah has relied upon policy-based reasoning to reach conservative, no duty results, *see Beach v. University of Utah*, 726 P.2d 413 (Utah 1986) (denying duty to college students), and to tailor liability, *see Higgins v. Salt Lake County,* 855 P.2d 231 (Utah 1993) (adopting a narrow approach to *Tarasoff* duties).

45. VERMONT

Following Prosser, the Vermont Supreme Court has stated that "the imposition of a duty is 'an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.'" *O'Connell v. Killington*, 665 A.2d 39, 42 (Vt. 1995) (quoting *Denis Bail Bonds, Inc. v. State*, 622 A.2d 495, 499 (Vt. 1993) (itself quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 53, at 358 (5th ed. 1984))); *see also Sabia v. State*, 669 A.2d 1187, 1191 (Vt. 1995); *Langle v. Kurkul*, 510 A.2d 1301, 1305 (Vt. 1986) (quoting *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968)). Although it has not adopted any universal list of appropriate factors, in determining duties owed by governmental bodies, the Vermont Supreme Court has repeatedly referenced a specific list of factors which it borrowed from the Minnesota Supreme Court. *Sabia*, 669 A.2d at 1191; *Denis Bail Bond*, 622 A.2d at 499 (citing *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806-07 (Minn. 1979)). And, in a case involving the question of whether or not to impose social host liability, the Vermont Supreme Court made favorable reference to California factors. *Langle*, 510 A.2d at 1304.

46. VIRGINIA

In recent times the Virginia Supreme Court has remained rooted in the past. Recognizing that duty is essential to a plaintiff's case, it has emphasized the importance of a plaintiff being in a protected class. *See Dudley v. Offender Aid and Restoration of Richmond, Inc.*, 401 S.E.2d 878, 882-83 (Va. 1991) (citing *Palsgraf v. Long Island Railroad,* 162

N.E. 99 (N.Y. 1928); RESTATEMENT (SECOND) OF TORTS § 281 (1965). Thus, in Virginia, "there is no such thing as negligence in the abstract, or in general . . . . Negligence must be in relation to some person." *Kent v. Miller*, 189 S.E. 332, 334 (Va. 1937); *see also Dudley,* 401 S.E.2d at 882; *Marshall v. Winston*, 389 S.E.2d 902, 905 (Va. 1990).

Thus, there has been very little general or abstract discussion of duty by the Virginia Supreme court, which has preferred to view duty in specific relational terms, focusing upon the "scope of the duty" and the "circumstances of the particular case." *Dudley*, 401 S.E.2d at 883. The Virginia Supreme Court has not adopted a Prosser (Green) approach and has only made passing reference to policies which may be used in its duty determinations. *See id.*; *see also Marshall*, 389 S.E.2d at 905.

45. WASHINGTON

The Washington Supreme Court has been influenced by Prosser (Green) notions. In a recent decision, the Washington Supreme Court cast a question of duty in terms of policy, pointing to the Prosser & Keeton treatises for guidance. *Hutchins v. 1001 Fourth Avenue Associates*, 802 P.2d 1360, 1362-71 (Wash. 1991). Implicitly following Prosser, that court has stated that "[u]ltimately, the policy question is one of fairness under contemporary standards." *Id.* at 1371 (citing *Hunsley v. Giard*, 553 P.2d 1096 (Wash. 1976) (quoting William Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953))). Further, following Prosser, the Washington Supreme Court has considered duty in light of a balancing of interests. *See Hutchins v. 1001 Fourth Avenue Associates,* 802 P.2d 1360 (Wash. 1991); *Hunsley v. Giard*, 553 P.2d 1096, 1102 (Wash. 1976); *Chappel v. Franklin Pierce School District, No. 402*, 426 P.2d 471 (Wash. 1967).

Washington puts great emphasis on foreseeability: "foreseeability determines the scope of the duty owed." *Hansen v. Friend*, 824 P.2d 483, 487 (Wash. 1992); *Christen v. Lee*, 780 P.2d 1307, 1313 (Wash. 1989) (considering a number of factors). Obviating the need for considering general policy concerns in a wide number of cases, Washington views foreseeability normally as a question for the finder of fact, usually the jury. *Hansen*, 824 P.2d at 487. However, in the context of determining an attorney's duty to non-clients, the Washington Supreme Court has analyzed questions of duty in light of a hybrid of the multi-factor balancing test first used in California. *Trask v. Butler*, 872 P.2d 1080, 1084 (Wash. 1994); *Strangland v. Brock*, 747 P.2d 464, 467 (Wash. 1987) (citing *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961)); *Bowman v. Two*, 704 P.2d 140, 143 (Wash. 1985).

48. WEST VIRGINIA

The West Virginia Supreme Court engaged in an extensive analysis of duty in *Robertson v. LeMaster*, 301 S.E.2d 563, 566-68 (W. Va. 1983). That analysis drew heavily upon Prosser (Green), *Palsgraf*, and California Supreme Court decisions. Casting duty in evolutionary terms, the West Virginia Supreme Court noted that "[t]hroughout the history of Anglo-American jurisprudence the concept of duty in tort law has evolved in response to the social aims of civilized society." *Robertson*, 301 S.E.2d at 566. Perceiving that, historically "duty existed to act with care towards all others," *id.* (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS §§ 4, 53 (4th ed. 1971)), *Robertson* stated that during the industrial revolution duty began to be used as a device to limit defendants' liability. *Id.* (citing same). *Robertson* asserted, however, that the "pro-defendant bias" has steadily eroded with a shift in emphasis towards compensation. *Id. Robertson* regarded "[t]he California Supreme Court [as] . . . the vanguard of the modern trend to expand the concept of duty in tort cases." *Id.* (citing *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968)).

Following the California lead, West Virginia has put special emphasis on foreseeability of injury. *Id.* at 567; *Miller v. Whitworth*, 455 S.E.2d 821, 824-25 (W. Va. 1995). In addition to foreseeability, "the existence of duty also involves policy considerations underlying the core issue of the scope of the legal system's protections." *Robertson*, 301 S.E.2d at 568 (citations omitted). In this vein, West Virginia has articulated some policy factors: "such considerations include the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing the burden on the defendant." *Id.* at 568 (citing *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968)); *Miller*, 455 S.E.2d at 825. It has acknowledged also that "[o]ther broader policy considerations also enter the equation, but they are not so readily articulated." *Robertson* 301 S.E.2d at 568 (citing Prosser (Green): Leon Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42, 45 (1962); WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS § 53 (4th ed. 1971)).

In the vein of keeping an open-ended approach to policy factors, the West Virginia Supreme Court has been willing to consider ad hoc questions of policy. *Courtney v. Courtney*, 413 S.E.2d 418, 426-28 (W.

Va. 1991) (considering public policy questions in the context of inter-family immunities); *Overbaugh v. McCutcheon*, 396 S.E.2d 153, 158 (W. Va. 1990) (considering but respecting social host liability in light of public policy rationales).

49. WISCONSIN

Without overt reliance on the Prosser (Green) approach as such, the Wisconsin Supreme Court follows an approach to liability and duty which is a compatible variation. Wisconsin's approach is quite similar to the California approach, but Wisconsin uses its own set of policy factors.

The Wisconsin Supreme Court puts heavy emphasis on foreseeability in determining duty and liability, *Rockweit By Donohue v. Senecal*, 541 N.W.2d 742, 747 (Wis. 1995), which that court believes is in the tradition of Justice Andrews' position in *Palsgraf*. *Id; see also Schilling v. Stockel*, 133 N.W.2d 335, 338 (Wis. 1965); *Klassa v. Milwaukee Gas Light Co.*, 77 N.W.2d 397, 401 (Wis. 1956); *Pfeifer v. Standard Gateway Theatre, Inc.*, 55 N.W.2d 29, 34 (Wis. 1952).

Schuster v. Altenberg, 424 N.W.2d 159 (Wis. 1988), has determined the structure of duty/liability analysis in Wisconsin. According to *Schuster*, "A defendant's duty is established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone. A party is negligent when he commits an act when some harm to someone is foreseeable." *Schuster*, 424 N.W.2d at 164 (quoting *A.E. Investment Corp. v. Link Builders, Inc.*, 214 N.W.2d 764 (Wisc. 1974)); *see also Rolph v. EBI Companies*, 464 N.W.2d 667, 672 (Wis. 1991).

Public policy is important to liability in Wisconsin, but in a *negative* way once foreseeability is established. *See Rolph,* 464 N.W.2d at 672. Once an act involving foreseeable harm has been committed, which in fact causes harm to someone, a Wisconsin court, in terms of proximate causation, can make a legal finding of non-liability based on public policy factors. *Id.*; *Schuster,* 424 N.W.2d at 164; *Morgan v. Pennsylvania General Insurance Co.*, 275 N.W.2d 660, 664 (Wis. 1979); *Schilling*, 133 N.W.2d at 339. "Duty" is otherwise not relevant. *Rolph*, 464 N.W.2d at 672; *Schilling v. Stockel*, 133 N.W.2d 335 (Wis. 1965). Wisconsin has stated that for public policy to trump the imposition of liability, the imposition of liability must "shock the conscience of society." *Pfeifer*, 55 N.W.2d at 34; *see also Rolph*, 464 N.W.2d at 672-73; *Schilling*, 133 N.W.2d at 339. The Wisconsin Supreme Court has stated that the following public policy facts are helpful in determining whether to so limit liability:

> "(1) the injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point."

Rolph, 464 N.W. 2d at 673; *see also Schuster,* 424 N.W.2d at 167; *Coffey v. Milwaukee*, 247 N.W.2d 132, 140 (Wis. 1976).

In addition, in two cases predating *Schuster*, the Wisconsin Supreme Court relied upon the California multi-factor or balancing test, articulated in *Lucas v. Hamm*, 364 P.2d 685, 687 (Cal. 1961), in determining the liability of a lawyer to a non-client in a will drafting scenario. *See Green Spring Farms v. Kersten*, 401 N.W.2d 816, 823 (Wis. 1987); *Auric v. Continental Casualty Co.*, 331 N.W.2d 325, 328 (Wis. 1983).

50. WYOMING

Wyoming relies upon the Prosser (Green) approach and has explicitly adopted California factors from *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976). Following and quoting Prosser, the Wyoming Supreme Court has adopted the idea that duty is not sacrosanct, but the sum total of policy considerations. *Gates v. Richardson*, 719 P.2d 193, 196 (Wyo. 1986) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 54, at 357-58 (5th ed. 1984)). The Wyoming Supreme Court has also, following Prosser, considered questions of duty in light of the relations of the parties and interests to be protected. *Pickle v. Board of County Commissioners*, 764 P.2d 262, 265 (Wyo. 1988) (quoting WILLIAM L. PROSSER,HANDBOOK ON THE LAW OF TORTS § 37, at 206 (4th ed. 1971)).

Acknowledging that there is no "scientific formula" for determining duty, *id.* at 265, and that the list of considerations is open-ended, *Gates*, 719 P.2d at 196, the Wyoming Supreme Court has adopted the list of policy factors used by the California Supreme Court in *Tarasoff*. *Ortega v. Flaim*, 902 P.2d 199, 203 & n.3 (Wyo. 1995); *Pickle*, 764 P.2d at 265; *Mostert v. CBL & Associates*, 741 P.2d 1090, 1094-95 (Wyo. 1987); *Gates,* 719 P.2d at 196.

In a recent case, *Ortega,* the Supreme Court of Wyoming refused to abrogate a common law rule and noted in so doing that the party seeking

to change the rule failed to "analyze these factors or provide a record for an analysis," 902 P.2d at 204, but instead only offered a court decision to argue for a modern trend. *Id.* Affirming its commitment to the factors and to argumentation based upon them, the court admonished that "such a change cannot be based solely upon a trend, but rather must be based upon relevant data and analysis which supports the legal, social and/or economic theories behind abrogating the common law." *Id.*