

Undercutting Premises Liability: Reflections on the Use and Abuse of Causation Doctrine

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TABLE OF CONTENTS

I.	INTRODUCTION	971
II.	ABOUT <i>SAELZLER</i>	976
III.	TORT CAUSATION AND <i>SAELZLER</i>	979
IV.	THE <i>SAELZLER</i> RESULT: WHY SHOULD WE CARE?.....	987
V.	HOW WILL <i>SAELZLER</i> AFFECT THE LITIGATION PROCESS?	993
VI.	POSSIBLE SOLUTIONS AND FINAL THOUGHTS	996

I. INTRODUCTION

When the California Supreme Court upheld the trial court's summary judgment for the defendants in *Saelzler v. Advanced Group 400*,¹ it further eroded the chance that crime victims attacked on property where they work or reside would be able to recover from the property owner for negligent security measures. What was surprising about the case was not the court's inclination to protect the property owner, but the ground on which the court affirmed summary judgment: absence of evidence to

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1. 23 P.3d 1143 (Cal. 2001).

raise a triable issue of fact on causation.² Like many torts professors, I am familiar with the incremental increase in barriers to liability occurring in California³ and nationwide,⁴ but the element of “duty,” rather than “causation in fact,”⁵ has been the customary vehicle for this resolution.⁶ In this Essay, I plan to address both the significance of this

2. *Id.* at 1152, 1154. Under California’s summary judgment statute, a defendant may obtain summary judgment if she can point to an absence of evidence on an essential element of the plaintiff’s claim. CAL. CIV. PROC. CODE § 473c(c) (West Supp. 2003). The burden of production then shifts to the party opposing the motion “to make a prima facie showing of the existence of a triable issue of material fact.” *Aguilar v. Atl. Richfield Co.*, 24 P.3d 493, 510 (Cal. 2001). *Aguilar*, *Saelzler*, and *Guz v. Bechtel Nat’l, Inc.*, 8 P.3d 1089 (Cal. 2000), constitute a trilogy of cases that bring California’s summary judgment standard very close to the federal standard. Glenn S. Koppel, *The California Supreme Court Speaks Out on Summary Judgment in Its Own “Trilogy” of Decisions: Has the Celotex Era Arrived?*, 42 SANTA CLARA L. REV. 483, 483 & n.3 (2002).

3. See Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with “New” Torts*, 49 DEPAUL L. REV. 455, 456, 466 (1999) (describing a general trend in the California Supreme Court that removes power from juries, returns it to courts, and tilts in favor of defendants).

4. See Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 649–50 (1992) (noting the expansion of cases imposing liability on landlords for their failure to adopt reasonable security measures to protect their tenants and others against foreseeable criminal attacks and suggesting that this period of expansion has ended); see also Shelley Ross Saxer, “*Am I My Brother’s Keeper?*”: *Requiring Landowner Disclosure of the Presence of Sex Offenders and Other Criminal Activity*, 80 NEB. L. REV. 522, 537–38 (2001) (giving examples of cases from several states that limit premises liability cases to situations where there is a danger of imminent harm).

5. California has condensed causation in fact and proximate causation into a single legal standard under the moniker of “legal” or “proximate cause.” See *Mitchell v. Gonzales*, 819 P.2d 872, 876–79 (Cal. 1991). However, the test the *Mitchell* court approved contains both the cause in fact and proximate cause strands and employs the substantial factor test for cause in fact. *Id.* Likewise, the Restatement and the Restatement (Second) both use the term “legal cause” to encompass cause in fact and proximate cause. RESTATEMENT OF TORTS § 9 (1934); RESTATEMENT (SECOND) OF TORTS § 9 (1965) [hereinafter RESTATEMENT (SECOND)]. The comments to the second tentative draft of the Restatement (Third) reveal the American Law Institute’s judgment that its prior formulations had been neither widely adopted nor particularly helpful. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 26 (Tentative Draft No. 2, 2002) [hereinafter RESTATEMENT (THIRD)]. The tentative draft separates the two concepts into chapters entitled “Factual Cause” and “Scope of Liability (Proximate Cause).” See *id.* §§ 28, 29. In this Essay, I use the terms “cause in fact,” “causation,” and “factual causation” interchangeably.

6. Because this type of case may require a landowner to have taken steps to protect a third person from injury by another, the existence of a legal duty is not a foregone conclusion. See RESTATEMENT (SECOND), *supra* note 5, § 314 (stating that the fact that an actor realizes or should realize action is necessary for another’s aid or protection does not of itself impose a duty); *id.* § 315 (stating that there is no duty to control the conduct of a third person unless a special relationship exists between the actor and the other). Many cases have discussed the issue of when duty ought to be recognized. For instance, California has at times emphasized the need to show foreseeability based on the surrounding circumstances. See, e.g., *Isaacs v. Huntington Mem’l Hosp.*, 695 P.2d 653, 657–59 (Cal. 1985) (rejecting the rigid “prior similar incidents” test for determining the foreseeability of third-party conduct in favor of the

analytical shift for plaintiffs who are alleging that negligent failures to provide security contributed to their injuries and the potential implications for other types of negligence cases.⁷

Personal injury attorneys rightly perceive *Saelzler* as having erected a substantial, almost insurmountable barrier to premises liability.⁸ Under cover of the summary judgment statute, the California Supreme Court has undercut substantive tort law by shifting the meaning of duty and cause in fact and eroding the balance between judge and jury that has been developed through years of tort law.⁹ The court's interpretation

more fluid "totality of the circumstances" test). However, the California Supreme Court shifted its focus eight years after *Isaacs*, holding that duty is determined "by a balancing of 'foreseeability' of the criminal acts against the 'burdensomeness, vagueness, and efficacy' of the proposed security measures." *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215 (Cal. 1993). The court concluded that the "requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents," and that "a high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards." *Id.*

7. The concept of judges erecting evidentiary barriers that modify or circumvent causation rules is not new. Some commentators have argued that federal trial judges in products liability cases have been doing just that in their roles as evidentiary gatekeepers monitoring the admissibility of scientific evidence. See Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 335 (1999). More generally, scholars have recognized that judges twist causation analysis to accommodate concerns that actually pertain to different elements of negligence. See, e.g., Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 544 (1962) (claiming that a common vice in analysis of negligence is overloading the causal relation issue with difficulties more readily and more adequately dealt with in the consideration of other issues); Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 68-72 (1956) (discussing how policy considerations are used by judges to determine whether a causation issue should be submitted to a jury); Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2201 (2000) (citing historical evidence that causation was narrowly conceived in the nineteenth century to protect class interests).

8. *Saelzler*'s attorney's webpage states that *Saelzler* is "the last nail in the coffin of the tort of premises owners' liability for third party criminal assaults." The Law Offices of Borton, Petrini & Conron LLP, *Daniel B. Wolfberg*, at <http://bpclaw.com/wolfberg.htm> (last visited May 27, 2003). Gerald A. Spala, a defense attorney who has written a commentary on *Saelzler*, states that the case seals the fate of many future cases and offers land and business owners "a significant weapon in concluding before trial a great number of these cases." Law Offices of Gerald A. Spala, *Tort Law and Criminal Acts*, at <http://www.geraldspala.com/temp/saelzler.htm> (last visited June 12, 2001); see also Michael J. Estep & Shari Hollis-Ross, *California Supreme Court Makes It Harder to Sue Property Owners in Security Issue Cases*, <http://www.burnhambrown.com/publications/article.cfm?pubid=12> (June 28, 2001); Eric A. Schneider, *Favorable Defense Case—Liability for Criminal Acts: Saelzler v. Advanced Group 400*, at <http://www.amclaw.com/Saelzler.html> (last visited May 27, 2003).

9. See *infra* notes 86-99 and accompanying text.

conflicts with virtually every goal of tort law, whether corrective, compensatory, or deterrent.¹⁰ The *Saelzler* decision has the potential to leave the most vulnerable and poorest plaintiffs in the worst position to obtain compensation for negligence.¹¹ In addition, defendants who owe legal duties and have breached them have no incentive to provide greater protection from crime to those entering their land, and in fact, may have a significant disincentive.¹² In short, the *Saelzler* decision potentially undercuts most of what we understand about how tort law should operate.

The substantive tort implications of the California Supreme Court's opinion in *Saelzler*, pointed out in dissenting opinions by Justices Kennard and Werdegar,¹³ have provoked little commentary in law reviews¹⁴ or the public press¹⁵ despite the opinion's serious impact on

10. Dan Dobbs lists compensation of injured persons and deterrence of undesirable behavior as the most commonly mentioned aims of tort law, but suggests they are subsumed in whole or in part by the broader, often conflicting goals of morality or corrective justice, and policy or social utility. DAN B. DOBBS, *THE LAW OF TORTS* § 8 (2000). This conflict arises because corrective justice focuses on the correctness of imposing liability, while the goal of social policy is to provide a system of rules that furthers the greater good of society. *Id.* Dobbs suggests that the next generation of torts lawyers and scholars must strive for a good mixture of social utility and personal accountability. *Id.* § 12. Gary Schwartz associates negligence liability with strong fairness values and an obvious concern for public safety. Schwartz, *supra* note 4, at 607. He believes that the negligence standard has achieved a synthesis of fairness and deterrence values. *Id.*

11. Despite the existence of statutory compensation for crime victims in some states, those statutory benefits are not nearly as comprehensive as tort damages. *See, e.g.*, CAL. GOV'T CODE § 13957(b) (West Supp. 2003) (limiting recovery under the statute to a maximum of \$35,000, which may be increased to \$70,000 if federal funding is available); FLA. STAT. ch. 960.13(9)(A) (1999) (limiting recovery to \$25,000 for all costs or \$50,000 if a written finding states that the victim suffered catastrophic injury); N.J. STAT. ANN. § 52:4B-18 (West 2001) (limiting recovery to a maximum of \$25,000); *see also infra* notes 97–99 and accompanying text.

12. *See infra* notes 97–99 and accompanying text.

13. *Saelzler v. Advanced Group 400*, 23 P.3d 1143, 1155 (Cal. 2001) (Kennard, J., dissenting); *id.* at 1158 (Werdegar, J., dissenting).

14. The case has been discussed with regard to development of the standard for summary judgment. *See Koppel, supra* note 2, at 531–40. The issue of causation in cases involving landowner liability for crimes on premises was discussed generally, and I believe wrongly, in an article by Rex Sharp. *See Rex A. Sharp, Paying for the Crimes of Others? Landowner Liability for Crimes on the Premises*, 29 S. TEX. L. REV. 11, 57 (1987) (asserting that cause in fact would not be proven even if a plaintiff could prove it was considerably more probable than not that extra security would have prevented the crime).

15. Frederic D. Cohen & Gerald A. Clausen, *Saelzler v. Advanced Group 400: Landowner Liability for Criminal Acts of Third Parties and the Question of Causation*, 22 CIV. LITIG. REP. 77, 79 (2000) (analyzing the court of appeal decision from the perspective of the plaintiff and defense bars); Maura Dolan, *Ruling in Assault Favors Landlords*, L.A. TIMES, June 1, 2001, at B1 (describing the *Saelzler* litigation and the court's opinion); Sonia Giordani, *Plaintiffs Bar Decries New Burden in Premises Suits*, LEGAL INTELLIGENCER, June 4, 2001, at 4 (describing the California Supreme Court ruling as one that "raises the bar on premises liability cases [and] also requires plaintiffs to work harder just to avoid summary judgment in most civil cases"); Dennis Yokoyama, *Danger Zones*, L.A. LAW., Jan. 2002, at 45 (describing the opinions of the court and

the ability of plaintiffs to seek redress against landlords. There are several possible reasons for this lack of debate. First, the question of what evidence is required to survive a motion for summary judgment on the issue of causation is dauntingly technical, involving complex issues of procedure, evidence, and tort law. Second, although the majority's analysis is arguably misguided, it is clear that cause in fact could properly negate liability in some cases at the summary judgment stage, particularly in light of California's liberalization of summary judgment rules.¹⁶ Thus, the issue is not susceptible to a clean resolution that will eliminate the problem. Third, *Saelzler* purports merely to affirm a long line of lower appellate authority,¹⁷ and other states' decisions reflect the same thinking.¹⁸ Thus the issue may seem either tired or futile.

characterizing the case as one in which the court "continued its recent trend of ruling in favor of defendant landowners in premises liability actions involving third-party criminal conduct").

16. The effect of *Saelzler* and other California Supreme Court cases liberalizing summary judgment rules has been to "extend the reach of summary judgment to resolve issues traditionally reserved for jury determination." Koppel, *supra* note 2, at 483. Indeed, federal law and California law have both "unleashed" summary judgment as a tool for case management. *Id.* at 554-67. Judges are permitted to decide on summary judgment issues that previously would have been reserved for rulings on a directed verdict motion at trial. *Id.* at 490. In addition, even before revisions to the summary judgment rules, causation issues were frequently decided before trial as a matter of law. *See, e.g.*, N.Y. Cent. R.R. Co. v. Grimstad, 264 F. 334, 335 (2d Cir. 1920) (stating that the motion to dismiss due to lack of causation should have been granted because the jury's determination that the ship's lack of life preservers caused the decedent's demise was pure conjecture and speculation); Salinetro v. Nystrom, 341 So. 2d 1059, 1061 (Fla. Dist. Ct. App. 1977) (upholding the grant of directed verdict against the plaintiff for lack of causation, reasoning that even if the doctor had asked the plaintiff if she were pregnant, the plaintiff would have answered in the negative); Fennell v. S. Md. Hosp. Ctr., Inc., 580 A.2d 206, 215 (Md. 1990) (holding that no causation can exist where the plaintiff has less than a fifty percent chance of survival).

17. *Saelzler*, 23 P.3d at 1149-51.

18. *See, e.g.*, Post Props., Inc. v. Doe, 495 S.E.2d 573, 577 (Ga. Ct. App. 1997) (holding that, although the attacker could have entered because of the defendant's negligence, he also could have been authorized to be on the premises); N.W. v. Amalgamated Trust & Sav. Bank, 554 N.E.2d 629, 637 (Ill. App. Ct. 1990) (stating that it is a "well settled rule that liability cannot be predicated upon surmise or conjecture as to the cause of the injury"); Perry v. N.Y. City Hous. Auth., 635 N.Y.S.2d 661, 662 (App. Div. 1995) (holding that, where a building had no locks for the outside doors, the landlord was not liable to a tenant assaulted by her ex-boyfriend because the plaintiff offered no evidence that her assailant took advantage of the unlocked doors or that the assailant was an intruder with no right or privilege to be present there); Kirsten M. v. Bettina Equities Co., 634 N.Y.S.2d 481, 482 (App. Div. 1995) (stating that, absent proof of the method by which the perpetrator entered the building, the landlord was not liable to a tenant who was raped in the laundry room by an unknown assailant, even though the building had defective locks on the main entrance); Wright v. N.Y. City Hous. Auth., 624 N.Y.S.2d 144, 146 (App. Div. 1995) (dismissing the complaint on grounds including

The fact that the issues posed by *Saelzler* are subtle and technical only highlights the importance of addressing them with attention and vigilance. The existence of cases that raise the same type of issue in other jurisdictions underscores the importance of understanding *Saelzler*'s implications. I hope this Essay will bring the substantive tort ramifications of *Saelzler* to the attention of judges and lawyers and assist them in addressing the causation issues.

II. ABOUT *SAELZLER*

Marianne Saelzler was delivering a package for Federal Express to a large apartment complex during daylight hours when she was attacked and injured on the premises by several men.¹⁹ Saelzler was unable to identify or apprehend the individuals who had attacked her.²⁰ She sued the owners of the apartment complex, Advanced Group 400, alleging that they had breached a legal duty to her by failing to provide adequate security in three ways: (1) by failing to keep entrance gates locked and functional, (2) by failing to provide daytime security despite the fact that the complex was known to be crime-ridden, and (3) by failing to warn her of the risk of criminal attack.²¹ Although California courts, like many jurisdictions, are hesitant to impose a legal obligation (the duty element of a negligence claim) on landowners to control the criminal acts carried out on the premises,²² Saelzler was able to surmount this hurdle.²³ She was able to allege facts showing that the complex where she was attacked had a record of frequent, recurring violent criminal activity, of which the defendants were well aware.²⁴ There was considerable gang activity surrounding the complex, and one gang was allegedly headquartered within the complex.²⁵ Also, the manager of the complex was the only person who had consistent security protection, always having an escort when she left her office to travel to her car, even during the day.²⁶ Thus, Saelzler showed a pattern of serious criminal

the plaintiff's inability to prove that the attacker was not a tenant of the building and the fact that the attack took place in the stairwell instead of the hallway).

19. *Saelzler*, 23 P.3d at 1147.

20. *Id.*

21. *Id.* at 1145, 1147. The trial court apparently found that the plaintiff had offered no evidence that the defendants could have reasonably and effectively warned members of the public from unspecified dangers of unknown individuals on the premises. *Id.* at 1147. This theory of breach received no attention from the California Supreme Court on review.

22. *See supra* note 6.

23. *Saelzler*, 23 P.3d at 1145.

24. *Id.* at 1147.

25. *Id.*

26. *Id.* at 1147–48. Under California's *Ann M.* case, these allegations met the

behavior at the complex and the management's knowledge of the danger and of the need for security. As to breach of that duty, the evidence was not quite as strong but still sufficient to survive summary judgment.²⁷ There was evidence from which a jury could infer that the defendants had been unreasonable in failing to provide security during daylight hours²⁸ or, alternately, in failing to repair or maintain the security gate.²⁹

The trial court granted summary judgment on the ground that there was no "reasonably probable causal connection" between the defendants' breach of duty and the plaintiff's injuries.³⁰ The plaintiff's evidence did not reveal whether the security gate that the plaintiff had found propped open had been the source of the assailants' entry, nor was it clear whether the assailants were tenants, visitors, or intruders.³¹ The plaintiff's inability to specify the origin or identity of the attackers doomed her argument that the lack of daytime security was a cause in fact of her injury because she could not show that extra security would have made any difference; the thought was that tenant assailants would not have been stopped by functioning gates or security guards.³² The court of appeal reversed, believing that the defendants had neither negated a necessary element of the plaintiff's case nor demonstrated that under no hypothesis were there material facts requiring a trial.³³

landowner duty requirements. The court's approach to duty in *Ann M.* requires a balancing of the foreseeability of harm against the burden of imposing a duty to protect against the criminal acts of third persons. In this way, the court takes into account the interests of business owners and land possessors as well as those of customers or other entrants on land who are the likely crime victims. See *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215 (Cal. 1993).

27. *Saelzler*, 23 P.3d at 1145.

28. The defendants regularly maintained nighttime security; occasionally, and on a random basis, they would provide daytime security. *Id.* at 1147–48. Both the police officers and the head of the defendants' security firm had suggested that the defendants begin regular daytime security patrols. *Id.* at 1148. The defendants' manager was aware of extensive crime on the premises, both from approximately fifty police reports in the previous year and from reports of its own security force. *Id.* at 1147. Finally, the evidence showed that some pizza companies did not deliver to the premises because of security concerns. *Id.*

29. However, the defendants' security logs showed that they regularly inspected access gates to make sure the gates were operational. *Id.* at 1148. Other evidence of reasonableness of steps taken to insure security included the fact that the defendants posted notices threatening eviction of persons involved in drug or gang activity and had carried through with evictions of violent tenants. *Id.*

30. *Id.* at 1148.

31. *Id.* at 1147.

32. *Id.* at 1152.

33. *Saelzler v. Advanced Group 400*, 92 Cal. Rptr. 2d 103, 106 (Ct. App. 1999), *rev'd*,

A majority of the California Supreme Court found the case to fall within a line of court of appeal cases holding that “abstract negligence,” without proof of a causal connection between the defendant’s negligence and the plaintiff’s injury, is insufficient.³⁴ The court reasoned that, given the plaintiff’s factual deficits and what it characterized as a weak and speculative expert opinion that daytime security would have made a difference, the plaintiff could not show that it was more probable than not that additional security precautions would have prevented the attack.³⁵ The court expressed several reasons for its opinion: the fear that finding causation would result in every landowner’s becoming an insurer of the safety of those entering the premises, the financial burden that increased security would impose on landowners and ultimately, tenants of low-income housing, and the possibility that a different resolution would uniformly preclude summary judgment on the causation issue in future cases.³⁶ The court responded to the objection that its opinion would rule out recovery against land possessors by asserting that if a plaintiff could show that an assailant had taken advantage of a lapse in security, and this had been a substantial factor in the assault, causation could be established.³⁷ Future plaintiffs could prove this causal link through eyewitness testimony, security cameras, fingerprints, or other forms of evidence.³⁸

23 P.3d 1143. The *Saelzler* majority stated the burden somewhat differently, noting that under the amended summary judgment statute, the moving party must make a showing that one or more elements cannot be established, at which point the opposing party must show she can reasonably expect to establish the element in contention). *Saelzler*, 23 P.3d at 1146–47. The *Saelzler* majority also characterized the court of appeal’s opinion as having shifted the burden to the defendants because of the defendants’ failure to provide security, and it found this approach contrary to the summary judgment statute and existing case law. *Id.* at 1154. In fact, the gist of the court of appeal’s thinking was that, given the high degree of foreseeability the plaintiff demonstrated to establish duty, causation should generally not be defeated as a matter of law unless there is evidence establishing that the general causal connection between the absence of security and criminal activity does not apply. *Saelzler*, 92 Cal. Rptr. 2d at 112. The court of appeal viewed this analysis as consistent with the general causation principle that where the injury that occurred is precisely the sort of thing that proper care on the part of the defendant would be intended to prevent, the court should allow a certain liberality to the jury in deciding the issue. *Id.* at 110 (citing PROSSER & KEETON ON TORTS 270 (5th ed. 1984)).

34. *Saelzler*, 23 P.3d at 1149–52. Appellate opinions in the line the court cited include the following: *Nola M. v. University of Southern California*, 20 Cal. Rptr. 2d 97 (Ct. App. 1993); *Thai v. Stang*, 263 Cal. Rptr. 202 (Ct. App. 1989); *Lopez v. McDonald’s Corp.*, 238 Cal. Rptr. 436 (Ct. App. 1987); *Constance B. v. State of California*, 223 Cal. Rptr. 645 (Ct. App. 1986); *Noble v. Los Angeles Dodgers, Inc.*, 214 Cal. Rptr. 395 (Ct. App. 1985).

35. The *Saelzler* court thought the primary reason for functioning security gates and guards at the entrances would be to exclude unauthorized persons and trespassers; given the number of problem tenants, the inference that the assailant was an intruder could not be made. *Saelzler*, 23 P.3d at 1151–52.

36. *Id.* at 1152–53.

37. *Id.* at 1154.

38. *Id.*

There were two dissenting opinions; one focused on the majority's use of the summary judgment statute to change the respective roles of judge and jury, and the other focused largely on the substantive tort implications. Justice Kennard believed that the majority opinion blurred the distinction between the role of the court and jury, with the end result reducing the jury's role.³⁹ In her view, a plaintiff should survive summary judgment, even under the amended and rather stringent summary judgment statute, if she could show that a reasonable trier of fact could find in her favor.⁴⁰ Justice Kennard suggested that the majority had usurped the jury's role by ruling on whether causation had been established by a preponderance of the evidence, instead of asking whether the plaintiff had produced evidence from which a trier of fact could have concluded that the element had been established.⁴¹ Justice Werdegar focused instead on what she viewed as a complete distortion of the law on causation. The majority was requiring the plaintiff to show that security devices would have changed the outcome, a burden nearly impossible to meet in many cases, especially where no eyewitnesses exist.⁴² Justice Werdegar also criticized the majority for wrongly importing policy concerns relevant to duty or proximate cause into the causation analysis,⁴³ for rejecting entirely the plaintiff's proffered expert testimony,⁴⁴ and for making unwarranted factual inferences.⁴⁵

III. TORT CAUSATION AND *SAELZLER*

Although both the majority and the dissenting opinions make several distinct arguments, the real dispute in *Saelzler* is about the quantum of proof necessary to survive a summary judgment motion and reach a jury.⁴⁶ Justice Werdegar's claim that the majority distorted the law of causation and Justice Kennard's concern about usurpation of the jury's role both stem from an understanding that cause in fact, like breach, is a

39. *Id.* at 1157 (Kennard, J., dissenting).

40. *Id.*

41. *Id.*

42. *Id.* at 1158, 1164 (Werdegar, J., dissenting).

43. *Id.*

44. *Id.* at 1160.

45. *Id.* at 1159.

46. It is beyond dispute that the broader standard for summary judgment allows resolution of issues that courts would have previously reserved for a jury. Koppel, *supra* note 2, at 490. But despite the increasing reach of the standard, there remain questions as to whether a plaintiff's evidence meets the threshold of raising a material issue.

quintessential jury question and one that can rarely be proven as an absolute.⁴⁷ Indeed, the preponderance of evidence standard applied to all negligence elements permits the inference that a defendant's breach is causally related to the plaintiff's injury when the fact finder finds it more likely than not.⁴⁸

Certainly there are cases in which the plaintiff cannot meet the threshold, but these do not and should not change the way courts approach sufficiency of evidence questions. The plaintiff's task is to present evidence connecting the defendant's alleged breach to the injury, and sometimes, neither direct nor circumstantial evidence exists. For example, in one California case, an assault, apparently committed by one group of patrons upon another, occurred in the Dodger Stadium parking lot following a game.⁴⁹ Even if one could prove that security staffing levels had been unreasonable, there was little reason to think that the presence of extra security would have prevented the assault, given both the huge lot and the lack of any evidence that the event was anything other than a random outburst.⁵⁰ Similarly, in a Utah case, a guest in the defendant's hotel was found murdered, but there was no sign of forced

47. See RESTATEMENT (SECOND), *supra* note 5, § 433B cmt. b.

48. See DOBBS, *supra* note 10, § 173.

[C]ourts have often recognized, implicitly or explicitly, that the jury must be permitted to make causal judgments from its ordinary experience without demanding impossible proof about what would have occurred if the defendant had behaved more safely. . . . [I]f the defendant's conduct is deemed negligent for the very reason that it creates a core risk of the kind of harm suffered by the plaintiff, then it is often plausible to infer causation in fact.

Id.; see also David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1773-74 (1997) (noting the preponderance standard and stating that "no plaintiff will ever be able to establish beyond all doubt what would have happened had the defendant's conduct been lawful").

49. *Noble v. L.A. Dodgers, Inc.*, 214 Cal. Rptr. 395, 396 (Ct. App. 1985). Mr. Noble and his wife were walking to their car in the stadium parking lot when they witnessed other fans urinating and vomiting near a car. Mr. Noble apparently said something to them and a scuffle ensued. He was injured as a result, and his wife brought a claim for emotional distress for witnessing the injury to her husband. The case went to a jury, which evidenced confusion but ultimately found the plaintiff husband to be fifty-five percent at fault and the wife to be thirty-five percent at fault. *Id.*

50. Unlike *Saelzler*, *Noble* was a case where there were no allegations of any specific breaches of security or other negligence, but rather a generalized allegation that more security would have prevented the injury. See *id.* at 399. The evidence revealed very low foreseeability of injury (five parking lot fights in the past sixty-six night games) and that a security force was employed to police the parking lot. See *id.* at 397. It is a case in which the evidence supporting duty and breach of duty seemed completely inadequate, and there was no basis on which to think security could have prevented an altercation between departing fans. *Saelzler*, on the other hand, had far more evidence of the predictability of criminal activity, specific allegations of negligence with regard to security devices on the premises and, despite the lack of proof as to the identity of the attacker, a much more plausible claim that reasonable precautions could have prevented the attack.

entry.⁵¹ With no evidence as to how the murderer had entered the room, the court found that even if there had been a showing of negligence by the defendant, any supposition as to the manner of entry would be speculation.⁵² In such cases, summary judgment should be granted.

But the California Supreme Court went well beyond a review of the sufficiency of the evidence in *Saelzler*. Although the court suggested that it was seeking evidence to meet the substantial factor test,⁵³ the court's examples of the necessary proof and the cases it relied upon strongly suggest that, unless evidence shows an assailant *in fact* exploited a security breach, there will *never* be grounds for a case to get to a jury.⁵⁴ The existence of that level of proof would clearly establish causation, but it would set the bar too high for most cases, thus depriving the jury of the opportunity to make reasonable inferences and deductions from the facts. For example, in *Saelzler*, a jury, if given the chance, might have inferred from the alleged facts that the presence of security guards would have deterred criminal attacks, whether from inside or outside the complex. This inference would be logical because the manager had security at all times when leaving her office, and daytime security had been recommended by both the complex's own security firm and the police. Yet the court not only precluded the jury from considering this issue, but went so far as to adopt the defendants' theory despite the existence of evidence that could have warranted the fact finder's adoption of the plaintiff's version.⁵⁵ By characterizing the case

51. *Mitchell v. Pearson Enters.*, 697 P.2d 240, 241–42 (Utah 1985).

52. *Id.* at 246.

53. *Saelzler*, 23 P.3d at 1153.

54. *Id.* at 1153–54. The court made clear that it is looking for evidence that shows the “assailant took advantage of the defendant’s lapse . . . in the course of committing his attack, and that the omission was a substantial factor in causing the injury.” The evidence that could prove this might include “[e]yewitnesses, security cameras, even fingerprints or recent signs of break-in or unauthorized entry.” *Id.* at 1154. The court found *Leslie G. v. Perry & Associates*, 50 Cal. Rptr. 2d 785 (Ct. App. 1996), to be the most analogous case. *Saelzler*, 23 P.3d at 1150. In *Leslie G.*, summary judgment for the defendant was affirmed in a case where the plaintiff sued the owners of her apartment building for negligence in failing to repair a broken security gate. The court of appeal stated that without direct evidence that the rapist had entered through the broken gate, the plaintiff could not survive summary judgment. *Leslie G.*, 50 Cal. Rptr. 2d at 792.

55. *See Saelzler*, 23 P.3d at 1154.

First, and contrary to the Court of Appeal’s hyperbole, the evidence discloses no flagrant failure in this case. As we have seen, most of the assaults and similar incidents of crime plaintiff has cited occurred during the night, and the record indicates defendants did provide extensive nighttime security. Moreover, plaintiff’s own evidence showed that defendants at least attempted

as a claim of inadequate, as opposed to nonexistent, security,⁵⁶ the court made the plaintiff's burden prohibitively difficult.⁵⁷ This characterization, pivotal to the outcome, turned on purely factual inferences that should have been made by the jury.

There is no reason to think courts are able to draw better factual inferences than juries in negligence cases.⁵⁸ In *Saelzler*, for example, Justice Werdegar took the majority to task for making the inference that daytime security would only serve the function of keeping unwanted intruders from entering the complex; in her view, daytime security would have been instrumental in monitoring and controlling the criminal elements inside the large complex.⁵⁹ Given two plausible inferences, the jury rather than the court should have made the decision as to which was more likely.

Many plaintiffs have retained experts to try to surmount the inherent uncertainty about whether security would likely have deterred the crime that resulted in their injuries. However, courts tend to disapprove of this costly addition to the litigation process.⁶⁰ In premises liability cases,

to keep all security gates in working order, performing regular inspections and repairs.

Id.

56. The parties disputed whether or not there was security during the evenings. The defendants pointed to the occasional employment of evening security, while the plaintiff pointed to the absence of regular security. *Id.* at 1147–48.

57. A plaintiff alleging that existing security is inadequate triggers the objection that it is impossible to know how much security is enough. A claim that there was no security at all has been more successful in convincing a court that, had some security been provided, it would likely have proven an effective deterrent. *See, e.g., Phillips v. Perils of Pauline Food Prod., Inc.*, 42 Cal. Rptr. 2d 28, 38 (Ct. App. 1995) (ordered not published) (distinguishing nonfeasance and misfeasance).

58. The fallacy that judges can decide factual issues better than juries has been illustrated various times in connection with decisions related to breach of duty. The classic example is Justice Holmes's conclusion, in *Baltimore & Ohio Railroad Co. v. Goodman*, 275 U.S. 66, 70 (1927), that a plaintiff was conclusively unreasonable if he did not stop, look, listen, and exit his vehicle to look down the track at a railroad crossing. Judge Cardozo's opinion in *Pokora v. Wabash Railway Co.*, 292 U.S. 98, 105–06 (1934), pointed out the problems with Holmes's approach. While Holmes furthered judicial economy, he did so by sacrificing the fact-sensitivity and flexibility required to reach a fair result.

There are numerous empirical studies on the issue of jury competency. For a comprehensive review and evaluation of the literature, see Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1262–80 (1992). Professor Saks concludes that “[t]he great majority of jury verdicts reach the same result that judges would in the same cases. *Id.* at 1287; *see also* Valerie P. Hans, *Attitudes Toward the Civil Jury: A Crisis of Confidence?*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 248, 248–81 (Robert E. Litan ed., 1993) (describing the results of a survey the author conducted); Neal R. Feigenson, *Can Tort Juries Punish Competently?*, 78 CHI.-KENT L. REV. 239, 286–88 (2003) (reviewing CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES (2002), a report of empirical study on jury awards and concluding that, contrary to Sunstein's view, judges do only a minimally better job at correctly awarding punitive damages than do juries).

59. *Saelzler*, 23 P.3d at 1159 (Werdegar, J., dissenting).

60. Although the American system generally discourages opinion testimony, both

courts frequently reject an expert's testimony about the role that particular security devices or strategies play in crime prevention because the experts express only their opinions and cannot testify with any certainty as to whether changes would have averted the crimes.⁶¹ Yet experts, by definition, give opinions, and they do so even on motions for summary judgment.⁶² Plaintiffs seeking to use expert testimony thus encounter the same categorical view of causation that they find when they rely on lay testimony; courts want the experts to establish causation absolutely and often this is impossible. In my view, because of the costs entailed, plaintiffs and defendants would probably benefit if premises liability cases could be litigated without the use of experts. In many instances, the experts' contributions offer little more than confirmation of what lay juries would infer. But, as with other types of cases, an expert with proper preparation and analysis might testify persuasively that certain precautions would likely have prevented a criminal attack.⁶³

lay and expert opinion may be admissible. FED. R. EVID. 701, 702; CAL. EVID. CODE §§ 702, 720, 800, 801 (West 1995). When the jury is equipped to make the factual determination without such evidence, expert evidence should be excluded. See *Brugh v. Peterson*, 159 N.W.2d 321, 325 (Neb. 1968) (finding that the expert testimony was neither necessary nor advisable as an aid to the jury). In California, the determination of the competency and qualification of an expert is left to the sound discretion of the trial court. *Redevelopment Agency v. First Christian Church*, 189 Cal. Rptr. 749, 757 (Ct. App. 1983). Its determination will not be disturbed on appeal unless a manifest abuse of discretion is shown. *Id.*

61. In *Nola M.*, the court criticized the expert for finding fault with all of the University of Southern California's security efforts and explaining how he would have done the job better, but being unable to say that a different configuration would have changed the outcome. *Nola M. v. Univ. of S. Cal.*, 20 Cal. Rptr. 2d 97, 107 (Ct. App. 1993); see also *Leslie G. v. Perry & Assocs.*, 50 Cal. Rptr. 2d 785, 794-95 (Ct. App. 1996) (excluding an expert because of the court's determination that the expert's opinion was based on speculation); *Thai v. Stang*, 263 Cal. Rptr. 202, 209 (Ct. App. 1989) (finding that the expert opinion was properly excluded by the trial court as too speculative).

62. See Edward Brunet, *The Use and Misuse of Expert Testimony in Summary Judgment*, 22 U.C. DAVIS L. REV. 93, 93-94 (1988) (discussing the use of experts at the summary judgment stage and noting that, while summary judgment affidavits are to be made on the basis of personal knowledge, experts usually do not have personal knowledge). Brunet notes that current evidentiary trends encourage the use of experts and that experts are "common-place" in some types of cases, such as medical malpractice cases. *Id.* at 94.

63. The California Rules of Evidence attempt to assure that the expert's opinion is reliable by limiting experts to those opinions that are based on matter "that is of a type that reasonably may be relied upon" by experts in the field. CAL. EVID. CODE § 801 (West 1995). In the event the expert opinion is based on novel scientific principles, California uses the *Kelly* test, from *People v. Kelly*, 549 P.2d 1240 (Cal. 1976). Under that test, the proponent must persuade the judge that the scientific principle or technique has been "sufficiently established to have gained general acceptance in the particular

It is perfectly legitimate to require experts to be reliable, but it is wrong to expect their testimony to establish causation conclusively.

Saelzler's potential stranglehold on this type of premises liability case is apparent upon consideration of what has followed in its wake. In a recent case involving the shooting of a patron during a liquor store robbery, the California Court of Appeal followed *Saelzler*'s lead in completely discounting all of the evidence that the plaintiff was able to present.⁶⁴ Initially, the defendant moved for summary judgment on the ground that no duty existed, but the trial court ruled for the plaintiff.⁶⁵ The case went to trial, where a motion for nonsuit was granted on the ground that one prior robbery at the store did not provide sufficient foreseeability to establish a duty and that there was no evidence that, had security measures existed, the robbery would have been prevented.⁶⁶ The court of appeal held that while the store owed its patrons a duty to take reasonable steps to secure its premises against robbery because the store had been the site of an armed robbery six months earlier, the evidence was insufficient to meet the plaintiff's burden on causation.⁶⁷ Although the plaintiff's expert, a police officer who patrolled the area on a bike and owned his own private investigation company, testified that several security measures that deter crime could have been used, the court found the expert's opinion too speculative.⁶⁸ It found no evidence that various security measures—fewer papers blocking the windows, signs indicating the presence of surveillance,⁶⁹ a sign advising of limited amounts of money on hand—would have made a difference.⁷⁰ The court concluded that a security guard likewise would have made no difference because the plaintiff himself was a security guard and did not stop the robbery.⁷¹ The court paid no attention to the fact that there had been only fifteen seconds between the assailants' entry into the store and the shooting, or that the plaintiff had been acting not as a security guard, but as a customer receiving change, at the moment he was shot.⁷²

field in which it belongs." *Id.* at 1244 (quoting *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)). Federal courts use the four guidelines set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to assess the scientific validity of certain scientific evidence.

64. *Yoon v. Suh*, No. B144809, 2001 WL 1227950, at *7 (Cal. Ct. App. Oct. 16, 2001).

65. *Id.* at *1.

66. *Id.* at *3–4.

67. *Id.* at *4.

68. *Id.* at *6.

69. There was a surveillance camera, but it was aimed only at the cash register and did not record the crime in issue. *Id.* at *1 n.3. There was also a door alarm, but it was not triggered because the store was open at the time of the robbery. *Id.* at *1.

70. *Id.* at *7.

71. *Id.*

72. The plaintiff was at the store purchasing cigarettes for resale in his own store.

As the *Saelzler* court envisioned, there will be some cases in which a plaintiff will have the required proof that the security device alleged to have permitted the security breach would have prevented the crime.⁷³ For example, in a recent California case, a plaintiff survived summary judgment when she sued her landlord because an assailant had beaten her after she had parked in a carport near her apartment.⁷⁴ She alleged evidence to prove both that her landlord had asked the city to close an alley adjoining the carport to reduce crime and that some of the parking spaces in her complex had been closed off by gates.⁷⁵ She stated further that she did not recognize the assailant as a fellow tenant and that he had entered the carport via its ungated alley entrance.⁷⁶ The court of appeal concluded that the defendants had not satisfied their burden of producing evidence that would require a trier of fact to find, more likely than not, an absence of causation.⁷⁷

Cases in which plaintiffs are able to prove causation at the level of certainty the court contemplates will be few; the challenge is to determine whether cases lacking documentary evidence and eyewitnesses can go forward. It is not possible, or even desirable, to try to specify exactly what evidence should suffice to raise a triable issue of fact regarding causation; the factual variation is too great and judges must exercise

Although he was trained as a security guard, he was at the defendant's store as a patron. Presumably, he was not dressed as a security guard. He had a gun with him, but it was tucked in the back waistband of his pants. He had not wanted to leave it in the car. *Id.* at *2.

73. See *Saelzler v. Advanced Group 400*, 23 P.3d 1143, 1154 (Cal. 2001). That this level of certainty is required is fairly clear from a number of comments: "[S]he is unable to prove they would not have succeeded in assaulting her if defendants had provided additional security precautions," *id.* at 1145; "Despite her expert's speculation, plaintiff cannot show that roving guards would have encountered her assailants or prevented the attack," *id.* at 1152; "[I]f the plaintiff in that case, [*Leslie G.*], could have proved her rape could have been prevented by a working security gate 'we wouldn't be having this discussion,'" *id.* at 1154 (quoting *Leslie G. v. Perry & Assocs.*, 50 Cal. Rptr. 2d 785, 793 n.5 (Ct. App. 1996)).

74. *Wiesman v. Plutsky*, No. B151727, 2002 WL 1924028, at *1 (Cal. Ct. App. Aug. 20, 2002).

75. *Id.* at *2.

76. *Id.* at *1.

77. *Id.* at *9. The court stated that the defendants' expert's opinion did not bear on whether gating would have deterred or otherwise prevented the robbery. *Id.* This panel of the court of appeal appears to have given some teeth to the requirement that the party moving for summary judgment make a prima facie showing of the nonexistence of any triable issue of material fact. See *id.* In *Saelzler*, Justice Chin made it clear that the burden on the movant can be met simply by pointing to an absence of evidence in the record to support the plaintiff's prima facie case, thus bringing California to the brink of the federal model. See Koppel, *supra* note 2, at 533.

their judgment.⁷⁸ In doing so, courts need to remind themselves of the large body of law that emphasizes the inherent uncertainty entailed in most causal inquiries. Such ambiguity is something courts simply have to live with, or they risk converting causation into an impossibly high barrier.⁷⁹ Years ago, Leon Green cautioned against exactly the situation that seems to have evolved in *Saelzler* and similar cases.⁸⁰ He described the causal relation issues in cases involving failure to provide safeguards for the victim's protection as among the "most difficult" and cautioned against framing the inquiry in terms of whether the injury would have been averted had the defendant performed his duty.⁸¹ As he put it, "To ask whether he would have escaped unscathed had the facilities been provided may present a false issue heavily weighted against the victim and one that can seldom, if ever, be answered."⁸² Green also observed that much of the confusion about causation stems from the courts' tendency to overburden the element with policy concerns that relate to other elements of negligence.⁸³ That is precisely what occurred in *Saelzler*.

78. Inevitably, some courts reach different conclusions on the same basic facts, but they must grapple with the uncertainty. Compare *Ingersoll v. Liberty Bank of Buffalo*, 14 N.E.2d 828, 830 (N.Y. 1938) (holding the dismissal of a complaint to be improper when a reasonable inference from the facts was that a defective tread caused a fall down the stairs, despite the fact that the jury might have concluded that a heart problem was the cause, because plaintiffs do not have to eliminate every possible cause as long as they show facts from which causation may be reasonably inferred), with *McInturff v. Chi. Title & Trust Co.*, 243 N.E.2d 657, 663 (Ill. App. Ct. 1968) (ruling that the evidence was insufficient to raise a jury question on causation where a worker fell down the stairway with no handrail because there were no eyewitnesses to the fall).

79. In an earlier era, some courts required the same type of direct evidence tying the breach to the injury as the California Supreme Court did in *Saelzler*. See, e.g., *Wolf v. Kaufmann*, 237 N.Y.S. 550, 551 (App. Div. 1929) (dismissing the plaintiff's negligence claim due to the fact that she could not rule out, by eyewitness testimony or other evidence, the decedent's improper use of the stairs and thus failed to establish a sufficient causal connection between his fall and the unlighted stairway). But as Judge Calabresi observed in writing for the Second Circuit, "All that has changed . . ." *Zuchowicz v. United States*, 140 F.3d 381, 390 (2d Cir. 1998). As Judge Calabresi recounts the history, Chief Judge Cardozo of New York and Chief Justice Traynor of California led the way, leading William Prosser to write that whether the defendant's negligence consists of a statutory violation or a breach of the common law standard, "the court can scarcely overlook the fact that the injury which has in fact occurred is precisely the sort of thing that proper care on the part of the defendant would be intended to prevent, and accordingly allow a certain liberality to the jury in drawing its conclusion." *Id.* at 391 (quoting *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 41, at 270 (5th ed. 1984)).

80. Green, *supra* note 7, at 548–62.

81. *Id.* at 559.

82. *Id.*

83. *Id.* at 552.

IV. THE *SAELZLER* RESULT: WHY SHOULD WE CARE?

Although it may be tempting to dismiss *Saelzler* as a case in which a plaintiff's attorney presented the evidence poorly, the case has greater implications. Likewise, it would be a mistake to view the case simply as an endorsement of policy arguments that disfavor plaintiffs' suing landowners following injury by third-party criminal attacks.⁸⁴ While a majority of the court expressed policy concerns that favor land possessors, of greater import is that it did so in a manner that sacrifices crucial distinctions between duty and causation.⁸⁵ It is precisely because *Saelzler* can be rationalized or overlooked that it is important to grapple with the way in which the case confounds the distinctions between duty and cause in fact.

The matter of whether a landowner has an obligation to protect a tenant from criminal conduct on the premises has been addressed hundreds of times, and courts have found, in the main, that such a duty can exist.⁸⁶ Like causation, duty is not absolute; duty is established only where landowners could foresee a certain type of crime on their property and only when the level of foreseeability outweighs the burden of imposing a duty in those circumstances.⁸⁷ Courts are well aware of the troubling policy issues that this duty may present.⁸⁸ A plaintiff who has

84. Koppel raises the issue of whether the liberal summary judgment statute "will provide leverage for judges to divert cases from the jury that they disfavor on substantive grounds." Koppel, *supra* note 2, at 539–40. I believe it not only provides leverage for judges, but it also has given judges license to remake tort law.

85. This blurring is ironic, as it does not seem to have been the court's intent. The court criticized the court of appeal for blurring causation and duty. *Saelzler v. Advanced Group 400*, 23 P.3d 1143, 1153 (Cal. 2001).

86. See, e.g., HARRY D. MILLER, CALIFORNIA REAL ESTATE § 22.54 (3d ed. 2001) (discussing the basis for recognizing a duty and citing various case examples); MICHAEL PAUL THOMAS ET AL., CALIFORNIA PREMISES LIABILITY: LAW AND PRACTICE § 1:50 (1996) (providing numerous examples of instances where a duty has been recognized by prior case law); John C. Findlay, Jr., *Premises Liability—Kuzmicz v. Ivy Hill Park Apartments, Inc.: Is the Landlord His Neighbor's Keeper?*, 21 AM. J. TRIAL ADVOC. 425, 425 (1997) (stating that "[a] landlord's duty to protect his tenants from third party criminal actions on his own property is well defined in the great majority of jurisdictions").

87. See *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215 (Cal. 1993) ("[D]uty in such circumstances is determined by a balancing of 'foreseeability' of the criminal acts against the 'burdensome, vagueness, and efficacy of the proposed security measures." (quoting *Gomez v. Ticor*, 193 Cal. Rptr. 600, 606 (Ct. App. 1983))); see also *supra* note 6. Duty is a question of law, to be decided on a case-by-case basis. See, e.g., *Isaacs v. Huntington Mem'l Hosp.*, 695 P.2d 653, 658 (Cal. 1985) (listing multiple factors a court must consider in deciding whether to impose a duty of care on a landowner).

88. See, e.g., *Powell v. Lemon Tree Inv. Co.*, No. B153363, 2002 WL 31053939,

pleaded sufficient facts to survive a motion to dismiss or a motion for summary judgment on duty grounds has withstood a powerful test.

However, when the *Saelzler* majority relied in its causation discussion on arguments that liability would burden land possessors, it gave defendants a chance to argue the duty question all over again. The policy issues the court raised had nothing to do with causation.⁸⁹ Rather, they were precisely the same burden arguments that already had been taken into account in analyzing duty.⁹⁰ The element of duty, considerably

at *3 (Cal. Ct. App. Sept. 16, 2002) (using the policy-oriented factors from *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), to decide whether there was a duty to an injured motorist); *Caristi v. Dinielli*, No. E029053, 2001 WL 1250164, at *8 (Cal. Ct. App. Oct. 18, 2001) (discussing the burden of imposing a duty on a landlord to screen tenants to determine potential violence and whether such scrupulous screening would even be effective in preventing injury); *Kotecki v. Walsh Constr. Co.*, 776 N.E.2d 774, 780 (Ill. App. Ct. 2002) (holding that the effect of imposing a duty on a landowner for injury to an employee of a painting subcontractor ignores the complicated working realities of a construction site); *Smith v. Dodge Plaza Ltd. P'ship*, 811 A.2d 881, 888 (Md. Ct. Spec. App. 2002) (arguing against imposing a duty on a landlord to protect tenants' invitees from criminal activity for fear that this would convert a landlord into an insurer).

89. Some scholars believe that causation should not be tainted by policy considerations. See, e.g., Green, *supra* note 7, at 549–50. “The moment some moral consideration is introduced into the inquiry the issue is no longer one of causal relation. Causal relation is a neutral issue, blind to right and wrong.” *Id.* at 549. However, the seminal causation opinions reveal that policy does indeed play a role. See, e.g., Malone, *supra* note 7, at 61. In his classic article, Professor Malone sought to establish that difficult decisions regarding cause in fact are often influenced by policy. *Id.* However, even if one accepts the argument that cause in fact decisions are laden with policy, there is still a question of what policies are applicable. Malone’s suggestions are highly subject-specific; for example, fact finders nearly always ignore the uncertainty of rescue at sea in cases brought by lost seaman, because it would be futile to recognize a duty to provide rescue equipment and then allow defendants to escape by seizing on the uncertainty that nearly always attends a rescue operation as a reason for dismissing the claim. *Id.* at 75, 77. In Malone’s view, the policy issues relating to cause in fact are so closely aligned with undefinable values that they are difficult to segregate and harmonize. *Id.* at 99. Although he recognizes the power of judges to determine what is sent to the jury, Malone views cause in fact as a matter where “the layman’s sense of values is deemed to be as good as that of the judge.” *Id.*

90. To the extent that one can identify general causation policies, they are quite distinct. One generalization Malone makes is that:

[w]henever it can be said with fair certainty that the rule of conduct relied upon by the plaintiff was designed to protect against the very type of risk to which the plaintiff was exposed, courts have shown very little patience with the efforts of defendant to question the sufficiency of the proof on cause.

Malone, *supra* note 7, at 73. Robertson states that all jurisdictions occasionally relax the normal requirements to serve the ends of justice and catalogs eight conceptual devices used to do so. These include the following: shifting from the but-for causation test to the substantial factor test, considering joint tortfeasors to be vicariously responsible for one another’s conduct, shifting the burden of proof to the defendant on cause in fact, using *res ipsa loquitur* to avoid causation difficulties, recognizing that a plaintiff may recover from a defendant who destroyed a chance of avoiding physical injury, holding each of two tortfeasors liable because they defeated or destroyed the plaintiff’s chances of proving causation against the other, using joint and several liability law to extend each tortfeasor’s responsibility, and adopting theories of market share liability. Robertson,

evolved from seminal cases such as *Palsgraf v. Long Island Railroad Co.*,⁹¹ casts judges in the role of gatekeepers. Indeed, many courts explicitly balance conflicting policy interests to decide who should be permitted to sue and what types of injuries should be deemed cognizable.⁹² The policy concerns presented by the *Saelzler* court majority are hardly trivial; essentially, the primary concern is that landowners will become insurers of entrants on land and that ultimately, the extraordinary burden of providing extra security will fall on the very class of persons the plaintiffs represent.⁹³ However, to insert these

supra note 48, at 1775–76. Case law provides examples of each of these devices. Each is a response to specific factual obstacles that make causation difficult, if not impossible, to establish utilizing the traditional but-for test and reflects a policy judgment that to preclude the plaintiff from any chance of recovery would be gravely unfair and indeed contrary to good policy. For example, *Summers v. Tice*, 199 P.2d 1 (Cal. 1948), involved two hunters, each of whom had negligently fired in the direction of the plaintiff. One piece of gunshot inflicted most of the plaintiff's damage, but he was unable to discern the source of the shot. The court shifted the burden of proof to the defendants to show they were not the cause and, barring their ability to do so, held they would be jointly and severally liable. *Id.* at 3–4. Without this burden shift, both defendants would have escaped liability. In *Haft v. Lone Palm Hotel*, 478 P.2d 465 (Cal. 1970), the California court, in a somewhat implausible construction of a California statute, held that the burden of proving causation in a case involving a motel pool drowning shifted to the defendant motel because the motel's failure to provide a lifeguard deprived the plaintiff of any witness to the drowning. *Id.* at 474–75. The difficulty with the analysis lay in the fact that the California statute the court was discussing did not require the motel to have a lifeguard.

91. 162 N.E. 99 (N.Y. 1928). Justice Cardozo's conception of duty was narrow in this case, reflecting none of the broad policy concerns that typify some of his other opinions. Working within the parameters of the duty element, he assigned the task of limiting liability to judges. See JOSEPH E. PAGE, TORTS: PROXIMATE CAUSE 46–49, 80 (2003).

92. See, e.g., *Rowland*, 443 P.2d at 564 (holding that there is a duty of care to persons foreseeably injured on land, regardless of status, unless public policy mandates an exception). Departure from this duty involves balancing the following: foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff was injured, 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 that a duty would impose, the consequences to the community of imposing a duty, and the availability, cost, and prevalence of insurance for the risk involved. *Id.* Leon Green was an early proponent of this policy balancing. See generally Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928); Leon Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255 (1929).

93. The majority accepted the reasoning of the court of appeal's dissent, which had noted that the ultimate cost of liability would be passed on to tenants in the form of increased rent. *Saelzler v. Advanced Group 400*, 23 P.3d 1143, 1152 (Cal. 2001). Similar arguments have been made elsewhere in the law (e.g., against recognition of the warranty of habitability in the 1970s). See, e.g., Joel R. Levine, *The Warranty of Habitability*, 2 CONN. L. REV. 61, 89–93 (1969) (discussing the argument that the cost increases connected with the warranty of habitability will force landlords to raise rents or abandon their buildings); Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law:*

policy concerns into causation analysis, where there is no analytical mechanism to counterbalance them, gives them too much power.

The policy issues relating to the question of relative culpability as between the perpetrator of a crime and a landowner are analytically separate from causation issues. Such concerns might raise proximate cause issues, but even there the law favors the plaintiff. Courts have taken the view that they ought to be cautious about releasing a negligent tortfeasor from liability, especially if that defendant had created the opportunity for the more culpable perpetrator to act.⁹⁴ Other tort doctrines, such as joint and several liability, similarly reflect a policy of drawing in every culpable party, rather than releasing one at the expense of the other.⁹⁵ Indeed, the perceived unfairness of joint and several liability lies precisely in the fact that the least culpable defendant may end up paying the whole; nonetheless, this is still the rule in a large

Causes and Consequences, 69 CORNELL L. REV. 517, 558–59 (1984) (discussing mainstream critical analysis of the revolution in landlord-tenant law, including critics' fears that those least able to pay increased rents would lose more than they gain from the warranty of habitability). Despite these criticisms, many states, either through legislation or judicial opinion, have adopted the view that public policy demands that property meet certain minimal criteria. See, e.g., RESTATEMENT (SECOND) OF PROP. § 5 stat. note 1 (1977) (listing thirty-three states and territories that had adopted legislation requiring the landlord to put leased premises into a condition fit for their intended use as of June 1, 1976); 2 RICHARD R. POWELL ET AL., POWELL ON REAL PROPERTY § 16B.04[2] n.42 (Michael Allan Wolf ed., 2003) (listing twenty jurisdictions in which state supreme courts have handed down decisions establishing something akin to the implied warranty of habitability).

94. See, e.g., *Bigbee v. Pac. Tel. & Tel. Co.*, 665 P.2d 947, 952 (Cal. 1983) (finding that it was “of no consequence” that the harm to the plaintiff resulted through the negligent or reckless harm of a third person); *Richardson v. Ham*, 285 P.2d 269, 272 (Cal. 1955) (finding that the intentional act of a third party in joyriding did not supersede the negligence of the defendant, who left a bulldozer unlocked, creating a risk of harm to the plaintiffs); RESTATEMENT (SECOND), *supra* note 5, § 449; see also PAGE, *supra* note 91, at 185–89 (stating that defendants should not be permitted to argue a lack of proximate cause solely on the ground that a wrongful intervention superseded the defendant’s negligence, but suggesting that extent-of-liability issues might arise if the type of harm perpetrated was completely different from the misconduct against which the defendant was obligated to protect the plaintiff); David W. Robertson, *Negligence Liability for Crimes and Intentional Torts Committed by Others*, 67 TUL. L. REV. 135, 138–41 (1992) (discussing the Restatement and Louisiana law).

95. The premise of joint and several liability has not changed over time. In its most common application, each of two or more tortfeasors who is a but-for cause of an indivisible injury is liable for the full extent of the plaintiff’s injury. See Robertson, *supra* note 48, at 1789. This ensures that injured plaintiffs can recover fully, even in the event of insolvency or unavailability of one codefendant. See, e.g., *Miller v. Union Pac. R.R. Co.*, 290 U.S. 227, 236 (1933) (citing a number of early U.S. Supreme Court and federal circuit court cases as establishing that “[t]he rule is settled by innumerable authorities that if injury be caused by the concurring negligence of the defendant and a third person, the defendant is liable to the same extent as though it had been caused by his negligence alone”).

number of jurisdictions.⁹⁶ Thus, if policy issues such as the burden on the defendant or relative culpability as between two potential tortfeasors come to dominate cause in fact, they have the potential to undercut not only cause in fact, but also other tort doctrines, such as proximate cause or joint and several liability, which have distinct, and often conflicting, goals.

This crossing of doctrinal lines is significant, not merely a technical quibble, because it challenges, albeit surreptitiously, the very premise of landowner responsibility. *Saelzler*, of course, does not completely insulate defendants. A defendant cannot totally ignore the threat of liability because it is impossible to predict in advance whether a victim will be able to present evidence that could connect a security breach with an injury. However, the likelihood that a plaintiff will be able to show that an assailant exploited a security breach to perpetrate a crime seems small enough that landowners can plausibly anticipate reduced liability on negligent security claims.⁹⁷ As a result, landowners may decide that

96. Most states retain either pure joint and several liability or some other form. See RESTATEMENT (THIRD) OF TORTS § 17 cmt. a (2000); see also *Norfolk & W. Ry. Co. v. Ayers*, 123 S. Ct. 1210, 1224–28 (2003) (upholding joint and several liability under the Federal Employers' Liability Act, even where some plaintiffs' asbestos exposure was significantly greater from sources other than the defendants' negligence). Even states that have reformed joint and several liability frequently retain some aspects of it. For example, in California, joint and several liability was limited by the passage of Proposition 51, which limits an individual tortfeasor's liability for noneconomic damages to an amount equal to that tortfeasor's proportionate fault. CAL. CIV. CODE § 1431.2 (West Supp. 2003). However, liability for economic losses remains joint and several. *Id.*

97. One might legitimately question whether tort law truly has a deterrent impact in the real world. Professor Gary Schwartz reviewed the evidence regarding landowner liability for a variety of torts, including failure to protect invitees and customers from criminal attack, and found that, as a consequence of the development of tort liability, landowners had taken a wide variety of steps to reduce the likelihood of injury. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 416–20 (1994). Ultimately, Schwartz concludes that tort law is “moderately successful” in deterring negligent conduct. *Id.* at 444. Other scholars have been more skeptical. See, e.g., Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 808–13 (1990) (arguing that there are serious flaws in the fault-based, risk-benefit analysis that cause the tort system to fail at deterring unsafe behavior; these flaws are, among others, the theoretical impossibility of calculating the benefits of accident avoidance, the unequal exposure to risk of those least likely to claim or recover damages, the inability of the trier of fact to correctly perform a cost-benefit analysis, and the fact that the efficacy of tort liability in encouraging safety rests on the dubious assumption that all defendants will attempt to maximize profits); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 558–59 (1985) (stating that the following undermine the deterrent potential of tort liability: society's failure to instruct people effectively in their civil obligations, the perceived unpredictability of the system, the failure of even ordinary people to act reasonably at all times, the difficulty that organizations confront in actually making cost-effective changes in their behavior, the

precautionary measures are not cost-justified. Further, it is apparent that the *Saelzler* opinion leaves the most vulnerable and poorest plaintiffs in the worst position.⁹⁸ Those who are hurt badly will fare much worse than those able to track down an intruder. People who do not live in apartment complexes with security cameras or other recording technology will be worse off than those who do. Landowners will have a disincentive to install such devices because these installations might assist a plaintiff in proving that a broken gate was used to enter or that a stranger committed the assault. In short, plaintiffs like *Saelzler*, who had no ability to protect herself while making a delivery, take such jobs at their own risk and are left completely unprotected.⁹⁹

Tenants who live in complexes like that owned by Advanced Group 400 may not have higher rents due to the landowners' increased liability premiums, but nor will they have leverage either to insist that security function properly or to insist that money be allocated to improve it.¹⁰⁰ In response, businesses such as United Parcel Service and Federal Express may join many pizza companies in refusing to allow their employees to enter such premises, thus cutting tenants off from services that others in society take for granted.¹⁰¹

tendency to discount the threat of liability, the need of some to take great risk despite the threat of the liability, and the generally low average cost of tort liability to most defendants); *see also* Dolan, *supra* note 15 (recounting an interview with Frederic D. Cohen, representative of a consortium of landowners, who stated that the *Saelzler* ruling will not deter his clients from securing their properties, and explaining that the ruling was needed to prevent juries from blaming property owners for crimes, notwithstanding the existence of good security).

98. Apart from the argument that this burden will weigh most heavily on those of lower socioeconomic status, one might also consider whether it impacts women more than men. Statistics indicate that female victims predominate in two categories of violent crime: violence between intimates and rape. *See* Elizabeth A. Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 HARV. WOMEN'S L.J. 157, 165 n.44 (1994) (citing CAROLINE W. HARLOW, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 1 (1991)). In other types of crime, men have been victimized at a higher rate, though the disparity between men and women is closing. *See* U.S. Department of Justice, *Victim Characteristics*, http://www.ojp.usdoj.gov/bjs/cvict_v.htm findings (last revised Mar. 9, 2003); *see also* Dolan, *supra* note 15 (quoting Daniel B. Wolfberg, *Saelzler's* attorney, who stated, "I don't think there is a case out there that has a man being a victim").

99. *Saelzler* may have been fortunate enough to have workers' compensation. But workers' compensation may not fully compensate for her losses. The benefits and the costs of workers' compensation declined, after a period of growth, for most of the 1990s. *See* MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 807 (7th ed. 2001). Some types of harm are excluded from coverage, including pain and suffering, disfigurement, psychic harm, loss of taste, smell, or sensation, and injury to sexual organs or function. *Id.* at 814.

100. *Saelzler v. Advanced Group 400*, 23 P.3d 1143, 1164 (Cal. 2001) (Werdegar J., dissenting).

101. *See, e.g., id.* at 1147.

V. HOW WILL *SAELZLER* AFFECT THE LITIGATION PROCESS?

I have already argued that *Saelzler*, if applied rigidly and mechanistically, has the potential to undermine judicial recognition of landowner duty and to muddy the law of causation. I think the case will affect the litigation process as well. The primary impact will be to make the litigation of this type of claim so burdensome that attorneys will view most cases presented as exercises in futility.

One reason that attorneys will disfavor claims like *Saelzler*'s is because the evidence needed to meet the burden of establishing causation will commonly be unavailable. Generally, courts believe that the goal of requiring that all available evidence be presented is a salutary one.¹⁰² I have no quarrel with that aim. However, there are practical obstacles that significantly hinder plaintiffs in gathering that evidence. Injured parties, especially gravely injured ones, frequently are not in a position to even hire attorneys until months after an accident has occurred. If they wait, evidence such as fingerprints, or the operational state of a security device at the precise time of the accident, is likely to be unavailable.¹⁰³ In the rare case in which eyewitnesses exist, they may be difficult to find if they do not come forward and identify themselves. The difficulty of obtaining evidence does not excuse a failure to pursue

102. See, e.g., *Howard v. Wal-Mart Stores, Inc.*, 160 F.3d 358, 360 (7th Cir. 1998) (Posner, C.J.) (noting that “[a] court shouldn’t be required to expend its scarce resources of time and effort on a case until the plaintiff has conducted a sufficient investigation to make reasonably clear that an expenditure of public resources is likely to yield a significant social benefit”). The Seventh Circuit rejected Wal-Mart’s contention that there was not enough evidence of liability to allow the case to go to the jury. *Id.* at 359. Although the evidence was thin as to the source of the liquid soap that the plaintiff had slipped on in the store, the court stated there was no reason to believe that the plaintiff was withholding information or that she had failed to thoroughly investigate the case. *Id.* at 360. Judge Posner also stated that, given the low financial stakes, it was not reasonable to expect the parties to develop the evidence further. *Id.*

103. For example, in *Saelzler*, the plaintiff presented evidence that the security gate was propped open on the day she entered. *Saelzler*, 23 P.3d at 1147. She also presented evidence of forty-five other instances involving broken security gates in the year before the accident. *Id.* However, she apparently did not produce evidence of *why* the gate was propped open on the day in question, or whether the assailants had entered through that gate and broken it in the process. *Id.* The court was very critical of these evidentiary deficits. *Id.* Likewise, in *Yoon*, the plaintiff’s expert inspected the liquor store one year after the armed robbery occurred. *Yoon v. Suh*, No. B144809, 2001 WL 1227950, at *3 (Cal. Ct. App. Oct. 16, 2001). Despite the expert’s familiarity with the neighborhood through his police work and his testimony that it appeared that no one had made any effort to deter any kind of crime on the property, he was unable to testify that things were in exactly the same condition as they had been in on the night of the robbery. *Id.*

it, nor is it unique to this type of premises liability case.¹⁰⁴ However, if plaintiffs in this type of case are required to establish that the defendants in fact utilized security breaches to perpetrate the attacks, as opposed to the usual burden on causation, factual deficits become insuperable.

Even assuming that there is evidence available to present to a court, the financial burden of having to develop a case in its entirety early on, in anticipation of a motion for summary judgment, is significant. No one could disagree that attorneys should gather the facts before filing a complaint, but to meet the threshold set by *Saelzler* requires a level of proof that is far more extensive. Moreover, the prospect of waiting to see whether a motion is filed is risky because, in many jurisdictions, the time within which to respond to a motion for summary judgment is short.¹⁰⁵ While the California Code of Civil Procedure was recently amended to extend the notice period to seventy-five days,¹⁰⁶ a move viewed as favorable to the plaintiffs' bar,¹⁰⁷ *Saelzler* will compel attorneys to expend money and time developing all available evidence as soon as they file a complaint. Further, plaintiffs' attorneys will need to allege and attempt to prove every possible breach of duty, rather than a select few, because the chances of proving causation improve dramatically with slight differences in issue formulation.¹⁰⁸ As an example, *Saelzler* may have come out differently had the plaintiff alleged either that the defendants unreasonably failed to provide escorts

104. See, for example, *Warren v. Jeffries*, 139 S.E.2d 718, 720 (S.C. 1965), a sad case in which a nonsuit in action for wrongful death based on *res ipsa loquitur* was affirmed because of a lack of evidence as to the condition of the car that killed the decedent. The car had never been inspected after the accident.

105. See, e.g., BANKR. D. ARIZ. R. 9013-1(g) (stating that the time to respond to a motion for summary judgment is thirty days); D.N.H. R. 7.1(b) (stating that objections to summary judgment motions shall be filed within thirty days from the date the motion is served); TEX. CT. R.C.P. 166a(c) (providing that "[e]xcept on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response").

106. Section 437(c)(a) of the California Code of Civil Procedure was amended to extend the notice period, effective January 1, 2003. CAL. CIV. PROC. CODE § 437c(a) (West Supp. 2003). As a practical matter, noticed motions must now be made seventy-five days before a hearing and no later than thirty days before the trial date. *Id.* The amendments also include a provision allowing supplemental discovery in some cases upon continuance by the trial court, and supplemental briefing in some cases. *Id.* § 437c(h), (i), (m)(2).

107. William M. Hensley, *Recent Developments on the Summary Judgment Motion Front*, ORANGE COUNTY LAW., Dec. 2002, at 6.

108. Leon Green argued that a connection to a defendant's course of conduct should suffice. Green, *supra* note 7, at 555. However, most courts and scholars do not accept this view and require that the plaintiff connect the specific breach to the injury. See Robertson, *supra* note 48, at 1768-75. One effect of the narrowness of the requirement is that the result may turn on how the breach is described, and thus, the conception of causation becomes very easily manipulated. This result-oriented argumentation exists in other areas of tort law as well, such as the risk-foreseeability test in the area of proximate cause. See PAGE, *supra* note 91, at 104-05. But it is not a positive trait.

for delivery persons or that the defendants were negligent, given the prevalent violence at the complex, for failing to warn them not to enter the premises unescorted.¹⁰⁹ Pursuing proof on all of these various scenarios will further increase costs.¹¹⁰

Another way in which the litigation process may change is that defendants will look to causation as the first possible ground for gaining dismissal. Litigating duty issues requires that the plaintiff and defendant gather evidence pertaining to the crime rate and patterns on the property.¹¹¹ Because most attorneys presumably would not accept cases in which they could not make some showing of the foreseeability of similar criminal activity on the premises, a defendant must convince the court of the unfairness of allowing the suit to proceed. The defendant must argue that either the burden of imposing a duty is too great or the value of imposing a duty is too low.¹¹² Litigating causation issues is simple by comparison; if the plaintiff does not have evidence indicating that a security device or measure was directly implicated in an attack, the defendant will be able to gain dismissal on a summary judgment motion. Unlike a motion to dismiss, however, the plaintiff's complaint will not be judged on the pleadings. Following *Saelzler* as a model, a court can and will make any number of factual inferences about whether an alleged breach is causative. A court can simply conclude that extra security would not help because guards would not have been there to see the crime, or that functioning parking garage doors do not matter because intruders can always follow legitimate entrants into the

109. The court viewed the plaintiff's warning claim as a much more general, vague, and unproven contention that the plaintiff, as a member of the public, should have been warned against unidentified assailants. *Saelzler v. Advanced Group 400*, 23 P.3d 1143, 1147 (Cal. 2001). This highly unfavorable characterization and the purported lack of proof precluded the theory from driving the litigation.

110. There will be some reduction in costs if courts adhere to the view that experts are not very helpful in these types of cases. There is no real harm in precluding expert opinion, so long as this prohibition is applied to both sides. *See supra* text accompanying notes 60–63. Generally, lay opinion as to whether a breach is a but-for cause or a substantial factor in bringing about an injury is as competent as expert opinion, and thus peculiarly a case for the jury. *See Robertson, supra* note 48, at 1768–69.

111. *See, e.g., Cooper v. House of Blues Entm't*, No. B151007, 2002 WL 31248870, at *3 (Cal. Ct. App. Oct. 8, 2002) (indicating that there were several prior criminal assaults and other incidents on the premises); *Sandoval v. Bank of Am.*, 115 Cal. Rptr. 2d 128, 134 (Ct. App. 2002) (stating that prior criminal assaults on the bank mandated increased security).

112. *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215–16 (Cal. 1993) (holding that, under the duty analysis, prior similar incidents are required to be proven almost always for foreseeability to be great enough to outbalance the burden of hiring security).

garage.¹¹³ Sometimes these factual inferences may seem ludicrous and improbable,¹¹⁴ but there will be little a plaintiff can do about them. The end result is that plaintiffs' attorneys will be extremely reluctant to litigate this type of case unless they can clear the exceptionally high hurdle of proving causation with certainty.

VI. POSSIBLE SOLUTIONS AND FINAL THOUGHTS

As noted at the outset of this Essay, there are no easy answers to the problem I describe; however, there are several possible ways to ameliorate *Saelzler*'s harsh impact on plaintiffs. The first of these is simply that courts must be aware of the implications of decisions like *Saelzler* and must recommit themselves to time-tested principles of proof and causation and to the jury's role in deciding issues of fact. It is inevitable that challenges to the plaintiff's evidence will arise before trial. Summary judgment procedure, modeled in many instances after federal law, gives the defendant the right to put the plaintiff's evidence to the test early on.¹¹⁵ But procedural revisions to summary judgment law cannot be permitted to undermine substantive tort law, whether by converting cause in fact into a duty surrogate or by obliterating the distinction between questions of fact and questions of law.

Tort law clearly demands that the plaintiff show that the defendant's breach actually brought about some harm to the plaintiff. But these requirements are moderated by the preponderance standard, which clarifies the important principle that causation need not be proven as an absolute, or indeed with any more certainty than the "more likely than not" threshold requires.¹¹⁶ What rises to the level of plausibly satisfying that standard ultimately has to be a matter within the courts' discretion.¹¹⁷ Thus, in evaluating the evidence brought before them, judges must be

113. See *Leslie G. v. Perry & Assocs.*, 50 Cal. Rptr. 2d 785, 792 (1996).

114. Courts following *Saelzler*'s reasoning would seemingly reject the notion that security devices, such as locking gates and security companies, have deterrent functions. They would assume these measures have no relation to the prevention of crime unless there is proof positive that the devices were exploited. See *Saelzler*, 23 P.3d at 1151–52, 1154.

115. Koppel, *supra* note 2, at 490, 497–506.

116. Professor Robertson states that "[t]he juxtaposition of wrongful conduct likely to cause a particular type of harm and a victim who has suffered that type of harm is sufficient to satisfy the cause-in-fact requirement in the absence of unusual circumstances that clearly defeat the normal inference." Robertson, *supra* note 48, at 1775.

117. See *RESTATEMENT (THIRD)*, *supra* note 5, § 28. The comment to section 28(a) notes that philosophers have taught that factual cause is "not a phenomenon that can be seen or perceived," but "instead, it is an inference drawn based on prior experience and some, often limited, understanding of the other causal factors—the causal mechanism—required for the outcome." *Id.* at cmt. b. The comment also acknowledges that "[t]he difficulty is often that evidence does not provide any reasoned method for determining what the respective probabilities are for the potential causes." *Id.*

mindful that the conclusive evidence they seek is not legally required, nor is it possible, in many instances, to obtain. If they remember these basic tenets of causation, causation issues can be handled without the need to take the extraordinary doctrinal step of shifting the burden of proof to the defendant.¹¹⁸ Finally, as much as courts might like to avoid giving jurors the discretion to find that a breach was causally related, factual inferences have long been the jury's province, and there they should stay.¹¹⁹

Courts also need to maintain the distinction between duty and cause in fact.¹²⁰ The duty requirements are so tough and so replete with policy considerations that it is hard to believe there would be any policy stone left unturned if duty were truly contested. The effect of moving

118. *Saelzler* and cases like it would not easily fit within the recognized theories shifting the burden of proof to the defendant. See *supra* note 90. It is more accurate to view the causal problem in *Saelzler* as but one example of a problem numerous cases share: whether safe behavior would have avoided the injury. DOBBS, *supra* note 10, at 407. Professor Dobbs gives numerous examples of the liberal impulses of courts in such cases. He states, however, that it is "hard to escape the feeling that the but-for rule with its hypothetical alternative case can be applied rigorously in some cases and quite lightly in others." *Id.* at 421–22.

119. Commentary to section 28(a) also notes that, because "modest [factual] differences . . . can substantially affect the power of an inference. . . . [T]he general approach of a given jurisdiction toward the degree of freedom afforded juries . . . is critical." RESTATEMENT (THIRD), *supra* note 5, § 28 cmt. b. The comment further notes that many courts are lenient if the plaintiff has done all that is reasonably possible to gather and present evidence. *Id.* Other courts have been willing to adopt a presumption of causation depending on the type of tortious conduct and the difficulties of proof faced by the plaintiff. *Id.*; see also Robertson, *supra* note 48, at 1774 (explaining that "when a defendant has engaged in [negligent conduct that] often leads to the kind of harm the plaintiff has suffered, [courts are] rightfully impatient with the defendant's claim that the plaintiff cannot prove [causation]").

120. *Nola M.* provides an example of a court that "protesteth too much." *Nola M. v. Univ. of S. Cal.*, 20 Cal. Rptr. 2d 97, 108–09 (Ct. App. 1993) ("Are we using causation as a smokescreen for a policy judgment on whether USC ought to be liable to Nola under the circumstances of this case? We don't think so."). The *Nola M.* court discussed various policy issues, all relating to duty questions, including the issue of judicial line drawing, the question of who would pay for security, the issue of whether police protection is a governmental or private function, and the question of what impact tort litigation would have on landowner insurance. *Id.*; see also *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968) (indicating that the balancing test for departure from landowner general duty of care involves balancing the following: the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff was injured, 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 a burden to the defendant a duty would impose, the consequences to the community of imposing a duty, and the availability, cost, and prevalence of insurance for the risk involved).

concerns over the costs of increased security into the causation issue is that they gain disproportionate power because causation law has no context in which to weigh the burden against relevant countervailing considerations.¹²¹ Many of the troubling implications of *Saelzler* and cases like it have never been aired simply because the issues are so difficult to assess in the causation context. In short, courts need to be much more cognizant of how tort law and policy work in the context of negligence. They need to be more honest about the bases of their decisions. If policy concerns about opening land possessors to liability are really at the core, they ought to grapple with them as duty issues. If an absence of evidence to prove a breach is the problem, as it may have been in some cases, they should step up to the plate and say so. They should not use rigid assessments of evidentiary sufficiency in proof of causation to obscure the true grounds for their decisions.

As to the specific problem of landowner disincentives to provide security for tenants and other entrants on land, in the absence of an interpretive shift by the courts, there may be a need for a regulatory or legislative structure that imposes certain affirmative obligations on landowners.¹²² Landowners of high crime buildings or complexes should not be permitted to completely abdicate responsibility for

121. Professor Malone asserted that the courts are prone to hold certain plaintiffs to a rigorous standard of proof when courts view the claim being litigated as one of less importance, or if they question the connection between the harm and the interests the legal claim seeks to protect. Malone, *supra* note 7, at 72–73. The Reporter’s Note to section 28 of the Third Restatement says that Malone’s insight may help explain cases like *Saelzler*. RESTATEMENT (THIRD), *supra* note 5, § 28 Reporter’s Note cmt. b. While I think it is inevitable that policy considerations will affect courts’ views of causation, the policy issues pertinent to causation are distinct from those relating to duty, and the transposition of those policies muddies the causation question. See *supra* note 90 (discussing causation policy).

122. Professor B.A. Glesner discusses several statutory duties in her exhaustive article. These take the form of municipal statutes imposing a duty to provide security or to provide clean and safe housing conditions. B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 701–02 (1992). Glesner states that these statutory requirements provide explicit predictable security standards, but they fail to protect the landlord because they generally do not provide that compliance with the statute would protect the landlord from liability. *Id.* Glesner also states that the public nuisance doctrine may create broad liability; while criminal nuisance is a possibility, most public officials utilize civil public nuisance because it is less costly to prove and litigate. *Id.* at 723–24. Forfeiture of a landlord’s property interests under federal law is also a possibility in the event the property is used to facilitate a drug violation with the landlord’s knowledge or consent. *Id.* at 742–56. Professor Glesner concludes that increased legal responsibility for landlords is bad from a policy perspective, doing nothing to address the root causes of crime and serving mostly to relocate crime to other areas. *Id.* at 772–73. She also concludes that heightened requirements for screening place the landlords in the position of trying to navigate around other laws that limit how much information they can obtain. *Id.* at 780–82. Finally, Glesner concludes that the most effective mechanisms include vigorous enforcement of building codes, growth of crime watch activities, and increases in youth activities. *Id.* at 788–89.

providing a reasonably safe environment.¹²³ One possibility would be to impose a system of graduated fines on land possessors who offer security devices but fail to keep them operative. While the risk of a fine is in no way equivalent to the risk of tort liability, a fine might at least provide some incentive for landowners not to leave land entrants at risk. Another possibility would be to require landlords to warn those entering the property that their security cannot be guaranteed.¹²⁴ In the case of delivery persons, landlords could be required to structure a delivery method that takes into account risks to the potential victim. Building or housing codes impose other requirements on landowners,¹²⁵ and there is no reason they could not impose some measure of responsibility on land possessors.¹²⁶

Finally, it would be a mistake to dismiss as an isolated phenomenon *Saelzler*'s subtle undermining of causation and the jury's role. Causation has always been difficult to prove with certainty, and there are many other areas of tort law where plaintiffs rely on the preponderance

123. Even critics of the duty to protect acknowledge that, in some instances, there must be minimum standards. Professor William K. Jones takes the view that victims of crime can only obtain those protections for which they are prepared to pay. William K. Jones, *Tort Triad: Slumbering Sentinels, Vicious Assailants, and Victims Variously Vigilant*, 30 HOFSTRA L. REV. 253, 282–83 (2001). He would impose limited duties in tort stemming from violations of building codes, breaches of express or implied promises about the safety of the premises, and several other limited scenarios. *Id.* But recognition of these limited duties would not solve the causation problem that plaintiffs encounter. Thus, a regulatory approach may prove necessary.

124. Although the trial court dismissed *Saelzler*'s failure to warn claim on the ground that she had no proof that it would have been feasible or effective, *see Saelzler v. Advanced Group 400*, 23 P.3d 1143, 1148 (Cal. 2001), in reality, warnings are *entirely* feasible. A sign posted on a gate warning delivery persons that they should not enter without an escort, or that their safety cannot be guaranteed, would easily alert entrants to the risk and permit them to make informed decisions as to whether or not to enter. Of course, no landowners want to post such signs on their premises, but if landowners are largely protected from negligent security claims by *Saelzler*, the lack of warning obligations only compounds the risks to land entrants.

125. Some states have statutes that require disclosure of specific items to prospective purchasers and lessees. Professor Saxer identifies disclosure of sex offenders living in the area as a prime example. Saxer, *supra* note 4, at 552. Section 2079.10a of the California Civil Code requires that written leases and rental agreements disclose the existence of a database of registered sex offenders, relieves the lessor of further disclosure obligations, and precludes the sex offender from bringing suit against the disclosing lessor. CAL. CIV. CODE § 2079.10a (West Supp. 2003).

126. The benefit of a statutory approach is that it would give a land possessor specific guidance about what must be done, both with regard to maintaining property and with respect to disclosure to land entrants. A land possessor might worry that disclosure of criminal activity could result in invasion of privacy or other tort actions. Statutes might shield the land possessor from liability in the event disclosures are made as required. *See Saxer, supra* note 4, at 562–64.

standard to surmount causal uncertainty.¹²⁷ If summary judgment procedure is understood as giving courts license to change the substantive law *sub rosa*, there will be no confining it to cases involving causation or premises liability.¹²⁸

127. One such area is *res ipsa loquitur*. Though *res ipsa* is a doctrine used to establish breach, it has a causative aspect: the jury is asked to decide whether the defendant is the most probable responsible cause. Normally, judges rely on the common knowledge and general experiences of jurors to make this assessment. See DAN B. DOBBS & PAUL T. HAYDEN, *TORTS AND COMPENSATION* 176 (4th ed. 2001).

128. In fact, Professor Koppel's study of summary judgment procedure under both the federal and California standards led him to conclude that "the premonitions of the dissenting justices in both trilogies regarding the overuse of summary judgment were not without substance." Koppel, *supra* note 2, at 573.