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# Policy Oscillation in California's Law of Premises Liability

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Ronald Steiner\*

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ABSTRACT

*The expansion of tort liability, which began in the middle of the 20th century, and the reaction against that expansion as the century came to a close, constitutes a clear demonstration of the nostrum that tort law is “public law in disguise.” Adjudication of private disputes became a battleground of public policy preferences on how risks and compensation should be distributed so as to better serve societal interests such as fairness, efficiency, and personal autonomy. This article examines in detail a critical battleground in a key state—the revolution and counter-revolution in premises liability in California—as a paradigm case. Close attention to the policy oscillation with regard to “duty,” from a limited concept to a more expansive definition and then back again, reveals how common law doctrinal change reflects the public policy preferences of repeat players and institutional actors, and the political ideology of judges and those politicians who appoint them. By mandating that a landowner had no duty to address the threat of crime by third parties unless there were prior similar incidents which made the event foreseeable, the early rule reflected the interests of property and commerce. California courts, pioneers in the revolutionary expansion of tort liability, led the way in formulating a new rule that found a duty when the threat of crime was foreseeable under the “totality of the circumstances.” Shortly after, however, California courts underwent a rapid change in personnel which produced a profound ideological shift in favor of “re-visiting” the expansion of tort liability. The new jurists, aided by ideological and commercial interests as amici, reinstated a modified version of the old prior similar incidents rule, expressly favoring the prerogatives of property ownership and a certain vision of economic costs and benefits. As can be seen, the changing law of premises liability in California is a clear example of how private law doctrine can be made and remade through policy choices that reflect ideological and political pressures brought to bear on the courts.*

I. PREFACE: TORT LAW AS “PUBLIC LAW IN DISGUISE”

It is commonly observed that a “basic change” in tort law occurred in the second half of the 20th Century.<sup>1</sup> What was once thought of as a private law subject, dealing with the deterrence and punishment of private wrongs through private actions, came to function “as a public law subject, concerned primarily with the adjustment of risks among members of the public so as to achieve fairer

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1. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 178 (Oxford Univ. Press 2003) (1980).

and more efficient means of compensating injured persons . . . .”<sup>2</sup> This understanding of tort law as “public law in disguise”<sup>3</sup> suggests that tort law doctrines are, “and perhaps always had been, exercises in public policy” and that, as in administrative law, tort law “use[s] private disputes as a basis for making public rules.”<sup>4</sup>

As such, it would not be surprising to find that doctrinal change in this quintessential common law subject shows a sensitivity to the institutional and ideological proclivities of repeat players and institutional actors, and reflects the political ideology of judges and those politicians who appoint them.<sup>5</sup> In such circumstances, doctrinal change in tort law would reflect not the formalist vision of judge-made law, which manifests the incremental and logical building of precedent upon precedent in one private dispute after another, but rather public policy choices of those with their hands on the levers of power.<sup>6</sup> By examining the changing law of premises liability in the critical jurisdiction of California, one can see the policy factors that reflect precisely such choices. The picture revealed is a paradigmatic example of how private law doctrine can be remade through policy choices that reflect ideological and political pressures brought to bear on the courts.

## II. THE “PATCHWORK QUILT” OF PREMISES LIABILITY FOR THE CRIMINAL ACTS OF THIRD PARTIES

Property owners who allow others onto their property, and especially businesses who invite people onto their property, have long been held to some degree of liability for the welfare of those visitors on their premises.<sup>7</sup> By the end of the 1990s, however, legal observers were commenting on the development of a “new frontier” in the law of premises liability: a property owner’s liability when visitors become the victims of violent crime.<sup>8</sup> The various standards used to

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2. *Id.*

3. Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1 (1959); Leon Green, *Tort Law Public Law in Disguise II*, 38 TEX. L. REV. 257 (1960).

4. WHITE, *supra* note 1, at 178.

5. See Paul H. Rubin, *Public Choice and Tort Reform*, 124 PUB. CHOICE 223 (2005).

6. By “policy,” I attempt no definition more ambitious than “authoritative decisions on behalf of society . . . .” See CHRISTOPHER E. SMITH, *COURTS AND PUBLIC POLICY* 1 (1993). Although, judicial policymaking troubles many observers and citizens given the undemocratic pedigree of judges and the lack of meaningful popular participation and accountability, Smith argues that the American constitutional scheme does not mandate all policymaking be done by popularly elected officials, and sees judicial responsibility for the protection of civil rights and liberties and judicial intervention in policymaking as “necessary, inevitable, and beneficial.” *Id.* at 19. Focusing on judicial policymaking in an area of tort law, the view of this article is less sanguine.

7. See generally, RESTATEMENT (FIRST) OF TORTS 329-350 (1934) (“Liability Of Possessors Of Land To Persons Thereon”); RESTATEMENT (SECOND) OF TORTS §§ 328E-350 (1965) (“Liability of Possessors of Land to Persons on the Land”).

8. Michael Higgins, *Stop ‘n’ Shop Crime: Business Owners Wonder How Far to Go to Protect Their Customers’ Safety Under OSHA Guidelines*, A.B.A. J., May 1999, at 32.

determine the existence of a duty show that the imposition of a duty, made by the court as a matter of law, "is not an immutable fact, but rather an expression of policy considerations leading to the legal conclusion that a plaintiff is entitled to a defendant's protection."<sup>9</sup>

In most jurisdictions, case law specifies that the owner of a property must take reasonable steps to prevent foreseeable crime.<sup>10</sup> However, the standards of foreseeability vary from jurisdiction to jurisdiction and have changed over the years. The majority of states impose liability on a property owner when he or she could have foreseen the likelihood of some criminal behavior, while in a minority of states, an owner will be held liable "only when he or she [had] knowledge of a threat posed by a specific assailant at a specific time."<sup>11</sup>

Initially, the majority rule was that a crime was considered "foreseeable" only if similar crimes had occurred on the premises.<sup>12</sup> "Jurisdictions vary in the evidence they deem relevant in determining foreseeability. Some require only evidence of prior crimes. A handful of these jurisdictions further restrict the scope of relevant evidence, considering only prior violent crimes as evidence that a violent assault was foreseeable."<sup>13</sup>

Numerous states have come to reject the "prior similars rule" as "illogical or unduly restrictive,"<sup>14</sup> and the "prior similars rule," sometimes derogatorily called the "one free crime rule," was rejected by most jurisdictions that reconsidered it in the 1980s and early 1990s.<sup>15</sup> "The prior-similar-incidents requirement has been dropped in [twenty-five] states, the District of Columbia, and four federal circuits."<sup>16</sup> For example, the Nevada Supreme Court adopted the "totality of the circumstances" rule in 1993, in the case of a plaintiff who had been shot in his motor home while parked in a Las Vegas casino parking lot.<sup>17</sup> The court reversed a summary judgment for the casino, ruling that a trier of fact should decide whether the inadequate security in the parking lot was at least partly responsible for the victim's injuries.<sup>18</sup>

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9. Vasquez v. Residential Invs., Inc., 12 Cal. Rptr. 3d 846, 853 (Ct. App. 2004) (citing Ludwig v. City of San Diego, 76 Cal. Rptr. 2d 809, 811 (Ct. App. 1998)).

10. Cf. RESTATEMENT (SECOND) OF TORTS § 344 (1965).

11. Philip M. Gerson & Edward S. Schwartz, *When Negligence Leads to Crime: Many Courts Have Expanded the Potential Liability of Property Owners, Possessors, and Managers for Negligent Security. Thorough Cases Analysis Means Rounding Up the Usual Suspects*, TRIAL, Dec. 2002, at 18, 22.

12. Corey L. Gordon, *A Safe Room at the Inn: Liability for Inadequate Security*, TRIAL, Oct. 1994, at 40, 42 (citing, among many, Doe v. Dominion Bank, 963 F.2d 1552, 1560 (D.C. Cir. 1992)). See also Doe v. Grosvenor Props. (Hawaii) Ltd., 829 P.2d 512, 516 (Haw. 1992); Sharp v. W. H. Moore, Inc., 796 P.2d 506, 510 (Idaho 1990); Siebert v. Vic Regnier Builders, Inc., 856 P.2d 1332, 1338-40 (Kan. 1993); Doud v. Las Vegas Hilton Corp., 864 P.2d 796, 799-800 (Nev. 1993).

13. Gerson & Schwartz, *supra* note 9, at 23.

14. *Id.*

15. Gordon, *supra* note 10, at 42 & n.14.

16. Julie Gannon Shoop, *Crime Victims Face Mixed Bag of Rulings on Inadequate Security*, TRIAL, Apr. 1994, at 12, 14.

17. *Doud*, 864 P.2d at 797-98, 800.

18. *Id.* at 802 (remanding the case to the district court for a trial on the merits).

Although the trend in the 1990s was in favor of the totality of the circumstances test, California is essentially unique in having first adopted and then “deliberately resisted” that test.<sup>19</sup> California, along with Tennessee and Louisiana, has adopted what purports to be a balancing test, under “which courts balance the foreseeable likelihood and severity of crime on the premises against the cost and availability of a given security measure—to determine whether the premises owner has a duty to adopt that measure.”<sup>20</sup> In practice, however, as will be discussed below, California courts made an even more significant public policy choice and essentially resurrected their old prior similar rule, with its concomitant “fatal[] flaw[s].”<sup>21</sup>

Corey Gordon, co-chair of the Inadequate Security Litigation Group, observed that the trend into the mid-1990s favored plaintiffs “harmed as a result of [inadequate] security at stores, hotels, and other businesses.”<sup>22</sup> “Courts in about half the states have eased burdens on plaintiffs who try to show that landowners should be held liable for crime-related injuries when they fail to safeguard their premises.”<sup>23</sup> However, Gordon noted that “courts are still unpredictable.”<sup>24</sup> “Conservative jurisdictions have been moving to liberal decisions, and liberal jurisdictions have been retreating.”<sup>25</sup> In particular, case law developments in California and other states suggests that plaintiffs “in premises liability cases face a ‘patchwork quilt’ of case law in which virtually no issue is settled.”<sup>26</sup> Examination of the cases from various California courts casts some interesting light on the nature of the debate over premises liability and elucidates the policy contests embedded in this “private law” domain.

### III. CALIFORNIA’S OSCILLATING LAW OF PREMISES LIABILITY

#### A. *Duty and Foreseeability in California Negligence Law*

According to Prosser, who is considered to be the dean of tort law scholars, people generally will not fall into tort liability if they “reasonably proceed upon the assumption that others will obey the criminal law.”<sup>27</sup> However, this generalization is subject to several important caveats—it only applies “[u]nder all

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19. Gerson & Schwartz, *supra* note 9, at n.20 (citing *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993)).

20. *Id.*

21. *Isaacs v. Huntington Mem’l Hosp.*, 695 P.2d 653, 658 (Cal. 1985).

22. Corey Gordon is co-chair of the Inadequate Security Litigation Group, which was previously the Association of Trial Lawyers of America (“ATLA”) and is now the American Association for Justice (“AJA”). Shoop, *supra* note 14, at 16.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 201 (W. Page Keeton ed., 5th ed. 1984).

ordinary and normal circumstances, in the absence of any reason to expect the contrary.”<sup>28</sup> “There are, however, other situations, in which either a special responsibility resting upon the defendant for the protection of the plaintiff, or an especial temptation and opportunity for criminal misconduct brought about by the defendant, will call upon him to take precautions against it.”<sup>29</sup>

California Civil Code section 1714 mandates a generalized negligence standard by which all individuals have an obligation not to unreasonably cause injury to any other person.<sup>30</sup> Section 1714 states:

Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.<sup>31</sup>

California courts have held that the duty of care mandated by section 1714 is a “fundamental principle” to which “no . . . exception should be made unless clearly supported by public policy” or through statutory exception.<sup>32</sup> A decision to depart from this “fundamental principle” requires “balancing of a number of considerations” (i.e., “*Rowland* factors”):

1. the foreseeability of harm to the plaintiff,
2. the degree of certainty that the plaintiff suffered injury,
3. the closeness of the connection between the defendant’s conduct and the injury suffered,
4. the moral blame attached to the defendant’s conduct,
5. the policy of preventing future harm,
6. the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and
7. the availability, cost, and prevalence of insurance for the risk involved.<sup>33</sup>

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28. *Id.*

29. *Id.*; see also *Gomez v. Tigor*, 193 Cal. Rptr. 600, 604 (1983).

30. See CAL. CIV. CODE § 1714 (West 1998 & Supp. 2007).

31. *Id.* § 1714(a).

32. *Rowland v. Christian*, 443 P.2d 561, 563-64 (Cal. 1968), *superseded in part by statute*, CAL. CIV. CODE § 847 (West 2007) (declaring that an owner of an estate will not be liable to a person for their injuries or death occurring in the commission of a felony). *Rowland* is famous for ending the reign of the so-called “status categories” (which alter a defendant’s liability based on the plaintiff’s status as a trespasser, a licensee, or an invitee) in California law. The California Supreme Court concluded that “although the plaintiff’s status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative.” *Id.* at 568. See also WHITE, *supra* note 1, at 190.

33. *Rowland*, 443 P.2d at 564.

The foreseeability of a particular kind of harm is given especially great weight in this balancing.<sup>34</sup> In addition, foreseeability has been called “an elastic factor,”<sup>35</sup> or a “flexible concept,” which supposedly means that:

the degree of foreseeability necessary to warrant finding a duty of care varies in each case depending on how great or small the burden of preventing the harm, and whether there are strong public policy reasons for preventing the harm. The greater the burden of preventing harm, the higher degree of foreseeability that may be required before a duty is imposed, absent other strong public policy factors. Likewise, the lighter the burden of preventing harm, the lower the degree of foreseeability required for the imposition of a duty.<sup>36</sup>

After the determination of duty as a question of law, foreseeability is also considered in “two more focused, fact-specific settings.”<sup>37</sup> First, the foreseeability of injury determines whether “the particular defendant’s conduct was negligent in the first place,” i.e., whether there was a duty breached.<sup>38</sup> “Second, foreseeability may be relevant to the jury’s determination of whether the defendant’s [breach of duty] was a proximate or legal cause of the plaintiff’s injury.”<sup>39</sup>

As a particular manifestation of the generalized obligations of section 1714, landowners are required to “maintain land in their possession and control in a reasonably safe condition.”<sup>40</sup> “[T]his general duty of maintenance . . . has [also] been held to include the duty to take reasonable steps to secure [at least] common areas” (i.e., areas not under the control of a tenant) against the kind of “criminal acts of third parties” on visitors, tenants, residents, customers, or patrons that are foreseeable or “likely to occur in the absence of such precautionary measures.”<sup>41</sup>

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34. *Ballard v. Uribe*, 715 P.2d 624, 628 n.6 (Cal. 1986). In contrast to the jury’s more fact-specific inquiry, “a court’s task—in determining ‘duty’—is not to decide whether a *particular* plaintiff’s injury was reasonably foreseeable in light of a *particular* defendant’s conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.” *Id.* (emphasis in original).

35. *Gomez*, 193 Cal. Rptr. at 605 (citing 2 HARPER & JAMES, LAW OF TORTS §18.2, at 1026 (1956)).

36. *Sharon P. v. Arman, Ltd.*, 65 Cal. Rptr. 2d 640, 646 n.6 (Ct. App. 1997) (depublished) (citing *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215 (Cal. 1993); *Gomez*, 193 Cal. Rptr. at 604-05), review granted, 945 P.2d 779 (Cal. Oct. 22, 1997), *rev’d*, 989 P.2d 121 (Cal. 1999). Note: Since the Appellate Court decision in *Sharon P.* has been “depublished,” it no longer appears in the official reports and cannot be cited as authority in California courts. On the issue of the somewhat Orwellian practice of “depublishing” once-published opinions, see Ron Cohen & Ronald Steiner, *Battle Cry: 8th Circuit Rejects Rule Against Citing Unpublished Opinions*, L.A. DAILY J., Sept. 6, 2000, at 7.

37. *Ballard*, 715 P.2d at 629 n.6.

38. *Id.*

39. *Id.*

40. *Ann M.*, 863 P.2d at 212 (citing CAL. CIV. CODE § 1714; *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968)).

41. *Id.* This formulation traces back to *Kline v. 1500 Mass. Ave. Apt. Corp.*, 439 F.2d 477, 481 (D.C. Cir. 1970) (“The duty is the landlord’s because by his control of the areas of common use and common danger

California courts have historically followed the logic of the *Restatement (Second) of Torts* on the issue of when this duty arises:

Since the [owner of land] is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.<sup>42</sup>

However, as Esper and Keating have noted, despite the “near universal acknowledgment that the duty of due care is highly general and broadly applicable, ‘no duty’ rulings are proliferating in California, especially in the intermediate appellate courts.”<sup>43</sup> This development is quite indicative of the recent history of premises liability in California. *Rowland* and its progeny, affirming a general and broadly applicable conception of duty, have been rewritten by Courts of Appeal decisions, which were, in turn, confirmed by a politically re-configured Supreme Court. This has resulted in a modern rule that mandates judges to dismiss or adjudicate cases on the basis of highly particularized, fact-specific determinations of duty and with limited, if any, fact-finding by juries.<sup>44</sup> Premises liability in California thus provides an important case study on the California courts’ significant role in the “ongoing conservative counter-revolution in torts.”<sup>45</sup>

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he is the only party who has the power to make the necessary repairs or to provide the necessary protection.”). For a seminal treatment of the issue, see Miriam J. Haines, *Landlords or Tenants: Who Bears the Costs of Crime?*, 2 CARDOZO L. REV. 299 (1981).

42. RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965) (emphasis omitted).

43. Dilan A. Esper & Gregory C. Keating, *Abusing “Duty,”* 79 S. CAL. L. REV. 265, 267 (2006).

44. See *id.* at 267-68 (“Notwithstanding this near universal acknowledgment that the duty of due care is highly general and broadly applicable, ‘no duty’ rulings are proliferating in California, especially in the intermediate appellate courts.... In ways which cannot be dismissed as wholly trivial, California courts are resuscitating nineteenth century doctrines and incorporating them into twenty-first century tort law, giving property rights and contractual freedoms priority over the physical integrity of the person.”)

45. *Id.* at 268.

B. *From “Prior Similar” to “Totality of the Circumstances” and Back Again: Shifting Policy from Isaacs to Ann M. and Sharon P.*

The key question when determining foreseeability in cases of premises liability involving criminal acts of third parties has been the place of prior similar incidents.<sup>46</sup> Prior to 1985, California Appellate Courts were split as to whether prior similar incidents were required in order to find foreseeability.<sup>47</sup> One line of cases had held that:

in the absence of prior similar incidents, an owner of land is not bound to anticipate the criminal activities of third persons, particularly where the wrongdoer was a complete stranger to both the landowner and the victim and where the criminal activity leading to the injury came about precipitously.<sup>48</sup>

However, an opposing line concluded that:

[w]hether a given criminal act is within the class of injuries which is reasonably foreseeable depends on the totality of the circumstances and not on arbitrary distinctions . . . . Foreseeability does not require prior identical or even similar events.<sup>49</sup>

In *Isaacs v. Huntington Memorial Hospital*,<sup>50</sup> a case where a doctor was shot in a hospital parking lot, the California Supreme Court rejected the line of appellate cases that has “rigidified the foreseeability concept” into a “prior similar incidents” rule.<sup>51</sup>

1. *Rejecting “Prior Similar”*: Isaacs (1985)

The plaintiffs in *Isaacs* were a doctor and his wife, suing the hospital where

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46. On “oscillations” in the tort doctrine of landowner liability, see Jason Scott Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341 (1991).

47. For a holding that prior similar incidents are necessary to finding foreseeability, see *Rogers v. Jones*, 128 Cal. Rptr. 404, 407 (Ct. App. 1976); *Totten v. More Oakland Residential Hous., Inc.*, 134 Cal. Rptr. 29, 33-34 (Ct. App. 1976); *Jamison v. Mark C. Bloome Co.*, 169 Cal. Rptr. 399, 402-03 (Ct. App. 1980); *Wingard v. Safeway Stores, Inc.*, 176 Cal. Rptr. 320, 323 (Ct. App. 1981); *Riley v. Marcus*, 177 Cal. Rptr. 827, 830 (Ct. App. 1981); *Jubert v. Shalom Realty*, 185 Cal. Rptr. 641, 644 (Ct. App. 1982); *Anaya v. Turk*, 199 Cal. Rptr. 187, 190 (Ct. App. 1984). For a holding that prior similar incidents are not required, see *Kwaitkowski v. Superior Trading Co.*, 176 Cal. Rptr. 494, 497 (Ct. App. 1981); *Gomez v. Ticor*, 193 Cal. Rptr. 600, 605 (Ct. App. 1983); *Cohen v. Southland Corp.*, 203 Cal. Rptr. 572 (Cal. App. 1984).

48. *Wingard*, 176 Cal. Rptr. at 324.

49. *Kwaitkowski*, 176 Cal. Rptr. at 497.

50. *Isaacs v. Huntington Mem’l Hosp.*, 695 P.2d 653 (Cal. 1985).

51. *Id.* at 658. Despite recent revisionism by California courts, *Isaacs* has long been seen as having “rejected” the prior similar incidents rule. See, e.g., Dennis T. Yokoyama, *The Law of Causation in Actions Involving Third-Party Assaults When the Landowner Negligently Fails to Hire Security Guards: A Critical Examination of Saelzler v. Advanced Group 400*, 40 CAL. W. L. REV. 79, 88-89 (2003).

he worked for serious injuries he sustained when he was shot by an unknown assailant in a parking lot across the street from the hospital's emergency room and physicians' entrance.<sup>52</sup> Two of the lights in the lot were not functioning, none of the hospital's three unarmed security guards patrolled or were stationed at that location, and there were no cameras monitoring the area.<sup>53</sup> The plaintiffs' security expert reviewed police records and concluded the hospital was in a "high crime area."<sup>54</sup> Furthermore, the expert and others testified that emergency rooms in general, and at this hospital in particular, were known to have a "high[] potential for violent acts."<sup>55</sup> One expert labeled the "parking lot 'totally devoid of any deterrents or security'" at the time of the incident.<sup>56</sup>

Despite this evidence, the plaintiffs were nonsuited at the end of their case-in-chief because the trial court agreed with the defendants that the plaintiffs had failed to prove "[n]otice of prior crimes of the same or similar nature in the same or similar portion of the defendant's premises . . . ."<sup>57</sup> To the trial court, proof of "prior similar incidents" was an element of the plaintiffs' prima facie case, and the plaintiffs therefore had the burden of proving such incidents.<sup>58</sup> A divided Court of Appeal in Los Angeles affirmed the judgment in favor of the defendant and held that there could be no liability "without evidence of prior similar incidents occurring at the property."<sup>59</sup>

The California Supreme Court in *Isaacs* reversed, concluding that, in determining whether the defendant had a duty of care to the plaintiff, foreseeability should be judged "in light of all the circumstances" of the case, rather than a simple focus on prior similar incidents on the premises.<sup>60</sup> Although such prior similar incidents are certainly "helpful to determine foreseeability," they are "not [a] necessary" element of foreseeability.<sup>61</sup>

*Isaacs* concluded that the "prior similars" test was "fatally flawed" for several reasons.<sup>62</sup> First, the court reasoned, results of the "prior similar" rule "are contrary to public policy" because the results discourage landowners from protecting premises they know are dangerous, giving landowners a "free assault" against a plaintiff-victim before they become liable for such acts occurring on

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52. *Isaacs*, 695 P.2d at 655.

53. *Id.* at 656.

54. *Id.*

55. *Id.*

56. *Id.* at 656-57.

57. *Id.* at 657. The trial court specified that evidence of "prior criminal activity would be limited to 'assaultive crimes or thefts' which occurred in the parking lots or in the emergency room area . . . ." *Id.* at 655 n.1.

58. *Id.* at 657.

59. *Isaacs v. Huntington Mem'l Hosp.*, 204 Cal. Rptr. 765, 767 (Ct. App. 1984) (depublished), *vacated*, 695 P.2d 653 (Cal. 1985).

60. *Isaacs*, 695 P.2d at 665.

61. *Id.* at 659.

62. *Id.* at 658.

their property.<sup>63</sup> Second, the rule inevitably “leads to arbitrary results and distinctions,” as different courts reach different conclusions on how similar in nature, how close in time, and how near in proximity another incident must be to count as a “prior incident.”<sup>64</sup> Third, California negligence law had elsewhere rejected equating foreseeability of a particular act with the existence of previous similar incidents.<sup>65</sup> Finally, the court concluded that “the ‘prior similar incidents’ rule improperly removes too many cases from the jury’s consideration,” which is contrary to the court’s “general reluctance to remove foreseeability questions from the jury.”<sup>66</sup>

2. *Causation Defeats Duty: Nola M. (1993)*

The *Isaacs* decision established a rule for determining duty, which arguably favored the plaintiff but in some ways merely forced defendants and courts skeptical of plaintiffs’ claims to more closely scrutinize other elements of the plaintiffs’ case—causation in particular. The paradigmatic case in this regard is *Nola M. v. USC*.<sup>67</sup>

The plaintiff in *Nola M.* was raped on the University of Southern California campus in the early evening after using an ATM at the campus credit union.<sup>68</sup> She presented expert testimony regarding deficiencies in the University’s security arrangements, including patrol patterns and the maintenance of the foliage on its grounds.<sup>69</sup> The jury found in the plaintiff’s favor, and she was ultimately awarded \$300,000 in compensatory and \$988,888 in punitive damages; the University appealed.<sup>70</sup>

On appeal, the court started its analysis with the standard acknowledgement that a person may have a duty to make sure that their property (whether real or personal) does not become “the opportunity for another [person] to do harm.”<sup>71</sup> Thus, if “the place or character” of the business or “past experience, is such that [the property owner] should reasonably anticipate careless or criminal conduct on the part of third persons, . . . he may be under a duty to take precautions against [such conduct] . . . .”<sup>72</sup> “Duty is a question of law to be determined” by the

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63. *Id.*

64. *Id.* at 658-59 (citing *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 337 n.12 (Mass 1983)).

65. *Id.* at 659 (citing *Weirum v. RKO Gen., Inc.*, 539 P.2d 36, 40 (Cal. 1975) (“[T]he fortuitous absence of prior injury does not justify relieving defendant from responsibility for the foreseeable consequences of its acts.”)).

66. *Id.* (citing *Bigbee v. Pac. Tel. & Tel. Co.*, 665 P.2d 947, 950 (Cal. 1983); *Cohen v. Southland Corp.*, 203 Cal. Rptr. 572, 578 (Ct. App. 1984)).

67. *Nola M. v. Univ. of S. Cal.*, 20 Cal. Rptr. 2d 97 (Ct. App. 1993).

68. *Id.* at 99.

69. *Id.* at 100.

70. *Id.* at 99-100.

71. *Id.* at 100.

72. *Id.* at 100-01.

court,<sup>73</sup> and, under the *Isaacs* rule, a duty exists if the injury was foreseeable in light of the totality of the circumstances.<sup>74</sup> In any event, the University did not dispute that it owed a duty to the plaintiff.<sup>75</sup> They did, however, insist that their negligence was not the cause of the plaintiff's injury.<sup>76</sup>

Rather than wrestle with the issue of breach, the court, in a 2 to 1 decision, assumed breach and addressed the question of causation.<sup>77</sup> Although the chain of causation is ordinarily broken by the intentional criminal acts of a third party, the court acknowledged that such acts "are not a superseding cause" when "the likelihood that a third person may act in a particular manner is 'one of the hazards which makes the actor negligent.'"<sup>78</sup> As an example, Justice Miriam Vogel, writing for the majority, noted the notorious case of the owner-operator of a bulldozer who "left it unlocked and accessible"; the owner was held liable to a plaintiff who was injured when the bulldozer was taken for a joyride and crashed by the thieves.<sup>79</sup> Given the foreseeability of risk and the near inevitability of harm caused by bulldozer joyriding, the owner had a duty to take reasonable steps to protect the plaintiffs from harm, and the misconduct of the thieves was not a superseding cause.<sup>80</sup> Similarly, a reckless driver who hits a plaintiff in a phone booth is not a superseding cause that breaks the chain of causation in a case that alleges liability on the part of a phone company due to its negligence in locating the phone booth too near a street; the risk of a car hitting the phone booth was precisely why the location of the phone booth was negligent.<sup>81</sup> However, the court pointed out that the lack of unarmed security guards at a fast-food restaurant was not the cause of harm done by a suicidal, homicidal maniac—a reference to the notorious 1984 attack at a San Ysidro McDonald's.<sup>82</sup>

In some ways, the *Lopez v. McDonald's Corp.* decision was a precursor to the causation analysis in *Nola M.* However, it is difficult to say just what rule can be derived from *Lopez* because, while all three justices on the panel voted in favor of McDonald's, there were two votes and a dissent for each of two separate theories.<sup>83</sup> The lead opinion by Justice Work argued that there was no duty to protect against a suicidal, homicidal maniac;<sup>84</sup> the opinion, in the alternative, assumed that a duty existed and engaged in causation analysis, finding that even

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73. *Id.* at 101.

74. *Id.*

75. *Id.*

76. *Id.* at 100.

77. *Id.* at 101.

78. *Id.* (citing RESTATEMENT, *supra* note 10, § 449; *Richardson v. Ham*, 285 P.2d 269, 272 (Cal. 1955); *Bigbee v. Pac. Tel. & Tel. Co.*, 665 P.2d 947, 952 (Cal. 1983)).

79. *Id.* at 101 n.4 (citing *Richardson*, 285 P.2d at 272).

80. *Richardson*, 285 P.2d at 272.

81. *Nola M.*, 20 Cal. Rptr. 2d at 101 n.4 (citing *Bigbee*, 665 P.2d at 952).

82. *Id.* at 104-05 (citing *Lopez v. McDonald's Corp.*, 238 Cal. Rptr. 436 (Ct. App. 1987)).

83. *Lopez*, 238 Cal. Rptr. at 436.

84. *Id.* at 441-47.

if McDonald's had breached a duty, that breach did not cause the plaintiff's injuries.<sup>85</sup> In concurring opinions, Justice Weiner rested his vote strictly on the analysis of causation,<sup>86</sup> and Justice Butler joined only in the conclusion that there was no duty and would not reach the question of causation.<sup>87</sup>

Since the trial court in *Lopez* determined that the restaurant owed no duty to the victims, the court never reached the question of causation.<sup>88</sup> Although causation, unlike duty, is a question of fact; "where reasonable minds will not dispute the absence of causation, the question is one of law."<sup>89</sup> Thus, when the plaintiff fails to present evidence that reasonable minds could believe, and relies instead on the mere speculation of expert witnesses, the action will not likely survive a motion for summary judgment.<sup>90</sup>

In *Nola M.*, unlike *Lopez*, the case was submitted to the jury, which determined that the University's deficient security "caused" the injury to the plaintiff.<sup>91</sup> On appeal, however, the court concluded that the jury erred in relying on evidence from the plaintiff's security expert, evidence the court found inconclusive because the expert "did not, and could not, say that [the security changes he recommended] would have prevented Nola's injuries."<sup>92</sup> In light of *Lopez* and other cases, the Court of Appeal concluded that, "as a matter of law, causation was not (and could not have been) proved in this case."<sup>93</sup>

Significantly, the *Nola M.* decision confronted what the court took to be a

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85. *Id.* at 449-50. Note that even under a strict prior similar incidents rule, the need to respond to acts of homicidal, suicidal maniacs is not always unforeseeable. *See, e.g., In re September 11 Litigation*, 280 F. Supp. 2d 279, 301 (S.D.N.Y. 2003) (denying World Trade Center defendants' motion for summary judgment, and noting, *inter alia*, that the prior 1993 terrorist attack on the World Trade Center implicated some of the same emergency evacuation and fire suppression concerns raised by the 9/11 plaintiffs).

86. *Lopez*, 238 Cal. Rptr. at 450 (Weiner, J., concurring).

87. *Id.* at 450-51 (Butler, J., concurring).

88. *Id.* at 438 (majority opinion) (appealing summary judgment).

89. *Nola M. v. Univ. of S. Cal.*, 20 Cal. Rptr. 2d 97, 101-02 (Ct. App. 1993) (citing *Constance B. v. State*, 223 Cal. Rptr. 645, 649 (Ct. App. 1986)).

90. In *Constance B.*, the plaintiff brought a negligence action after she was sexually assaulted, claiming that her injuries were caused by, *inter alia*, dangerous lighting conditions at a state-owned rest stop. 223 Cal. Rptr. at 646. The Court of Appeal affirmed summary judgment for the state of California, because there was no factual question regarding causation, as the undisputed facts showed that allegedly improper lighting was not a proximate cause of the assault. *Id.* at 652. The court dismissed her expert witness' opinion that (1) the rest stop's lighting created a risk of injury and (2) better lighting would have deterred the assault, as "fanciful" speculation and "a theory of mood lighting," respectively. *Id.*

91. *Id.* at 100. "Cause," of course, encompasses both cause-in-fact (e.g., defendant's actions were a substantial factor in the injury) and proximate cause (e.g., defendant's actions made the injury reasonably foreseeable). Compare 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1185 (10th ed. 2006) ("The first element of legal cause is cause in fact: i.e., it is necessary to show that the defendant's negligence contributed in some way to the plaintiff's injury, so that "but for" the defendant's negligence the injury would not have been sustained.") with 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1186 (10th ed. 2006) ("The doctrine of proximate cause limits liability; i.e., in certain situations where the defendant's conduct is an actual cause of the harm, the defendant will nevertheless be absolved because of the manner in which the injury occurred.").

92. *Nola M.*, 20 Cal. Rptr. 2d at 107.

93. *Id.*

potential criticism of its analysis, articulated to some extent in Justice Spencer's dissent: "[a]re 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."<sup>94</sup> Causation is essential, "perhaps because it imposes rational limits on liability which otherwise attaches under the judiciary's expansive view of duty."<sup>95</sup> Note the rather pointed reference to "the judiciary's expansive view of duty" and the risk the view poses of ignoring "rational limits on liability."<sup>96</sup> Given that the trial judge and the jury had imposed liability in a situation where two out of three appellate judges thought causation was not, and could not have been proven, the appellate court's concern about an irrational imposition of liability seems more than speculative.

Professor Dennis Yokoyama has argued that "[t]he significance of *Nola M.* is revealed not so much in its causation-based holding, but in its conflation of policy concerns germane to an analysis of duty, with its treatment of the causation issue."<sup>97</sup> A final piece of dicta in *Nola M.* essentially acknowledges that its analysis of causation was driven in part by its concern about the extent of duty under the existing law of premises liability in California:

If the theoretical underpinnings of the duty cases are correct, there must be a legally sound approach to the causation issue and that is what we have attempted to articulate in this case. If there is flaw in our analysis, we suggest it may be time for the Supreme Court to reexamine the concept of duty it articulated in *Isaacs v. Huntington Memorial Hospital*, in the context of a society which appears unable to effectively stem the tide of violent crime. But unless we as judges limit the duty we created, it appears inevitable that the Legislature will do it for us.<sup>98</sup>

This passage has been interpreted by at least one observer as a "plea . . . to overturn *Isaacs* outright."<sup>99</sup> It was a plea that the California Supreme Court heard loud and clear.

### 3. "Refining" *Isaacs*: *Ann M.* (1993)

In light of criticism like that in *Nola M.*, the California Supreme Court eventually decided to depart from the rule announced in *Isaacs*. A critical development in that retrenchment came in *Ann M. v. Pacific Plaza Shopping Center*,<sup>100</sup> where the court ruled that a plaintiff cannot hold a landowner liable for

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94. *Id.* at 108-09.

95. *Id.* at 109.

96. *Id.*

97. Yokoyama, *supra* note 51, at 102.

98. *Nola M.*, 20 Cal. Rptr. 2d at 109 (citation omitted).

99. Shoop, *supra* note 16, at 13.

100. *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993).

failing to provide security guards unless the plaintiff can show that the landowner knew of prior similar incidents on the premises.<sup>101</sup>

Ann M. was a photo shop employee in the Pacific Plaza Shopping Center, a San Diego strip mall, and was raped just after opening the store one morning in 1985.<sup>102</sup> She sued the owners of the shopping center, claiming that they had unjustifiably decided not to hire security guards.<sup>103</sup> She argued that the need for guards was shown by a number of robberies, purse snatchings, and general incidents, including one where a man pulled down women's pants, as well as the presence of "transients" loitering in the common areas of the shopping center.<sup>104</sup> A security company invited to a meeting of the tenants' association had recommended regular foot patrols, but the association concluded that the costs would be prohibitive and, instead, contracted to have a security company drive by the area three or four times each day.<sup>105</sup>

Pacific Plaza moved for summary judgment, claiming it owed Ann M. no duty because the attack was unforeseeable.<sup>106</sup> Despite Ann M.'s arguments that the attack was foreseeable in light of the circumstances that had surfaced before the tenants' association, the trial court granted the shopping center's motion, finding that no duty was owed to Ann M.<sup>107</sup>

Ann M. appealed from the judgment in favor of Pacific Plaza, and the Court of Appeal in San Diego affirmed, though on different grounds.<sup>108</sup> The appellate court reasoned that "Pacific Plaza owed a duty to . . . maintain the common areas and leased premises in a reasonably safe condition, including the duty to take reasonable precautions against foreseeable criminal activity by third persons."<sup>109</sup> However, the court concluded that the evidence was such that "no reasonable jury could conclude Pacific Plaza acted unreasonably in failing to provide a security patrol."<sup>110</sup> In short, there was a duty, but there was no breach.

The appellate court's finding of a duty reflected an attempt to resolve what it admitted was a "confusing and confused" area of law.<sup>111</sup> The San Diego justices

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101. *Id.* at 216.

102. *Id.* at 209-10. See also the statement of facts in *Miller v. Pac. Plaza Shopping Ctr.*, 14 Cal. Rptr. 2d 272 (Ct. App. 1992) (depublished), *review granted*, 846 P.2d 703 (Cal. 1993), *aff'd sub nom.*, *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993). Though the published California Supreme Court opinion concealed the plaintiff's identity, the appellate court opinion did not.

103. *Ann M.*, 863 P.2d at 211.

104. *Id.* at 210.

105. *Id.*

106. *Id.* at 211.

107. *Id.*

108. *Id.*

109. *Id.* See also *Miller v. Pac. Plaza Shopping Ctr.*, 14 Cal. Rptr. 2d 272, 274-75 (Ct. App. 1992) (depublished), *review granted*, 846 P.2d 703 (Cal. 1993), *aff'd sub nom.*, *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993).

110. *Miller*, 14 Cal. Rptr. 2d at 276.

111. *Id.* at 273 (citations omitted) (citing *Marois v. Royal Investigation & Patrol, Inc.*, 208 Cal. Rptr. 384, 386 (Ct. App. 1984)).

explained:

One 'duty' inquiry used by some courts focuses on the reasonableness of the defendant's conduct. Where a court determines that the plaintiff was injured in spite of the defendant's reasonable actions, it is sometimes stated that the defendant's duty did not extend to the prevention of the plaintiff's injury. The second 'duty' inquiry involves those 'considerations of policy' which on occasion lead courts to refuse to impose liability *even when* the plaintiff's injury was caused by the defendant's failure to act reasonably.<sup>112</sup>

They reasoned that the inquiry into "legal duty" is the province of the court,<sup>113</sup> and that the inquiry should focus only on whether there are "policy considerations which restrict the liability of a presumably negligent defendant."<sup>114</sup> That is, as the court explained:

In deciding that narrow question of legal "duty", as opposed to the broader factual questions of negligence and causation, we must begin by assuming the defendant has acted unreasonably and proceed to analyze whether other policy considerations dictate a departure from the general rule that "all persons have a duty "to use ordinary care to prevent others being injured as a result of their conduct. . . ."<sup>115</sup>

Thus, the decision of the trial court and the arguments of the defendant were flawed because "[t]he myriad of factors" they addressed "all lead to the conclusion either that [the defendant landlord] acted reasonably (i.e., was not negligent) or that anything it could have done would not have prevented [Ann M's] injuries."<sup>116</sup>

Despite concluding that a legal duty existed to provide adequate security, the Court of Appeal affirmed the grant of summary judgment on the ground that the plaintiff had made no showing of admissible evidence of security problems sufficient to have put the landowner on notice that security patrols were needed.<sup>117</sup> Ann M., unhappy with the appeal court's decision, then sought review

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112. *Id.* (citing *Marois*, 208 Cal. Rptr. at 386).

113. *See* *Ballard v. Uribe*, 715 P.2d 624, 629 n.6 (Cal. 1986).

114. *Miller*, 14 Cal. Rptr. 2d at 274.

115. *Id.* (citing *Ballard*, 715 P.2d at 629 n.6).

116. *Id.*

117. *Id.* at 275. The court noted that the plaintiff's evidence consisted of little more than hearsay reports during tenant meetings about incidents of purse snatchings and misbehavior by transients. *Id.*

Despite extensive discovery, . . . Miller was unable to offer any evidence to substantiate what she heard at the meetings or otherwise show that Pacific knew of security problems at the shopping center. Indeed, Pacific Plaza officials submitted declarations stating they were unaware of any report of a rape or any similar violent crime occurring at the center before the assault on Miller. Interrogatory responses clarify that Pacific had no record of any prior incidents of felony criminal activity at the shopping center dating back to December 31, 1982."

by the California Supreme Court.

Rather than simply affirm the *Miller* decision, the California Supreme Court granted review in order to attempt, once again, to clarify its jurisprudence of premises liability.<sup>118</sup> Writing for the majority, Justice Edward Panelli noted that *Nola M.* and other appellate opinions had “questioned the wisdom of our apparent abandonment of the ‘prior similar incidents’ rule.”<sup>119</sup> Panelli also picked up on the suggestion in *Nola M.* that widespread, violent crime made “refinement” of *Isaacs* necessary: “Unfortunately, random, violent crime is endemic in today’s society. It is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable.”<sup>120</sup>

Justice Panelli’s opinion argued that “refinement” of the *Isaacs* rule was made easier for the court because *Isaacs* had overreached somewhat—since the evidence in that case contained prior similar incidents, enunciation of a new rule was unnecessary to the holding.<sup>121</sup> The implication was that *Isaacs* did not quite need to be overturned because its discussion of the “totality of the circumstances” was simply some sort of dicta.<sup>122</sup>

Next, the court noted the concern raised by the Court of Appeal in *Nola M.* about the division of labor between the judge and the jury. Without citing any cases, the court complained that the “broad language” of *Isaacs* “has tended to confuse duty analysis generally” because “the opinion can be read to hold that foreseeability in the context of determining duty is normally a question of fact

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*Id.*

118. *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993).

119. *Id.* at 214.

120. *Id.* at 215.

121. *Id.*

122. With all due respect, this assertion is simply wrong. Dr. Isaacs had sought review by the high court specifically because the trial court and the Court of Appeal in Los Angeles had relied on a prior case to hold that prior similar incidents were a prerequisite for a finding of duty and had *expressly* concluded that there were *not* prior similar in that case. *See Isaacs v. Huntington Mem’l Hosp.*, 204 Cal. Rptr. 765, 767 (Ct. App. 1984) (depublished) (citing *Wingard v. Safeway Stores, Inc.*, 176 Cal. Rptr. 320, 320 (Ct. App. 1981)) (“Plaintiffs presented no evidence of prior incidents which would have given the hospital reason to anticipate the unprovoked shooting of Dr. Isaacs in the hospital’s parking lot.”), *vacated*, 695 P.2d 653 (1985). The California Supreme Court in *Isaacs* never suggested that there were prior similars, and it never disputed that the trial court and the Court of Appeal correctly applied the prior similars rule to the facts of the *Isaacs* case; it only questioned the rule itself. *See Isaacs v. Huntington Mem’l Hosp.*, 695 P.2d 653 (Cal. 1985). There is also no reason to think that the result in *Isaacs* would be different under *Ann M.*’s revived prior similars rule, considering that Dr. Isaacs presented no evidence of prior violent assaults in the parking lot where he was attacked.

Furthermore, the “overreach” that Justice Panelli alleges happened in *Isaacs* is actually more evident in *Ann M.* The trial court in that case ruled that the defendant owed no duty to the plaintiff under the existing *Isaacs* rule; the Court of Appeal affirmed on the ground that, although a duty did exist, there was no evidence to support the allegation that the defendant breached it. *See Miller v. Pac. Plaza Shopping Ctr.*, 14 Cal. Rptr. 2d 272, 275 (Ct. App. 1992) (unpublished), *review granted*, 846 P.2d 703 (Cal. 1993), *aff’d sub nom.*, *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993). The California Supreme Court could have simply affirmed on either ground, or it could have denied *Ann M.*’s petition for review without making any comment at all.

reserved for the jury.”<sup>123</sup> The court stressed that this reading was “in error”: “Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court.”<sup>124</sup>

Justice Panelli and the majority concluded there was no evidence that the owners in *Ann M.* knew of prior crimes at the shopping center, and even if they did, the crimes that occurred were not similar enough to the violent rape of Ann M.<sup>125</sup> “Because hiring security guards is costly, the court said, a landowner cannot be required to do so without a ‘high degree’ of foreseeability,”<sup>126</sup> and this “degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner’s premises.”<sup>127</sup> “To hold otherwise would be to impose an unfair burden upon landlords and, in effect, would force landlords to become the insurers of public safety, contrary to well established policy in this state.”<sup>128</sup>

Justice Stanley Mosk, in his lone dissent, noted that the majority opinion “in effect resurrects an improper test discarded by this court eight years ago” in *Isaacs*.<sup>129</sup> His “bottom line” was that liability in general, and specifically whether providing security guards would be overly burdensome, “are factual matters that should be decided by a jury, not by summary judgment.”<sup>130</sup> With these remarks as preface and conclusion, Justice Mosk demonstrated his commitment to the “totality of the circumstances” rule by “quot[ing] at length” the bulk of then-Chief Justice Bird’s analysis in *Isaacs*.<sup>131</sup>

Not surprisingly, Ann M.’s attorney was bitter: “The decision ‘reinstates the first-free-assault rule,’ said Carl Lewis, a La Jolla, California, attorney who represented the [plaintiff].”<sup>132</sup> “It’s clearly a pro-business decision and tends to abridge individual rights that had been established in the state.”<sup>133</sup> Another grim plaintiffs’ counsel complained of *Ann M.*: “California has seemingly come full circle, at first rejecting the ‘prior similars’ rule and recently resurrecting it, at least in cases where the plaintiff argues that security guards should have been employed. The principle of *stare decisis* and victims of violence in California have both suffered in the process.”<sup>134</sup>

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123. *Ann M.*, 863 P.2d at 215.

124. *Id.*

125. *Id.* at 216. The Court also noted that the shopping center owners could not be held negligent for not knowing of the prior incidents, given their record keeping practices. *Id.*

126. Shoop, *supra* note 16, at 12.

127. *Ann M.*, 863 P.2d at 215. The Court noted that “other circumstances such as immediate proximity to a substantially similar business establishment that has experienced violent crime on its premises could provide the requisite degree of foreseeability.” *Id.* at 215 n.7.

128. *Id.* at 215-16.

129. *Id.* at 218 (Mosk, J., dissenting).

130. *Id.* at 217.

131. *Id.* at 217-18.

132. Shoop, *supra* note 16, at 12.

133. *Id.*

134. Peter S. Everett, *Violence Comes to the Mall*, TRIAL, Oct. 1994, at 62, 65 n.2 (citations omitted).

A critical question is whether *Ann M.* did indeed constitute a revival of the prior similar rule. Taking the *Ann M.* court at its word, some commentators described the new California rule as a compromise between a too rigid prior similar rule and a too flexible totality of the circumstances test.<sup>135</sup> Under this “balancing” approach to determining duty, “[a] high degree of foreseeability justifies a more onerous burden than a limited degree does.”<sup>136</sup> Looking at the case a bit differently, Professor Dennis Yokoyama recently described *Ann M.* as “mov[ing] away from the totality of the circumstances approach adopted in *Isaacs*, at least with respect to whether landowners have a duty to provide security guards, and resurrect[ing] the prior similar incidents test.”<sup>137</sup>

Similarly, Corey Gordon argued that the *Ann M.* decision was “not the catastrophe for crime victims” and plaintiffs’ counsel “that some observers believed it” to be.<sup>138</sup> Trying to put the best possible face on things, Gordon tried to distinguish *Ann M.* from the more defendant-friendly causation analysis in *Nola M.*: “‘The supreme court could have adopted the same reasoning’ in the case of *Ann M.* . . . ‘It didn’t do that. What it did was carve out a very narrow and limited exception to the general rule of applying a duty of reasonable care to a landowner.’”<sup>139</sup>

As was noted above, foreseeability is “an elastic factor,”<sup>140</sup> or a “flexible concept,” meaning it varies depending on the nature of the protection sought.<sup>141</sup> On this basis, Gordon reasoned that “less foreseeability would be necessary to require landowners to provide [less costly] protections than to hire security guards”; a showing of prior similar incidents would be unnecessary.<sup>142</sup> “‘This is only a security-guards case’” and, contrary to Justice Mosk’s conclusion in dissent, Gordon assumed that “[t]he *Isaacs* totality-of-the-circumstances rule will still apply when victims seek less costly security measures.”<sup>143</sup>

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135. See Donna Lee Welch, *Ann M. v. Pacific Plaza Shopping Center: The California Supreme Court Retreats from Its “Totality of the Circumstances” Approach to Premises Liability*, 28 GA. L. REV. 1053, 1068-69 (1994); see also Gerson & Schwartz, *supra* note 9, at 23; John A. Harris, *Finding a Remedy for Renters: When Crime Occurs in a Residential Apartment Building, a Security Expert Can Help you Evaluate Whether the Victim has a Viable Case Against the Property Owner*, TRIAL, Dec. 2002, at 38, 39.

136. Harris, *supra* note 136, at 39.

137. Yokoyama, *supra* note 51, at 92.

138. Shoop, *supra* note 16, at 12.

139. *Id.* at 13.

140. *Gomez v. Ticor*, 193 Cal. Rptr. 600, 605 (Ct. App. 1983).

141. *Sharon P. v. Arman, Ltd.*, 65 Cal. Rptr. 2d 640, 646 n.6 (Ct. App. 1997) (depublished) (citing *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215 (Cal. 1993)), *review granted*, 945 P.2d 779 (Cal. Oct. 22, 1997), *rev’d*, 989 P.2d 121 (Cal. 1999).

142. Shoop, *supra* note 16, at 13.

143. *Id.* at 12-13. Because *Ann M.* involved a dispute over whether security guards were necessary, the Court of Appeal in San Francisco later held that case to be “inapposite” to one where a landowner already employed a security guard, because “[t]he duty to protect had already been assumed and therefore the issue of foreseeability becomes irrelevant.” *Mata v. Mata*, 130 Cal. Rptr. 2d 141, 145 (Ct. App. 2003). The California Supreme Court subsequently overruled *Mata* on this point. See *Delgado v. Trax Bar & Grill*, 113 P.3d 1159, 1174-75 (Cal. 2005); see also discussion *infra* Part III.G.

Gordon also cited a footnote from *Ann M.*, where the justices explicitly “left open the possibility that some types of commercial property [are] ‘so inherently dangerous that, even in the absence of prior similar incidents, providing security guards will fall within the scope of a landowner’s duty of care.’”<sup>144</sup> Borrowing from cases relying on Prosser’s text, the court noted that a “retail store located in a shopping center” is not the same as “a parking garage or an all-night convenience store,” which create “an especial temptation and opportunity for criminal misconduct.”<sup>145</sup>

C. *Closing Open Questions: Sharon P. (1999)*

Did anything of the totality of the circumstances rule survive *Ann M.*? Did *Ann M.* really establish a balancing test, or was it actually a revival of the old prior similars rule? Pro-plaintiff optimism such as Gordon’s was soon put to the test in the case of yet another parking garage assault.

Sharon P. was sexually assaulted by an unknown assailant at 11:00 on a Thursday morning after parking her car in her assigned space in the underground parking garage of the Los Angeles office building where she worked was a tenant.<sup>146</sup> The evidence at trial indicated that maintenance and monitoring of the garage had been increasingly neglected: the garage was dirty and unkempt, several lights were burned out or missing, security cameras were not functioning, and the garage sometimes smelled of urine (on an inspection some months after the attack, there was a suggestion that a transient had set up a cot in a garage storage area).<sup>147</sup> The bank located on the first floor of the building had been held up seven times over the two years preceding the attack.<sup>148</sup> No wonder Los Angeles was known as the “bank-robbery capital of America” during the 1990s.<sup>149</sup>

Sharon P. sued the owner of the building and garage where she was assaulted, as well as the management company that ran the garage for the building owner.<sup>150</sup> After receiving the parties’ pleadings and evidentiary declarations, the trial court granted defendants’ motions for summary judgment “based upon the foreseeability analysis articulated in *Ann M.*,” finding “it significant that there was no evidence of crimes occurring within the parking garage.”<sup>151</sup>

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144. Shoop, *supra* note 14, at 16 (quoting *Ann M.*, 863 P.2d at 216 n.8).

145. *Ann M.*, 863 P.2d at 216 n.8.

146. *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 123 (Cal. 1999).

147. *Sharon P. v. Arman, Ltd.*, 65 Cal. Rptr. 2d 640, 643 (Ct. App. 1997) (depublished), *review granted*, 945 P.2d 779 (Cal. Oct. 22, 1997), *rev’d*, 989 P.2d 121 (Cal. 1999).

148. *Sharon P.*, 989 P.2d at 123.

149. See James W. Blair Jr., *Bonnie and Clyde Take an Early Retirement in L.A.*, CHRISTIAN SCI. MONITOR, Apr. 4, 2000, at 2.

150. *Sharon P.*, 989 P.2d at 123.

151. *Id.* at 124.

The Court of Appeal reversed, distinguishing *Ann M.* as a case about “the narrow question of whether the owner of a strip mall shopping center, in fulfilling its duty to maintain the common areas of its premises in a reasonably safe condition, *must provide security guards for those areas.*”<sup>152</sup> Indeed, the court’s opinion repeatedly adds italicized emphasis to suggest the narrowest possible reading of *Ann M.* For example, the court described *Isaacs* as having only been “rejected, *in part,*” by *Ann M.*;<sup>153</sup> it describes the holding in *Ann M.* as establishing “two general rules regarding a landowner’s duty *to provide security guards,*”<sup>154</sup> each of which hinge on there being “*a high degree of foreseeability,*”<sup>155</sup> rather than ordinary foreseeability. Furthermore, the court described the “heart of the case” in *Ann M.* as being whether the landowner “had reasonable cause to anticipate that criminal conduct such as rape would occur in the shopping center premises *unless it provided security patrols in the common areas.*”<sup>156</sup>

Thus, the Court of Appeal concluded that “*Ann M.* did not totally rewrite *Isaacs* on the issue of prior similar incidents, but only addressed that issue vis-à-vis the claimed necessity of a *specific* preventative measure: security guards.”<sup>157</sup> So interpreted, *Ann M.* “does not preclude the application of *Isaacs*’s directive to analyze foreseeability using the totality of circumstances in a case where those circumstances include, as they do here, such factors as an inherently dangerous premises and a history of prior (although not similar) criminal acts on nearby premises.”<sup>158</sup>

The Court of Appeal further narrowed *Ann M.* by taking footnote eight seriously, which “expressly left open the question of ‘whether some types of commercial property are so inherently dangerous that, even in the absence of prior similar incidents, providing security guards will fall within the scope of a landowner’s duty of care.’”<sup>159</sup> The court cited further dicta in *Ann M.* as having established that parking garages and all-night convenience stores “*create[] ‘an especial temptation and opportunity for criminal conduct.’*”<sup>160</sup> The appellate court presented this language (which originated in Prosser) in support of the proposition from *Gomez* that the “very operation of a parking structure” creates “an especial temptation and opportunity for criminal misconduct,” and that such structures “*invite[] acts of theft and vandalism*” and are “likely places for robbers and rapists to lie in wait.”<sup>161</sup>

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152. *Sharon P.*, 65 Cal. Rptr. 2d at 648 (emphasis in original).

153. *Id.* (emphasis in original).

154. *Id.* at 649 (emphasis in original).

155. *Id.* (emphasis in original).

156. *Id.* (emphasis in original).

157. *Id.* (emphasis in original).

158. *Id.*

159. *Id.* at 650.

160. *Id.* (emphasis in original).

161. *Id.* at 651 (quoting *Gomez v. Ticor*, 193 Cal. Rptr. 600, 604 (Ct. App. 1983)).

In its application of the *Rowland* factors, the *Sharon P.* court stressed “the availability and cost of insuring against the risk, the policy of preventing future harm, the moral blame in the defendant’s conduct, and the burden to defendant and the community of imposing a duty to provide security measures and requiring liability for breach of the duty.”<sup>162</sup> The evidence in the case demonstrated that the defendants could get and did have liability insurance, and the court observed that “its cost has presumably already been passed on to tenants utilizing the parking facilities for themselves and their customers and clients.”<sup>163</sup> “Indeed,” the court went on, “there is no indication that such insurance is not generally available to owners and managers of parking structures.”<sup>164</sup>

Furthermore, the court felt that the policy presumption in favor of steps preventing future harm also cut in favor of imposing this liability.<sup>165</sup> The need for commercial parking structures “can hardly be avoided,” but because “they are located on private property, they are not routinely, or even sporadically, patrolled by the police.”<sup>166</sup> Thus, that security “must be the responsibility of the owners and operators.”<sup>167</sup>

Finally, the court observed that “there is no evidence that the cost of providing sufficient protection cannot reasonably be passed on to the persons who utilize the parking garage,” and it was even appropriate to do so:

The “cost” of parking should include its entire cost, including reasonable security measures. Further, it is more reasonable to have all persons utilizing a commercial parking structure pay for the economic cost of security, and thereby realize the benefit of that security, than it is to make an individual user bear the physical and emotional cost of a criminal act which results from an owner’s or manager’s failure to employ sufficient crime deterrence measures.<sup>168</sup>

After determining that the assault was foreseeable and that, under the policy considerations established by *Rowland*, the defendants owed a duty of care to the plaintiff to provide reasonable security in the garage, the Court of Appeal remanded the case to the trial court to allow a jury to determine the issues of breach and causation based on the totality of the circumstances presented.<sup>169</sup>

In a strong dissent, Justice Kitching argued that the prior similars approach

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162. *Id.* at 652.

163. *Id.*

164. *Id.* Of course, such insurance policies had premiums based on the law before this case. If this case were to have stood as the definitive statement of the common law in California, commercial parking structures virtually always would be subject to a high degree of duty, so the current cost and availability of insurance might not reflect the future cost and availability. *See Haines, supra* note 41.

165. *Sharon P.*, 65 Cal. Rptr. 2d at 652.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 653-54 & n.22.

from *Ann M.* should be applied to parking garages such as in *Sharon P.*<sup>170</sup> She contended that the majority had ignored the California Supreme Court's caution that "[w]hen deciding whether to expand a tort duty of care, courts must consider the potential social and economic consequences."<sup>171</sup> She suggested that a rule that labels commercial parking structures "inherently dangerous" and therefore "automatically imposes a duty as a matter of law"<sup>172</sup> might drive up costs so much that some business owners would be forced to close or relocate. Justice Kitching cited a law review article arguing that "[i]t serves no one to impose a duty which, rather than protecting customers, forces the businesses which they frequent to close."<sup>173</sup>

After Sharon P.'s victory in the appellate court, the California Supreme Court granted the defendants' petition for review and reversed.<sup>174</sup> The court began with the familiar rule that "[t]he existence of a duty is a question of law for the court" and "foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court."<sup>175</sup> Thus, "[t]he critical issue in this case is whether a sexual assault by a third party in the tenant garage was sufficiently foreseeable to support a requirement that defendants secure that area against such crime."<sup>176</sup>

The court rejected the view that parking garages are "inherently dangerous" or pose "an especial temptation or opportunity for [crime]," expressly repudiating statements in *Gomez v. Ticor* to that effect.<sup>177</sup> The court acknowledged, as it did in *Ann M.*, that "[i]t is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable."<sup>178</sup> "Not only is random, violent crime 'endemic in today's society,' but one can easily think of a host of locations and businesses that, for one reason or another, present attractive opportunities to the criminal element of society."<sup>179</sup> As such, the court was unwilling to "find that the occurrence of violent crime in commercial underground parking structures is highly foreseeable as a matter of law" because it "would be opening the door to virtually limitless litigation over what other types of property could also be characterized as 'inherently dangerous.'"<sup>180</sup>

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170. *Id.* at 654 (Kitching, J., dissenting).

171. *Id.* at 656 (quoting *Macias v. State*, 897 P.2d 530, 540 (Cal. 1995) (discussing how, given "potential social and economic consequences," the court refused to impose a private tort duty on a private manufacturer of malathion insecticide to second-guess the state government's decisions as how to inform the public regarding large-scale pesticide spraying in urban areas in response to fruit-fly infestation)).

172. *Id.* at 654.

173. *Id.* at 656 (quoting Uri Kaufman, *When Crime Pays: Business Landlords' Duty to Protect Customers from Criminal Acts Committed on the Premises*, 31 S. TEX. L. REV. 89, 112-13 (1990)).

174. *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 123 (Cal. 1999).

175. *Id.* at 125.

176. *Id.*

177. *Id.* at 127 (citing *Gomez v. Ticor*, 193 Cal. Rptr. 600 (Ct. App. 1983)).

178. *Id.* at 129 (quoting *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215 (Cal. 1993)).

179. *Id.* (citations omitted).

180. *Id.*

The court acknowledged that “[i]t is difficult to quarrel with the abstract proposition that the provision of improved lighting and maintenance, operational surveillance cameras and periodic walk-throughs of the tenant garage owned and operated by defendants might have diminished the risk of criminal attacks occurring in the garage,” but it held that “absent any prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location,” such measures were not required.<sup>181</sup> Of course, this passage comes very close to acknowledging that the court is essentially resurrecting the prior similar rule, rather than applying any balancing test, in that prior similar will be required even when the “burdensome” duty at issue is no more than routine security measures such as lighting, video cameras, and walk-throughs.

The court in *Ann M.* had purported to be establishing a balancing test, requiring a high degree of foreseeability “where the burden of preventing future harm is great” but a lesser degree of foreseeability “where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means.”<sup>182</sup> In *Sharon P.*, the court supposedly was applying this balancing test to a case involving a demand for relatively routine security safeguards that were significantly less costly than guards and involved a type of property that California courts and other observers had previously identified as particularly susceptible to criminal activity.<sup>183</sup> Nevertheless, the court concluded that the crime was not foreseeable and that there was no duty to establish and maintain even routine security elements, and it did so essentially, though not expressly, on the grounds that no prior similar incidents could be shown.<sup>184</sup>

Indeed, Justice Werdegar, who concurred in the result and portions of the opinion, dissented from the majority’s discussion of foreseeability specifically because it appeared “impliedly to reinstitute” the old “prior similar incidents rule.”<sup>185</sup> She contended that “[e]mpirically, a landlord is not, as the prior similar incidents rule would have it, entitled to one free assault before the failure to take appropriate security measures subjects him or her to the risk of civil liability.”<sup>186</sup>

Justice Mosk, again dissenting, took the majority to task for framing the analysis of duty in such a way as to usurp the province of the jury as a fact-finder.<sup>187</sup> Though the determination of duty is the job of the court, Mosk observed, “as a general matter, if the type of harm alleged is too remote a

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181. *Id.* at 132-33.

182. *Ann M.*, 863 P.2d at 215.

183. *Sharon P.*, 989 P.2d at 121.

184. *Id.* at 132-33. This “no duty” decision disregarded the robberies and other crimes of the property, even though, as Esper and Keating note, “[m]any of the precautions which would make robbery less likely in a parking structure (adequate lighting, security cameras) will also make rape less likely.” Esper & Keating, *supra* note 43, at 320.

185. *Sharon P.*, 989 P.2d at 133-34 (Werdegar, J., concurring in part and dissenting in part).

186. *Id.* at 134-35.

187. *Id.* at 137 (Mosk, J., dissenting).

consequence of the type of misconduct alleged, the defendant is not liable.”<sup>188</sup> Since there was no question of such remoteness in *Sharon P.*, the court’s task was finished. “It is for the jury to decide whether, under the facts of this case, the harm to Sharon P. was a foreseeable consequence of defendants’ conduct.”<sup>189</sup> He noted that prior cases have clarified the confusion surrounding the question of foreseeability and duty as follows:

Duty is not an immutable fact of nature, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. The foreseeability of a particular kind of harm is significant in the duty calculus, but a court’s task—in determining duty—is not to decide whether a *particular* plaintiff’s injury was reasonably foreseeable in light of a *particular* defendant’s conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.<sup>190</sup>

In Mosk’s view, the majority had confused this issue, and *Sharon P.* re-introduced fatal flaws into the law.<sup>191</sup>

*D. Cementing the Return of Prior Similar: Nicole M. (1999), Hassoon (2001), Morris (2002), Morris (2003), and Saz (2004)*

The California Supreme Court has stepped in to insist that the law under *Ann M.* requires a balancing of burdens on the defendant and risks to the plaintiff.<sup>192</sup> However, numerous cases in various divisions of the California Court of

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188. *Id.*

189. *Id.*

190. *Id.* (internal quotation marks omitted) (quoting *Brewer v. Teano*, 47 Cal. Rptr. 2d 348, 351 (Ct. App. 1995); *Ballard v. Uribe*, 715 P.2d 624, 629 n.6 (Cal. 1986)); *see also* *Vasquez v. Residential Invs., Inc.*, 12 Cal. Rptr. 3d 846, 853 (Ct. App. 2004); *Ludwig v. City of San Diego*, 76 Cal. Rptr. 2d 809, 811 (Ct. App. 1998).

191. *Sharon P.*, 989 P.2d at 137 (Mosk, J., dissenting).

192. *See* *Delgado v. Trax Bar & Grill*, 113 P.3d 1159, 1166-67 (Cal. 2005); *Wiener v. Southcoast Childcare Ctrs., Inc.*, 88 P.3d 517, 521-22 (Cal. 2004).

Appeal,<sup>193</sup> often left untouched by the California Supreme Court, seriously questioned whether anything of the *Isaacs* rule survived *Ann M.* and *Sharon P.*<sup>194</sup>

In a case from the Court of Appeal in San Jose, *Nicole M. v. Sears, Roebuck & Co.*,<sup>195</sup> the plaintiff was sexually assaulted while walking in a part of a Sears parking lot that had burned out lights and overgrown vegetation.<sup>196</sup> As in *Sharon P.*, Nicole M. had framed her case to come within the terms of *Ann M.*'s footnote 8, which suggested that parking garages might be "inherently dangerous" and subject to a special liability rule.<sup>197</sup> After defendant Sears prevailed on summary judgment, the parties made *Ann M.*'s meaning the focus of their dispute on appeal.<sup>198</sup> Plaintiff Nicole M. argued that after *Ann M.*, "prior similar incidents are prerequisite only to providing security guards and not lesser security measures," while Sears argued that "*Ann M.* totally revamped the entire body of case law governing liability for third party criminal conduct."<sup>199</sup>

The Court of Appeal largely adopted Sears' interpretation of *Ann M.* that "[t]he requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises."<sup>200</sup> Nicole M. complained about burned out lights and overgrown bushes at the location of the attack, as well as an accumulation of trash and litter, and the presence of a homeless man living in the bushes.<sup>201</sup> A security consultant testified that the location was an example of what experts in the field term a "rape corridor" and constituted "a sexual assault waiting to happen."<sup>202</sup> The court concluded, however, that the "circumstances were not cause for the property owner to reasonably anticipate crime in the absence of prior similar incidents."<sup>203</sup>

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193. Unlike the situation with the well-known numbered circuit courts of appeal of the federal judiciary, the convention of identifying California Courts of Appeal by district and division is not particularly meaningful for all but the relatively small number of people who practice regularly in California appellate courts. And even some of them will admit to having trouble keeping it straight. Since a principle observation of this section will be that this area of law does not conform to the formalist conception of a uniform law applied consistently regardless of which division or panel considers the case, the familiar name of the actual city in which an appellate panel sits will be used, rather than numerical district and division labels which, for most people, obscure the distinction between the courts.

194. In addition to the cases discussed in this part, see also Part III.E below for the discussion of Pamela W. v. Millsom, 30 Cal. Rptr. 2d 690 (Ct. App. 1994), which also implied a revived prior similars rule.

195. *Nicole M. v. Sears, Roebuck & Co.*, 90 Cal. Rptr. 2d 922 (Cal. App. 1999).

196. *Id.* at 923.

197. *Id.* at 926 & n.2.

198. *Id.* at 926. The impact of *Sharon P.* in *Nicole M.* is rather interesting. The trial court in *Nicole M.* initially had cited the Court of Appeal decision in *Sharon P.* as the basis for an order rejecting a summary judgment motion by Sears, but after *Sharon P.* was accepted for review by the California Supreme Court and the Court of Appeal's opinion was thus depublished, Sears renewed its motion for summary judgment, and the trial court flip-flopped, deciding in favor of Sears. *Id.* at 926 n.2.

199. *Id.* at 926.

200. *Id.* at 928 (citing *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215 (Cal. 1993)).

201. *Id.* at 923 (noting, however, that the homeless man living in the bushes was not the person who assaulted Nicole M.).

202. *Id.*

203. *Id.* at 928.

Under the express language of *Ann M.*, prior similars have to be shown only when the high degree of foreseeability of possible criminal activity would create a duty to undertake an especially burdensome precaution, such as providing security guards.<sup>204</sup> There was no discussion of any such balancing test in the *Nicole M.* decision, however. According to *Nicole M.*, prior similars must be shown even in a case where the security precautions sought amounted only to sweeping up trash, replacing burned out lights, and trimming shrubbery.<sup>205</sup>

In *Hassoon v. Shamieh*,<sup>206</sup> before the Court of Appeal in San Francisco, the plaintiff was shot while patronizing a grocery store in the Tenderloin district after the defendant store's employee intervened in a fight among several men who sold drugs on the street outside the store.<sup>207</sup> The defendant's employee rescued one of the combatants by pulling him into the store.<sup>208</sup> As a result, the other drug dealers fired a semiautomatic weapon into the store, wounding several customers including the plaintiff.<sup>209</sup> The plaintiff's case was rejected by the trial court on summary judgment, and the Court of Appeal affirmed, holding that "the absence of proof of prior similar incidents at defendants' place of business is fatal to a successful damages claim in tort."<sup>210</sup>

According to the Court of Appeal, the "proposition [that] lies at the heart of the rulings in both *Ann M.* and *Sharon P.*" is that "[f]or reasons of legal policy, in California, the duty to take security measures for the protection of visitors is not coextensive with the foreseeability of potential harm."<sup>211</sup> Instead, the court reasoned, "the foreseeability required to warrant raising a duty on the premises owner to take protective measures against *third party violence*" is a "*heightened* foreseeability . . . that goes beyond the general foreseeability of the risk of harm to visitors imposed on any owner of real property."<sup>212</sup> Thus, "[f]or policy reasons identified by the court in *Ann M.* and *Sharon P.*, . . . duty (and tort liability) requires more than mere foreseeability; it requires a 'heightened foreseeability' embodied in the 'prior similars' rule."<sup>213</sup>

As such, *Hassoon* expressly provides that the heightened foreseeability requirement embodied in the prior similars rule extends not only to security guards and other burdensome requirements, but functions as an element of establishing duty in any cases seeking to impose on a landowner any obligation to take "reasonable security measures" against the possibility of violent crime by

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204. See *Ann M.*, 863 P.2d at 215.

205. See *Nicole M.* 90 Cal. Rptr. 2d at 928.

206. *Hassoon v. Shamieh*, 107 Cal. Rptr. 2d 658 (Ct. App. 2001), *disapproved by* *Delgado v. Trax Bar and Grill*, 113 P.3d 1159, 1171 (Cal. 2005).

207. *Id.* at 659.

208. *Id.*

209. *Id.*

210. *Id.* at 660.

211. *Id.* at 661 (citations omitted).

212. *Id.* (citations omitted).

213. *Id.* at 661 n.2 (citations omitted).

third parties:

As we read these controlling precedents, the requirement of “prior similar incidents” is *more* than a factual precondition to premises liability; it is the objective event that separates the duty of care imposed by the law on ordinary property owners from the higher duty imposed on that smaller class of owners whose prior experience with physical violence on their premises makes it reasonable for the law to impose upon them a duty to take reasonable security measures, a breach of which resulting in injury is answerable in damages.<sup>214</sup>

In *Hassoon*, despite the fact that competing sets of drug dealers were literally dueling for control of the street outside, which would have been relevant under a totality of the circumstances approach, the plaintiff was unable to show that prior similar incidents had occurred at the store itself.<sup>215</sup> Thus, the court concluded, the defendants had no duty as a matter of law.<sup>216</sup> “[I]n the absence of evidence of prior similar incidents (violent crime at defendants’ grocery store), defendants cannot be said to have been under a legal duty to take measures to protect plaintiff against the contingency that he might foreseeably be injured as a result of physical violence while visiting defendants’ property.”<sup>217</sup>

In *Morris v. Motel 6 Operating L.P.*,<sup>218</sup> an unpublished opinion, the Riverside division of the Court of Appeal, relying on *Hassoon* and *Nicole M.*, affirmed the trial court’s ruling that a San Bernardino motel owed no duty to a customer shot in its parking lot because of a lack of prior similar incidents (despite information in the record suggesting a history of prior vehicle thefts, burglaries, and six violent acts at the motel).<sup>219</sup> The court cited *Hassoon* for the proposition that “absence of proof of prior similar incidents at defendant’s place of business is fatal to a successful damages claim in tort.”<sup>220</sup> And with a reference to *Nicole M.*, the Riverside court expressly ruled that “the prior similar incidents requirement applies even where a plaintiff asserts that the landowner has a duty to implement less burdensome security measures than security guards, such as lighting and

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214. *Id.* at 661.

215. *Id.* at 660.

216. *Id.* at 660-61.

217. *Id.* Note that this case might well have been decided for the defendant as a matter of proximate cause—is giving sanctuary to a person being shot at a legal cause of injury to a by-stander subsequently shot by the same gunman? Similarly, as the California Supreme Court later noted, rendering aid to an endangered person is a public policy good that could be taken into account in the analysis of *Rowland* factors. *Id.* at 663-64. Should the law require a duty to refrain from rescuing a person in danger? See *Delgado v. Trax Bar & Grill*, 113 P.3d 1159, 1171 n.23 (Cal. 2005). If “[d]anger invites rescue,” *Wagner v. Int’l Ry. Co.*, 133 N.E. 437, 437 (N.Y. 1921) (Cardozo, J.), courts certainly should be careful about adopting a public policy that would deter a rescuer.

218. No. E029523, 2002 Cal. App. Unpub. LEXIS 2148 (Ct. App. Apr. 12, 2002).

219. *Id.* at \*7-\*9.

220. *Id.* at \*12 (citing *Hassoon*, 107 Cal. Rptr. 2d at 660).

landscaping.”<sup>221</sup>

In another case, *Morris v. De La Torre*, the Court of Appeal in San Diego suggested that the balancing test purportedly mandated by *Ann M.* was effectively meaningless after *Sharon P.*<sup>222</sup> The San Diego court nominally acknowledged that the California Supreme Court had claimed to be establishing a balancing test but then treated *Sharon P.* as reviving the prior similar test in precisely the way that Justice Werdegar’s concurring opinion in *Sharon P.* had cautioned against.

Pointing to *Nicole M.*, the San Diego court concluded that “[i]n *Sharon P.*, the court extended the prior similar incidents requirement to less burdensome security measures, including lighting, security cameras, and periodic inspections at an underground parking structure.”<sup>223</sup> In light of that understanding, the court held that a 24-hour taco shop, which had become the marked turf of a local gang, had no duty towards a customer who was severely injured by a gang member—despite the fact that the gang member interrupted his beating of the plaintiff in the front parking lot to enter the shop, grab a knife from the kitchen, and return to the parking lot to repeatedly stab the plaintiff.<sup>224</sup> Plaintiff Morris had proposed four steps the shop might have taken: provide security guards, monitor gang activity, hire only documented workers, and warn customers.<sup>225</sup> While *Sharon P.* plainly requires a showing of prior similars for hiring security guards, the San Diego court treated all four steps as unduly burdensome in the absence of prior assaultive crimes on customers.<sup>226</sup> The court arrived at this conclusion, despite noting substantial evidence of (1) a local gang claiming the shop as its turf, marking it with graffiti, (2) gang members fighting in and outside the shop, (3) gang members harassing patrons, and (4) numerous burglaries, carjackings and auto theft, and other incidents at the shop.<sup>227</sup> Police records alone indicated that there were as many as twenty-one serious or violent incidents reported at the strip mall where the shop was located, including several fights in the year-and-a-half before the attack on Morris.<sup>228</sup>

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221. *Id.* at \*13 (citing *Nicole M. v. Sears, Roebuck & Co.*, 90 Cal. Rptr. 2d 922, 926-27 (Ct. App. 1999)).

222. *Morris v. De La Torre*, 4 Cal. Rptr. 3d 568 (Ct. App. 2003) (depublished), *review granted*, 81 P.3d 221 (Cal. 2003), *aff’d*, 113 P.3d 1182 (Cal. 2005). The petition for review, however, was filed by the shop owner, who had prevailed on the question of duty relating to the foreseeability of the incident, but challenged the second part of the Court of Appeal’s opinion which found that the employees of the shop may have breached a separate duty owed to a customer by not calling the police during the several minutes they were watching the beating and stabbing take place. The California Supreme Court affirmed the holdings of the appellate court. *Morris v. De La Torre*, 113 P.3d 1182 (Cal. 2005). *See also infra* Part III.G.

223. *Morris*, 4 Cal. Rptr. 3d at 576 (citations omitted).

224. *Id.* at 572, 578-79.

225. *Id.* at 578.

226. *Id.* at 579.

227. *Id.* at 573, 578-79.

228. *Id.* at 573. Despite all this activity, defendant De La Torre said he had no knowledge of any crimes or gang activity at or around his shop. *Id.* De La Torre also said the reason his employees did not call for help

Most interesting is the court's conclusion that the plaintiff's proposed duty to hire only legal workers was unduly burdensome.<sup>229</sup> This claim related to statements from shop employees who said they did not call the police because they did not want to get involved and did not want to draw the attention of the authorities, seeing as they were working illegally.<sup>230</sup> Of course, the defendant was already under a legal obligation to hire only legal workers. The court, however, does not explain how a legal requirement the government has already imposed on the defendant, a requirement enforceable through criminal sanctions,<sup>231</sup> could somehow become unduly burdensome as a matter of law when framed as a duty under tort law. Without addressing the conundrum, the court simply subjected this to a prior similars analysis.<sup>232</sup>

A panel of the Court of Appeal in Los Angeles ruled similarly in *Saz v. Independence Gardens Townhomes Homeowners Association*, where a homeowner-resident of a condominium complex sued the homeowners' association after she was assaulted and robbed in the common area of the complex.<sup>233</sup> The plaintiff alleged that the association was liable for failing to repair a security fence from which a section was missing, despite complaints at association meetings that the resulting opening was large enough for a person to squeeze through.<sup>234</sup> The trial court granted the association's motion for summary judgment, ruling that the plaintiff had to prove the existence of a duty by showing "that there was some kind of prior incident that would put the defendant on notice."<sup>235</sup>

The Court of Appeal in *Saz* quoted from *Ann M.* at length, and included references to *Ann M.*'s supposed balancing test.<sup>236</sup> The plaintiff argued that her allegations had met the requirements of the balancing test "because fixing the metal bar was inexpensive, and the risk of criminal assault so great, [that] the failure to do so established the association owed a duty to homeowners like [her]," even without a showing of prior similars.<sup>237</sup> The court, however, never bothered to refute the plaintiff's express invocation of the balancing test and never engaged in its own balancing of burdens, but simply held that the "lack of

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during the attack was that the phone was not working at the time, and that he had called and got it repaired the following day. *Id.* at 572-73. However, evidence from the phone company indicated there was no call for any repair or any service done to the line. *Id.*

229. *Id.* at 579 & n.7.

230. *Id.*

231. See 8 U.S.C.A. § 1324a (2004) (providing up to 6 months imprisonment and a \$3,000 fine for "any person or entity which engages in a pattern or practice" of hiring unauthorized aliens for employment).

232. *Id.* One might say the duty was inapplicable to the situation at hand, or say that causation was lacking even though the duty was breached, but the court said neither of those things.

233. *Saz v. Independence Gardens Townhomes Homeowners Ass'n*, No. B161403, 2003 Cal. App. Unpub. LEXIS 7189 (Ct. App. July 28, 2003).

234. *Id.* at \*6.

235. *Id.* at \*11.

236. *Id.* at \*16-\*20.

237. *Id.* at \*10.

evidence of prior incidents of physical assaults on the premises or surrounding area tends to indicate the attack in the present case was possibly the first of its kind and as such was unforeseeable.”<sup>238</sup> Once again, the lack of prior similar incidents was dispositive.<sup>239</sup>

*E. Exceptions which Prove the Rule: Pamela W. (1994) and Vasquez (2004) in the San Diego Court of Appeal*

In the immediate aftermath of the *Ann M.* decision, the Court of Appeal in San Diego returned to its occasional, self-appointed task of trying to draw formal coherence from the ongoing oscillations in the California law of premises liability.<sup>240</sup>

In *Pamela W. v. Millsom*,<sup>241</sup> the appellate court in San Diego handed down a decision that, at least arguably, attempted to take seriously the balancing test purportedly established by the California Supreme Court. *Pamela W.* affirmed a trial court’s ruling that a lack of prior similar incidents precluded a rape survivor’s claim against a landlord for failing to provide functioning window locks in a residence in a four-unit condominium complex.<sup>242</sup> Acknowledging that *Ann M.* had required evidence of prior similar incidents in the context of a highly burdensome demand for security guards, the *Pamela W.* court tried to apply the “balancing test” derived from *Ann M.* and concluded that “the burden of providing security guards in the case of a shopping center is likely no more onerous than the burden of providing greatly increased physical security” for defendants renting out their single condominium unit in a small complex.<sup>243</sup>

Given the explicit reference to the *Ann M.* balancing test and the fact-specific nature of the ruling, *Pamela W.* certainly cannot be lumped with the cases which simply applied a revived, prior similars rule. Nevertheless, it must be remembered that *Pamela W.* was only asking for something like window locks that worked.<sup>244</sup> Is it really so obvious that providing functioning locks on the windows of a rented condominium unit is so burdensome, even for the owner of a single unit, as to overbalance the personal security of a tenant, particularly

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238. *Id.* at \*21. The court did note that there was evidence of a prior incident of criminal conduct involving vehicle vandalism, which the court considered “decidedly dissimilar in nature to the attack on Saz.” *Id.* at \*20-\*21.

239. *Id.*

240. See, e.g., *Miller v. Pac. Plaza Shopping Ctr.*, 14 Cal. Rptr. 2d 272 (Ct. App. 1992) (depublished), review granted, 846 P.2d 703 (Cal. 1993), *aff’d sub nom.*, *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993); *Marois v. Royal Investigation & Patrol, Inc.*, 208 Cal. Rptr. 384 (Ct. App. 1984); *Duffy v. City of Oceanside*, 224 Cal. Rptr. 879 (Ct. App. 1986).

241. *Pamela W. v. Millsom*, 30 Cal. Rptr. 2d 690 (Ct. App. 1994).

242. *Id.* at 692.

243. *Id.* at 695.

244. See *id.* at 692 n.2.

when the evidence suggested that the building was located in a high crime area<sup>245</sup> and a burglary recently had occurred in the unit directly above the plaintiff's?<sup>246</sup>

Furthermore, the *Pamela W.* court's paraphrase of *Ann M.*'s requirements do not actually indicate the court was engaged in any "balancing" at all. The opinion by Justice Nares re-words the *Ann M.* tests as follows:

While there may be circumstances where the [provision of substantial additional security] will be required to satisfy a landowner's duty of care, such action will rarely, if ever, be found to be a 'minimal burden.' . . . Moreover, the obligation to provide [security measures] adequate to deter criminal conduct is not well defined. . . . For these reasons, we conclude that a high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes [adequate measures to prevent the harm]. We further conclude that the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises.<sup>247</sup>

This paraphrase does not simply change some words to reflect the specifics of the *Pamela W.* case. Instead, the court's paraphrase states a rule that requires no balancing at all; it expressly states that any duty to provide adequate security measures is contingent on a showing of prior similar incidents.<sup>248</sup>

In another exception from the emerging majority rule, Justice McDonald, writing a different opinion for the Court of Appeal in San Diego, made another attempt to apply a balancing test in a case involving a domestic violence homicide, *Vasquez v. Residential Investments, Inc.*<sup>249</sup> In that case, the minor child of a woman murdered by her live-in companion, the child's father, sued the owners of the apartment building where the mother and child were staying while the couple was separated.<sup>250</sup> The entry door of the apartment had a "diamond- and triangular-shaped" window panel missing, which had been complained to the building manager repeatedly.<sup>251</sup> While waiting for the building manager to fix the problem, the apartment residents had covered the opening with a small piece of plywood attached with finishing nails.<sup>252</sup> The manager had purchased the

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245. *Id.* at 692.

246. *Id.* at 691, 695.

247. *Id.* at 695 (emphasis in original) (citing *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215 (Cal. 1993)).

248. *Id.* at 695 (citing *Ann M.*, 863 P.2d at 215). When the trial court had granted summary judgment to the defendant in *Pamela W.*, the basis of the defendant's motion was that there was no foreseeability because there had been no showing of prior similar incidents. *Id.* at 692. The court ruled in favor of the defendants, even though the *Ann M.* decision was still a year away and the un-refined *Isaacs* opinion was still the law. *Id.* at 692-93. The appellate panel, of course, was acting after *Ann M.* had been decided. *Id.* at 694.

249. 12 Cal. Rptr. 3d 846 (Ct. App. 2004).

250. *Id.* at 849.

251. *Id.* at 850.

252. *Id.*

materials to repair the door but never completed the repair.<sup>253</sup> The plaintiff's father, jealous because he suspected the plaintiff's mother of resuming a relationship with a prior boyfriend, came to the apartment with a knife, knocked out the plywood patch, gained access to the door's inside lock mechanism, entered, and killed the plaintiff's mother.<sup>254</sup> The plaintiff's father was convicted of murder.<sup>255</sup>

The trial court made a tentative ruling granting the defendants' motion for summary judgment, finding that the owners "had no notice of [the father's] violent tendencies or of criminal activity around the apartment building, and therefore owed no duty to replace the windowpane," and finding that "it was unlikely [the father] would have been stopped even had the glass pane been replaced."<sup>256</sup> The court allowed the plaintiff to take and submit a deposition from the imprisoned father, in which the father stated that he would not have entered the residence if the window panel had been in place because he would have been reluctant to punch through a glass window with his hand.<sup>257</sup>

In reversing the trial court's ruling, Justice McDonald's opinion for the appellate panel reflects a palpable frustration with the "perplex[ing]" and "amorphous body of law" the California courts have made of this area of law.<sup>258</sup> The court attempted to clarify matters by showing that the real purpose of the balancing test required of a court is not to determine the *existence* of a duty owed by a landowner, but rather the "*scope*" of that duty.<sup>259</sup> Justice McDonald's *Vasquez* opinion noted that if the court only considers "the broad proposition that landlords have a duty to exercise reasonable care to maintain their property in a safe condition" "rather than focusing on the scope of duty," then duty is always present.<sup>260</sup> Instead, he reasoned, "the question of a landlord's duty is *not* whether a duty exists *at all*, but rather what is the *scope* of the landlord's duty given the particular facts of the case?"<sup>261</sup> "Only after the scope of the duty under consideration is defined may a court meaningfully undertake the balancing analysis of the risks and burdens present in a given case to determine whether the specific obligations should or should not be imposed on the landlord."<sup>262</sup>

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253. *Id.* at 850 n.3.

254. *Id.* at 850.

255. *Id.*

256. *Id.* at 851.

257. *Id.* at 851, 862. Having killed his daughter's mother and earned himself a lengthy prison term, the father had motives the usual perpetrator would not have to cooperate with lawyers for his motherless child in her suit against the owners of the apartment building.

258. *Id.* at 853. Some commentators argue this state of confusion was inevitable. "[B]y proliferating highly particular 'no duty' exceptions to California's general duty of reasonable care, these developments threaten the concept of 'duty' with incoherence and disintegration." Esper & Keating, *supra* note 43, at 272.

259. *Vasquez*, 12 Cal. Rptr. 3d at 853-54 (emphasis in original).

260. *Id.*

261. *Id.* Cf. Esper & Keating, *supra* note 43, at 289 (describing the scope or extent of liability as a question of proximate cause).

262. *Id.* at 854. Justice McDonald acknowledged that this inquiry has come to be treated as a balancing

In outlining what it called its “specific action approach,” the court noted that its “reference to the scope of the landlord’s duty is intended to describe the specific steps a landlord must take in a given specific circumstance to maintain the property’s safety to protect a tenant from a specific class of risk. It is this question that we decide as a matter of law.”<sup>263</sup>

The *Vasquez* court’s “specific action approach” aims to resolve the question of whether duty is a question for the judge or a jury a degree of highly specific fact-finding.<sup>264</sup> Unfortunately, this intellectually complex approach has the signal problem of claiming to summarize an existing body of law when the cases from which it derives that summary do not actually say what *Vasquez* summarizes them to say. That is, whatever its analytical virtues, the *Vasquez* opinion is simply wrong as a statement of what California courts are in fact doing when they review questions of duty.

*Vasquez* concedes that the best support it can derive for its approach from *Ann M.* and *Sharon P.* is that those cases used something like the specific approach “sub silentio.”<sup>265</sup> With regard to other cases, the *Vasquez* court not only admitted that other courts “have not drawn the semantic distinction between the *existence* of a landlord’s duty and the *scope* of that duty in a given factual situation,” but also that many courts “have not been explicit in weighing the burden on the landlord were it placed under a duty to conduct itself in the manner proposed by the plaintiff against the degree of foreseeability of the specific harm to the plaintiff.”<sup>266</sup> The court specifically conceded that *Hassoon* had not “examined the precise actions that the plaintiff’s proposed duty would have entailed,” so that the court not only did not, but “could not assess or weigh the burden on the landlord (if it was placed under a duty to conduct itself in the manner proposed by plaintiff) against the degree of foreseeability of the harm.”<sup>267</sup>

Like the same appellate division’s earlier decision in *Miller*, the *Vasquez* opinion gamely attempts to bring analytical rigor and intellectual precision to the question of duty in premises liability cases, and though it has not suffered the same ignominy as the depublished earlier decision, *Vasquez* fares no better as a

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of the burden on the landowner against the foreseeability of risk to the tenant, and that this is actually a rather truncated version of the more fulsome considerations supposedly relevant under *Rowland*. *Id.* at 854 n.5 (citing *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968)). He noted that “the extent to which [the other *Rowland*] factors have been employed by the courts appear to have been in a secondary or tertiary role,” and that “foreseeability and extent of burden to the defendant . . . have evolved to become the primary factors considered in every case.” *Id.*

263. *Id.* at 854 (emphasis omitted).

264. Indeed, fact-finding so specific that it might be thought to be within the province of a jury weighing the evidence rather than a judge reviewing a motion as a matter of law. *See* *Esper & Keating*, *supra* note 41, at 279-82 (arguing that a jury is particularly suited to decide because “[t]he rulings produced by ordinary negligence cases typically are so fact-specific that they do not apply beyond the circumstances at hand, and do not yield general ‘rules.’ There is thus no occasion to exercise the distinctively legal authority of judges.”).

265. *Vasquez*, 12 Cal. Rptr. 3d at 854.

266. *Id.* at 856 n.7 (emphasis omitted).

267. *Id.* at 857 n.8.

statement of the imposing hurdles actual plaintiffs are required to clear if they are to survive the stage of pre-trial motions. In both instances, the Court of Appeals in San Diego has resisted the conclusion that the prior similars rule is once again the law in California, but the California Supreme Court and other courts throughout the state have demonstrated that such resistance was, and perhaps still is, futile.

*F. Revisiting “Fatal Flaws” under the Revived Prior Similars Rule*

Since human nature did not change appreciably in the decade and a half between *Isaacs* and *Sharon P.*, cases decided under the revived prior similars rule exhibited the same “fatal flaws” that led the *Isaacs* court to reject the rule in the first place.

“Fatal Flaw” #1: *The first victim always loses.* The *Isaacs* court had warned that the prior similars rule was “contrary to public policy” because

under the rule, the first victim always loses, while subsequent victims are permitted recovery. Such a result is not only unfair, but is inimical to the important policy of compensating injured parties. Surely, a landowner should not get one free assault before he can be held liable for criminal acts which occur on his property.<sup>268</sup>

The *Nicole M.* court was unusually blunt in acknowledging the revival of what the *Isaacs* court labeled unfair—the parallel between the prior similars rule and the old dog-bite rule—in allowing the defendant a “free pass” for the first injury. Without any reference to *Isaacs*, the *Nicole M.* court baldly observed:

Unfortunately, plaintiff was the victim of the first recorded criminal assault in the Sears parking lot. Under the circumstances of this case, we conclude that Sears could not have reasonably anticipated the crime and was under no duty to prevent it.<sup>269</sup>

The appellate panel in *Saz* similarly held that the “lack of evidence of prior incidents of physical assaults on the premises or surrounding area tends to indicate the attack in the present case was possibly the first of its kind and as such was unforeseeable.”<sup>270</sup> The court’s reasoning—because this was the first assault it was unforeseeable as a matter of law—again explicitly allows every dog to get one bite, the approach that *Isaacs* had cautioned against.

The prior similars rule “means that a landowner has no duty to protect against a crime, however likely it may be, until one such crime has actually

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268. *Isaacs v. Huntington Mem’l Hosp.*, 695 P.2d 653, 658 (Cal. 1985) (citation omitted).

269. *Nicole M. v. Sears, Roebuck, & Co.*, 90 Cal. Rptr. 2d 922, 928 (Ct. App. 1999).

270. *Saz v. Independence Gardens Townhomes Homeowners Ass’n*, B161403, 2003 Cal. App. Unpub. LEXIS 7189, at \*21 (Ct. App. July 28, 2003).

occurred.”<sup>271</sup> And this aspect of the rule is a feature, not a bug; it is, in fact, the entire purpose of the rule. Of course, the impact of the rule “creates an incentive for landowners to disregard the safety of their patrons and take an unjustifiably low level of precaution.”<sup>272</sup> As between the first and the second victim, the injustice of the rule is patent; “it sacrifices the safety of the first victim to no good end. Why should one person suffer a rape which might have been avoided at reasonable cost just because no one has yet been raped?”<sup>273</sup>

*Fatal Flaw #2: How similar is similar?* Isaacs also complained that the prior similar rule “leads to arbitrary results and distinctions,” because “there is uncertainty as to how ‘similar’ the prior incidents must be to satisfy the rule,” leading “different courts to enunciate different standards of foreseeability.”<sup>274</sup> Cases decided under the revived prior similar rule reflected just such differences.

In *Morris v. De La Torre*, there was evidence that the shop was known and marked as on the turf of a local gang, that gang members fought in and outside the shop, and that there was gang harassment of patrons, as well as burglaries, carjackings, auto theft, and other incidents.<sup>275</sup> Even police records indicated there were at least eleven, and perhaps as many as twenty-one, serious or violent incidents reported at the strip mall where the shop was located, including several fights.<sup>276</sup> In one prior episode, members of the gang challenged a patron at the counter for being in their territory and demanded money.<sup>277</sup> The patron victim managed to flee to his car, but as he was driving away, the gang members hit and kicked his vehicle.<sup>278</sup> The attack on plaintiff Morris began in essentially the same way; members of the same gang “approached plaintiff and his companions in a hostile manner and asked where they lived.”<sup>279</sup> One gang member said “that the taco shop belonged to the Nestor gang and Morris and his friends could not eat there.”<sup>280</sup> Nevertheless, the trial court ruled there were no prior similar incidents because, despite the previous bloody fights and assaults on patrons, there was no evidence of prior attempted murders or aggravated assaults.<sup>281</sup> Somehow, the fact that the “shop was a gathering place for gang members and that fistfights had occurred on the premises did not make the type of violent assault that occurred

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271. Esper & Keating, *supra* note 43, at 320.

272. *Id.*

273. *Id.*

274. Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653, 658-59 (Cal. 1985).

275. Morris v. De La Torre, 4 Cal. Rptr. 3d 568, 573 (Ct. App. 2003) (depublished), *review granted*, 81 P.3d 221 (Cal. 2003), *aff'd*, 113 P.3d 1182 (Cal. 2005).

276. *Id.* (including one fight that was reported to be quite bloody, in the year and a half before the attack on the plaintiff)

277. *Id.*

278. *Id.*

279. Morris v. De La Torre, 113 P.3d 1182, 1185 (Cal. 2005).

280. *Morris*, 4 Cal. Rptr. 3d at 572.

281. *Id.* at 574.

foreseeable.<sup>282</sup>

In *Morris v. Motel 6*, a man in a parking lot was shot by assailants when he came upon them at his vehicle.<sup>283</sup> The appellate court in *Motel 6* held that the trial court properly excluded the evidence of the prior vehicle thefts and burglaries in the parking lot because the crimes were not ones of violence against a person.<sup>284</sup> Other evidence of three violent crimes against persons was excluded from consideration because the police reports of those crimes indicated only that the crimes were reported at the motel, not whether they took place at the motel. A fourth was excluded because it involved a fight between employees at the motel.<sup>285</sup> An incident involving a man who was beaten outside a motel room door was ruled dissimilar in that it did not occur in the parking lot and did not involve a shooting.<sup>286</sup> Most remarkably, an incident in which a gun was pointed at a man who interrupted thieves stealing his car's stereo in the motel parking lot was ruled dissimilar because no shots were actually fired, and there were no injuries in the prior incident.<sup>287</sup> The court held that a difference that seems no more than fortuitous was the basis for finding the second, otherwise identical, incident unforeseeable as a matter of law.<sup>288</sup>

Courts have sometimes disagreed about the existence of prior similars because there are different interpretations of the role the criminal perpetrator's intent plays in making an incident similar or not. For example, in *Claxton v. Atlantic Richfield Co.*, the trial court granted summary judgment in favor of a defendant gas station operator despite numerous prior violent incidents.<sup>289</sup> The trial court found that the prior incidents were dissimilar because they lacked the racial animus evident in the violent attack on the plaintiff.<sup>290</sup> The Los Angeles

282. *Id.*

283. *Morris v. Motel 6 Operating L.P.*, No. E029523, 2002 Cal. App. Unpub. LEXIS 2148, at \*6 (Ct. App. Apr. 12, 2002).

284. *Id.* Note that, in the era of *Isaacs*, the California Supreme Court expressly had indicated that a prior burglary *did* put a landowner on sufficient notice to impose liability for a subsequent crime of violence against a person on the same property. See *Frances T. v. Village Green Owners Ass'n*, 723 P.2d 573, 579 (Cal. 1986).

285. *Motel 6*, 2002 Cal. App. Unpub. LEXIS 2148, at \*8.

286. *Id.*

287. *Id.* at \*9. The *Morris v. Motel 6* court noted that the standard of review regarding a trial court's exclusion of evidence based on what constituted prior similar incidents is done under a deferential abuse of discretion standard. *Id.* It concluded that the trial court's rulings "did not exceed the bounds of reason" and were not an abuse of discretion. *Id.* It then engaged in a *de novo* review of the trial court's grant of summary judgment in favor of the defendant, and affirmed summary judgment in light of the record, now devoid of any evidence of prior criminal acts based on previously affirmed ruling excluding all evidence of the six prior violent assaults and the numerous property crimes:

Since *Morris* lacked any evidence of prior similar incidents at the close of his case, the trial court properly found that *Morris*'s shooting was not foreseeable. From that premise, the trial court properly resolved the duty issue by finding a lack of duty on the part of Motel 6. Without duty, there can be no negligence. When no duty exists, the liability analysis is over.

*Id.* at \*12 (citation omitted).

288. *Id.* at \*9, \*12-13.

289. 133 Cal. Rptr. 2d 425 (Ct. App. 2003), *reh'g denied*, 2003 Cal. LEXIS 5454 (July 30, 2003).

290. *Id.* at 430.

division of the appellate court reversed, noting the plaintiff had presented “substantial evidence showing . . . the ARCO station had significant crime problems,” including multiple robberies (several involving weapons and several of the station and its manager), fights between African-Americans and Hispanic gangs, assaults on customers, and numerous crime—including five homicides in the park adjacent to the station.<sup>291</sup> The trial court found it significant that the attack on the plaintiff Claxton was prosecuted as a racially-motivated hate crime arising out of hostility by the local Hispanic gang against African-Americans, but the appellate panel ruled it was “immaterial whether any prior robberies or assaults at the station were motivated by racial animus, or were merely garden-variety anti-social behavior.”<sup>292</sup> The trial court’s error, according to the appellate court, was to limit its consideration of prior, violent, personal assaults to what it considered to be the empty set of those which were proven to be racially-motivated.<sup>293</sup> “As set forth in *Ann M.* and *Sharon P.*, the test is prior ‘similar’ incidents, not prior identical incidents”; the criminal’s precise intent was not really relevant.<sup>294</sup>

Conversely, in *Wiener v. Southcoast Childcare Centers, Inc.*, the court held that the intent of the perpetrator mattered, and application of the prior similars rule to an incident where a vehicle crashed through a playground fence left two appellate justices with the impression that the plaintiffs’ tragic losses were foreseeable, while the trial judge, a dissenting appellate justice, and the California Supreme Court were equally convinced they were not.<sup>295</sup> *Wiener* involved a notorious and tragic incident in which a man intentionally drove his car through the fence surrounding a daycare center playground as a “patently and highly absurd and bizarre” way of venting his undirected rage against unsuspecting innocents.<sup>296</sup> The plaintiffs, parents of children killed in the crash, argued, *inter alia*, that the foreseeable inadequacy of the playground fence—a four foot high chain link fence—was established by a prior incident in which an unmanned postal vehicle had crashed through the same fence, fortunately without causing injury.<sup>297</sup>

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291. *Id.* at 433.

292. *Id.* at 433-34. The trial court apparently was stumped by the fact that a violent criminal gang which was self-identified as Hispanic, and which was involved in a turf war against other gangs self-identified as African-American, might somehow see its opportunistic, profit-motivated criminality as consistent with hostility toward African-Americans in general, not concerned that the African-American they were assaulting was not a member of a rival gang.

293. *Id.* Though the procedural settings of *Claxton* and *Motel 6* are the same (appeal from a motion for nonsuit after presentation of plaintiff’s evidence), the *Claxton* court engaged in a *de novo* rather than deferential review, because it treated the appeal as one from the motion for nonsuit, *id.* at 430, rather than from an evidential ruling as in *Motel 6*. *Morris v. Motel 6 Operating L.P.*, No. E029523, 2002 Cal. App. Unpub. LEXIS 2148, at \*5-\*6 (Ct. App. Apr. 12, 2002).

294. *Claxton*, 133 Cal. Rptr. 2d at 433 (citations omitted).

295. 88 P.3d 517 (Cal. 2004), *rev’g* 132 Cal. Rptr. 2d 883 (Ct. App. 2003).

296. *Id.* at 520.

297. *Id.*

The trial court dismissed the case for lack of prior similars,<sup>298</sup> the appellate panel held the mail truck crash was a prior similar incident,<sup>299</sup> and the Supreme Court unanimously reversed because the harm was not foreseeable, though it split as to why.<sup>300</sup> Five justices thought the third-party criminal's bizarrely and inexplicably murderous state of mind made the incident unique and unforeseeable as a matter of law.<sup>301</sup> Two other justices concurred, but thought that criminal perpetrator's state of mind was irrelevant because "plaintiffs [had] not raised a triable issue of fact whether the childcare center negligently failed to protect the children against automobiles entering the playground in any fashion."<sup>302</sup> Thus, while in *Claxton*, the dissimilarity in motive was irrelevant to a consideration of the similarity of the prior incidents, the majority in *Wiener* believed the motive of the criminal rendered irrelevant a prior event which was, as a matter of physics, essentially identical.<sup>303</sup>

*Fatal Flaw # 3: Equating Fortuity with Foreseeability.* The court in *Isaacs* had repeated the warning from *Weirum v. RKO* against a liability rule which would exempt defendants from the duty to account for the foreseeable consequences of their action or inaction.<sup>304</sup> As *Weirum* noted:

"The mere fact that a particular kind of an accident has not happened before does not . . . show that such accident is one which might not reasonably have been anticipated." Thus, the fortuitous absence of prior injury does not justify relieving defendant from responsibility for the foreseeable consequences of its acts.<sup>305</sup>

But the prior similars rule effectively carves out an exemption from this standard rule of negligence. For example, in *Morris v. Motel 6*, a prior incident of armed robbery was considered different than a later armed robbery shooting because no shot was fired in the earlier incident. The shooting incident was also found different from a prior violent assault of a guest because that assault occurred outside the door of one of the motel's rooms instead of the motel's

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298. *Id.* at 521.

299. *Id.*

300. *Id.* at 525.

301. *Id.* ("[H]ere, the foreseeability of a perpetrator's committing premeditated murder against the children was impossible to anticipate, and the particular criminal conduct so outrageous and bizarre, that it could not have been anticipated under any circumstances.").

302. *Id.* at 526 (Moreno, J., concurring). The concurring opinion did not explain the basis for this conclusion, but in light of the record of the case discussion in the majority opinion, the basis must have been a judgment that the prior vehicle crashes near the childcare center, including the incident of the unmanned postal vehicle crashing through the fence, were too dissimilar from the intentional crash through the fence which was the subject of this litigation.

303. *Id.* at 525.

304. *Isaacs v. Huntington Mem'l Hosp.* 695 P.2d 653, 659 (Cal. 1985).

305. *Weirum v. RKO Gen., Inc.*, 539 P.2d 36, 40 (Cal. 1975) (citation omitted).

parking lot.<sup>306</sup> Surely, these distinctions were little more than “fortuitous,”<sup>307</sup> and had circumstances in the first incident been slightly different, the incident could easily have resulted in a shooting.

Under the general rule as expressed in *Weirum*, fortuitous differences would not lead to a different legal conclusion. But the rule in premises liability reverses the presumptions of the general rule. That is, “the fortuitous absence of prior injury” *does* “reliev[e] defendant from responsibility for the foreseeable consequences of its acts,” and “the mere fact that a particular kind of [harm] has not happened before” *does* show, at least as a matter of law, there was no duty to take reasonable measures to prevent it, even where, under the circumstances, the harm actually was foreseeable.<sup>308</sup>

*Fatal Flaw #4: Judicial Usurpation of the Jury's Role.* The rejection of the prior similars rule reflected, in part, the *Isaacs* court's attempt to respect the law's “general reluctance to remove foreseeability questions from the jury.”<sup>309</sup> In virtually all the cases discussed above, and in the vast majority of premises liability claims arising from the criminal acts of third parties, the case either never gets to the jury or a jury's verdict for a plaintiff is overturned on appeal. This usurpation of the jury's role is highly problematic. Indeed, “judicial preemption of the jury's *fact-finding* role by rulings of ‘no duty’ is unlikely to be an improvement because ‘no duty’ rulings are made before the facts are fully developed.”<sup>310</sup>

Even where the facts are not in dispute, the jury plays a vital role: “negligence cases go to the jury whenever the *evaluation* of the facts is subject to reasonable disagreement.”<sup>311</sup>

By virtue of their plurality and diversity, juries are far more likely than individual judges to embody the range of reasonable disagreement over the conduct at issue in a negligence case. Unlike judicial determinations of “no duty,” jury adjudication proceeds on a fully developed factual record and reaches judgment after the airing of competing viewpoints on

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306. *Morris v. Motel 6 Operating L.P.*, No. E029523, 2002 Cal. App. Unpub. LEXIS 2148, at \*8-\*9 (Ct. App. Apr. 12, 2002).

307. See *Weirum*, 539 P.2d at 40. From the perspective of the first victim, of course, “fortunate” rather than merely “fortuitous.”

308. *Id.* Indeed, the rule might well absolve a defendant of liability in cases where the harm was actually foreseen. Since the lack of prior similars terminates the case as a matter of law, a defendant may well avoid discovery related to what it actually knew or thought about the potential for harm on its premises.

309. *Isaacs*, 695 P.2d at 659.

310. *Esper & Keating*, *supra* note 43, at 279.

311. *Id.* at 279-80. See also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 8(b) (Proposed Final Draft No. 1, 2005) (“When, in light of all the facts relating to the actor's conduct, reasonable minds can differ as to whether the conduct lacks reasonable care, it is the function of the jury to make that determination.”).

the reasonableness of the defendant's conduct.<sup>312</sup>

Ironically, the appellate court's attempt in *Vasquez* to salvage premises liability law from its perplexing and amorphous state actually makes the judicial usurpation of the jury's role much worse. As noted above, the "specific action approach" proposed in *Vasquez* was not and could not have been the actual approach used by the California Supreme Court in *Sharon P.* Not only did the court never mention any such thing, as the *Vasquez* court admitted,<sup>313</sup> but much of the "specific action" that the plaintiff in *Sharon P.* sought was relatively cheap and essentially cost-free. Indeed, most of what she was asking for amounted to conventional matters of maintenance that are routinely budgeted for in all buildings—replacing burned out lights, keeping existing video monitors operational, picking up the trash, and ejecting homeless squatters.<sup>314</sup> The *Vasquez* panel attempted to resolve this significant problem in a footnote, but it had to acknowledge the concern highlighted in Justice Werdegarr's concurring opinion in *Sharon P.*: the majority opinion specifically applies a prior similar rule to a plaintiff seeking relatively inexpensive and routine property management measures.<sup>315</sup> The appellate court in San Diego tried to salvage their analysis by pointing to some language in *Sharon P.* that suggests "the plaintiff's proposed alternate measures were vague and impossible to define, were of questionable efficacy, and were not necessarily less burdensome than hiring security guards."<sup>316</sup> But *Sharon P.*'s proposed specific actions were conventional security and maintenance issues, and if subject to a motion to dismiss as "vague and impossible to define,"<sup>317</sup> then the whole issue of inadequate security has been removed from California law in most circumstances.<sup>318</sup>

Similarly, it is difficult to imagine how questions of efficacy and burden in a specific factual setting are to be resolved as questions of law. Though duty is a question of law, the duty inquiries in California premises liability cases has become "so fact-specific that they do not apply beyond the circumstances" of a given case, and thus "fail to possess the generality required of law."<sup>319</sup> There is still more specificity required in the *Vasquez* specific action approach—that is, it

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312. Esper & Keating, *supra* note 43, at 281.

313. *Vasquez v. Residential Invs., Inc.*, 12 Cal. Rptr. 3d 846, 854 (Cal. App. 2004) (arguing that the "specific action approach" was used "sub silentio").

314. See *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 123-24 (Cal. 1999). Despite its small cost, the replacement window in the Ramirez apartment may have been, realistically speaking, more burdensome than the routine maintenance sought in *Sharon P.*, because it required attention to non-routine facilities repair, apparently involving an order for a special item.

315. *Vasquez*, 12 Cal. Rptr. 3d at 855 n.6 (citing *Sharon P.*, 989 P.2d at 123-24).

316. *Id.* ("This analysis dovetails with our conclusion that the legal issue of duty should focus on the specific measures the plaintiff claims the landlord had the duty to undertake because the efficacy and burdensomeness of any proposed duty can only be evaluated by examining those specific measures.").

317. *Id.*

318. See *id.*

319. Esper & Keating, *supra* note 43, at 280.

requires a very significant degree of fact-finding by a trial court supposedly resolving duty as a question of law.

The duty question in the *Vasquez* case itself, for example, required fact-finding regarding the nature and number of other crimes in the neighborhood, whether the building owners and managers knew or should have known about those crimes, whether violent perpetrators had dangerous propensities, whether the manager did or could know about them, whether the residents had complained about the missing window section (and whether their complaints were security-related or based on aesthetic concerns and the fact that the plywood patch let in cold air), and how much it would cost to repair the missing window.<sup>320</sup> Any and all of these facts might have been subject to dispute, including “he-said, she-said” disputes hinging on the credibility of witnesses whose statements might well have been submitted as deposition transcripts or affidavits. These factual disputes were resolved without jury input on a motion for summary judgment, and the appellate panel had to review *de novo* on the basis of the paper record of the proceedings below.<sup>321</sup>

The problems associated with the “specific action approach” to the analysis of duty reflect quite precisely the concerns of an earlier California Supreme Court, and of Justice Mosk’s prescient dissent, regarding the limitations of courts pitching their inquiry at too specific a level of analysis, and thus invading the role of the jury.<sup>322</sup> As Justice Mosk noted,

[i]f the question of legal duty must not be “left to the jury,” lest “the court . . . abdicat[e] decision in favor of men who do not know the law,” so the questions of proximate cause and foreseeability in the fact-specific context of this case must not be left to a reviewing court that, in the absence of a full trial, cannot and does not know all of the relevant facts.<sup>323</sup>

Rather than duty, the efficacy of proposed measures is more a question of whether a duty was breached or whether the breach of duty was a cause of the harm, rather than whether a duty exists, and thus more the province of the jury than the judge.

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320. See *Vasquez*, 12 Cal. Rptr. 3d at 846.

321. *Esper & Keating*, *supra* note 43, at 280. It should be noted that a motion for summary judgment, a vehicle for resolving cases where there is no dispute about material facts, is actually an odd vehicle for resolving these cases, which often involve highly disputed material facts. Generally, a question of law would be resolved through a motion to dismiss. A motion to dismiss, however, is limited to the face of the complaint, and cannot help the court in these cases, given the highly fact-intensive nature of the inquiry required.

322. *Ballard v. Uribe*, 715 P.2d 624, 629 n.6 (Cal. 1986); *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 137 (Cal. 1993) (Mosk, J., dissenting).

323. *Sharon P.*, 989 P.2d at 137 (Mosk, J., dissenting) (alterations in original) (citations omitted).

## G. Re-Setting the Pendulum? Delgado (2005) and Morris (2005)

As the foregoing discussion suggests, trial and appellate courts throughout the state, as well as many commentators and advocates, had come to believe that, after *Ann M.* and *Sharon P.*, the prior similars rule was back in effect in California and the totality of the circumstances rule mandated by *Isaacs* was a thing of the past.<sup>324</sup> The California Supreme Court took notice of this development, and took the opportunity in 2005 (auspiciously, the twentieth anniversary of *Isaacs*) to offer some advice on the application of the prior similars analysis of duty in a pair of cases in which, by the court's own admission, the issue was not even squarely raised.

In *Delgado v. Trax Bar and Grill*<sup>325</sup> and *Morris v. De La Torre*,<sup>326</sup> the court focused on how a business proprietor should respond when a patron is subjected to an imminent or actual assault on the business premises. In *Delgado*, the appellate court concluded that the defendant had no duty to hire security guards because there were no prior similar incidents, and the California Supreme Court agreed.<sup>327</sup> The questions on review were whether the fact that the proprietor already had hired guards made a duty analysis "irrelevant,"<sup>328</sup> and whether a business has a "special-relationship-based duty . . . to respond to events unfolding in its presence by undertaking reasonable, relatively simple, and minimally burdensome measures," such as calling 911.<sup>329</sup> Similarly, in *Morris*, the California Supreme Court agreed with the lower courts that there was a lack of prior similars before the crime was manifested, and thus no foreseeability of violent assault.<sup>330</sup> The court stressed that "the sole question" on review was "whether defendant had a duty to aid plaintiff with respect to the ongoing criminal conduct."<sup>331</sup>

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324. Justice Mosk's dissent in *Ann M.* predicted that the majority opinion would resurrect the prior similars rule, *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 216 (Cal. 1993) (Mosk, J., dissenting); and his dissent and Justice Werdegard's concurring opinion in *Sharon P.* repeated that caution *Sharon P.*, 989 P.2d at 137 (Cal. 1999) (Mosk, J., dissenting); *Id.* at 133 (Werdegard, J. concurring in part and dissenting in part).

325. 113 P.3d 1159 (Cal. 2005).

326. 113 P.3d 1182 (Cal. 2005).

327. *Delgado*, 113 P.3d at 1172.

328. *Id.* at 1160.

329. *Id.* at 1172.

330. *Morris*, 113 P.3d at 1187.

331. *Id.* Defendant De La Torre claimed that he had no special relationship with the plaintiff because *Morris* was only accompanying his friends to the restaurant and did not plan to eat there himself. *Id.* at 1189. The court disagreed, noting that the rule of law is that "a special relationship exists between a business proprietor and not only its patrons or customers, but also its invitees," including prospective customers and "those who accompany the invitee. . . ." *Id.* at 1189 (emphasis omitted) (citing Dan Dobbs, 1 THE LAW OF TORTS § 234, at 601 (2001)).

In this discussion of whether a business visitor who accompanies paying customers is an invitee, the court relied on an old California case, *Farrier v. Levin*, 1 Cal. Rptr. 742 (Ct. App. 1959); a recent Oregon case, *Walsh v. C & K Mrkt., Inc.*, 16 P.3d 1179 (Or. Ct. App. 2000); and Dobbs, *supra* note 321. At least part of the reason for such weak authority has to be the fact that California lacks much recent case law on invitees given that it abolished the law associated with the status categories of invitee, licensee, and trespasser in the renowned case

The majority insisted that foreseeability in cases such as *Delgado* and *Morris*, where there was imminent or ongoing criminal conduct, “contrasts fundamentally” with foreseeability in the context of “possible *future* criminal conduct” in cases such as *Ann M.*<sup>332</sup> Nevertheless, in these cases, the court took the opportunity, on a supposedly “fundamentally” different question, to weigh in on the application of the prior similars test in the context of possible future criminal conduct. The court’s discussion was premised on the idea that courts and commentators have all along misunderstood the law of premises liability in California and from the time before *Isaacs* to the present day, the law had always been the same.<sup>333</sup> Though conceding that *Isaacs* “left open the possibility” that a duty to hire security guards could exist without prior similar incidents, the court in *Delgado* explained that *Ann M.* had “expressly retreated from the open-ended formulation set forth in *Isaacs.*”<sup>334</sup> Despite the problematic language of *Isaacs*, the court argued “the heightened foreseeability doctrine” of a “sliding-scale balancing formula” had been the law “prior to and in our decision in *Isaacs.*”<sup>335</sup> The court expressly repudiated the formulation in *Hassoon*, which held that prior similars was a prima facie element of any claim for premises liability.<sup>336</sup> The court described “the guiding principles” of the “sliding scale balancing formulation”:

In circumstances in which the burden of preventing future harm caused by third party criminal conduct is great or onerous (as when a plaintiff, such as in *Ann M.*, asserts the defendant had a legal duty to provide guards or undertake equally onerous measures, or as when a plaintiff, such as in *Sharon P.* or *Wiener*, asserts the defendant had a legal duty to provide bright lighting, activate and monitor security cameras, provide periodic “walk-throughs” by existing personnel, or provide stronger fencing), heightened foreseeability—shown by prior similar criminal incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location—will be required. By contrast, in cases

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of *Rowland v. Christian*, 443 P.2d 561, 564-66 (Cal. 1968), *superseded in part by statute*, CAL. CIV. CODE § 847 (West 2007) (rejecting the rigid common law rule predicating duty of care on the injured person’s status as an invitee, licensee, or trespasser). See also Robert L. Rabin, *Rowland v. Christian: Hallmark of an Expansionary Era*, in *TORTS STORIES* 73 (Robert L. Rabin & Stephen D. Sugarman eds., 2003). The *Morris* opinion’s entire reasoning on liability to invitees is accomplished without any reference to *Rowland*; the single mention of the case comes late in the opinion and on an unrelated point. *Morris*, 113 P.3d at 1192.

332. *Morris*, 113 P.3d at 1189.

333. [FOOTNOTE NEEDED TO SUPPORT THIS ASSERTION]

334. *Delgado*, 113 P.3d at 1166.

335. *Id.* at 1171 (citing *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215 (Cal. 1993)). See also *Morris*, 113 P.3d at 1188-89.

336. *Delgado*, 113 P.3d at 1170-71 (citing *Hassoon v. Shamieh*, 107 Cal. Rptr. 2d 658, 661 (Ct. App. 2001)). The court did not repudiate, or even mention, cases with the same holding, such as *Nicole M. v. Sears, Roebuck, & Co.*, 90 Cal. Rptr. 2d 922 (Ct. App. 1999) or *Morris v. Motel 6 Operating L.P.*, No. E029523, 2002 Cal. App. Unpub. LEXIS 2148 (Ct. App. Apr. 12, 2002).

in which harm can be prevented by simple means or by imposing merely minimal burdens, only “regular” reasonable foreseeability as opposed to heightened foreseeability is required.<sup>337</sup>

Interestingly, the court listed a number of “onerous” measures, including some rather routine maintenance steps, while it failed to list less burdensome measures, perhaps because there are so few cases to cite in which a safety measure, no matter how minimal or routine, was held to be a duty.

Whether or not the court will be able to convince the lower courts that the law requires a sliding-scale balancing test remains to be seen. What is clear is that the majority did not convince dissenting Justices Kennard<sup>338</sup> and Brown.<sup>339</sup> Justice Brown joined Justice Kennard’s dissenting opinion, which rejected the majority’s revisionist history of the oscillations in premises liability.<sup>340</sup> Their dissent tells a different story.<sup>341</sup>

Justice Kennard’s summary begins by noting that “[t]wo basic approaches have evolved” on this “vexing” question.<sup>342</sup> The totality of circumstances approach applies general principles of negligence; it takes into account such things as the nature, condition, and location of the premises, and it views foreseeability as a question of fact that turns on the evidence. Under the second approach, a business owner has no duty in the absence of a prior similar incident on the premises: “it views foreseeability as requiring the occurrence of a prior similar event before a duty to take precautionary measures can be imposed on the business owner.”<sup>343</sup>

Consistent with virtually all commentators, the dissenters see history as demonstrating not a single, harmonious approach, but two distinct theories.<sup>344</sup> “In 1985,” Justice Kennard explained, “this court in *Isaacs v. Huntington Memorial Hospital* held that the existence of a business owner’s duty to anticipate criminal acts of third parties could be established, even if there had not been a prior similar incident, by considering the totality of circumstances, with foreseeability of harm being a question of fact for the jury.”<sup>345</sup> But eight years later, the court “revisited the totality of the circumstances rule” and held in *Ann M.* “that in the absence of a prior similar incident, a business owner had no duty to provide security guards to protect a plaintiff against a criminal assault by a third party.”<sup>346</sup> The dissent thought this “revisiting” was at least partially justified because “there

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337. *Delgado*, 113 P.3d at 1171 n.24.

338. *Id.* at 1176 (Kennard, J., dissenting).

339. *Id.* at 1181 (Brown, J., dissenting).

340. *Id.*

341. *Id.*

342. *Id.* at 1178 (Kennard, J., dissenting).

343. *Id.* (citations omitted).

344. *Id.* at 1177-80.

345. *Id.* (citations omitted).

346. *Id.*

was no need in *Isaacs* to consider the viability of the prior similar incident approach in order to decide the case because the facts there disclosed ample evidence of prior third party criminal assaults.<sup>347</sup> This characterization is not consistent with how the *Isaacs* case was discussed by the California Supreme Court or the Courts of Appeal.<sup>348</sup>

In *Sharon P.*, the court “applied the prior similar incident rule of *Ann M.* to a business owner’s failure to provide security measures other than hiring guards.”<sup>349</sup> The holding of *Sharon P.* was “that, in the absence of a prior similar incident or other evidence showing a foreseeable risk of a violent criminal assault, the business owner did not owe the plaintiff a duty to deter criminal assaults in its underground garage by keeping the garage brightly lit and clean, or by ‘requir[ing] existing personnel to periodically walk through the garage.’”<sup>350</sup> The dissent then pointed to *Wiener* in 2004, in which the court had explained “our cases analyze third party criminal acts differently from ordinary negligence, and require us to apply a heightened sense of foreseeability before we can hold a defendant liable for the criminal acts of third parties.”<sup>351</sup> The holdings in *Sharon P.* and *Wiener* did not mention a balancing test, but were just recitations of the prior similars rule.<sup>352</sup>

Justices Kennard and Brown then called the majority on its misdirection:

The majority here goes far beyond this court’s recent decisions in *Ann M.* and its progeny. Anyone reading this court’s decisions in *Ann M.*, *Sharon P. v. Arman, Ltd.*, and *Wiener v. Southcoast Childcare Centers, Inc.*, would conclude that (1) the prior similar incident rule applies to premises liability claims against business owners for failing to take precautions against possible *future criminal* conduct of third parties when the conduct is a criminal assault by a third party, and that (2) as suggested in *Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, the totality of circumstances rule applies when the business’s owner or employees become aware that criminal conduct is *ongoing or imminent*. Relying on certain language in *Wiener v. Southcoast Childcare Centers, Inc.*, the majority announces a different rule in which the existence of a business owner’s duty to prevent harm from third-party criminal acts is determined through a “sliding-scale” approach by balancing the degree of foreseeability of harm against the weight of the burden that a

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347. *Id.* (citations omitted). As noted above, the implication seems to be that *Isaacs* did not quite need to be overturned because its discussion of the totality of the circumstances rule was some sort of dicta.

348. See *Isaacs v. Huntington Mem’l Hosp.*, 695 P.2d 653 (Cal. 1985); *Isaacs v. Huntington Mem’l Hosp.*, 204 Cal. Rptr. 765 (Ct. App. 1984) (depublished), *vacated*, 695 P.2d 653 (Cal. 1985).

349. *Delgado*, 113 P.3d at 1178 (citation omitted).

350. *Id.* (citations omitted).

351. *Id.* at 1178-79.

352. *Id.* at 1179 (citations omitted) (emphasis in original).

particular preventive measure would impose on the business owner.<sup>353</sup>

According to two of the California Supreme Court's own justices, "[a]nyone reading this court's decisions" would have thought that the totality of the circumstances rule had been adopted in *Isaacs* but replaced by the old prior similar rule, at least by the time of *Sharon P.*<sup>354</sup> The survey of California cases above indicates that most of the lower courts understood the law that way. Perhaps from this point, the balancing test will be considered the rule for premises liability in California, but, as with the rejection of *Isaacs* in *Ann M.*, the change in the law will come without the benefit of a California Supreme Court decision openly acknowledging that the previous rule has been overturned.

#### IV. ACCOUNTING FOR THE OSCILLATIONS IN PREMISES LIABILITY: A PUBLIC POLICY REVOLUTION AND COUNTER-REVOLUTION IN THE PRIVATE LAW OF PREMISES LIABILITY

The California Supreme Court's early adoption of the "totality of the circumstances" rule reflected its pioneering position in the movement toward what Guido Calabresi and others came to call "enterprise liability."<sup>355</sup> According to that perspective, liability rules in negligence were migrating toward approaches which would maximize safety, compensation to injured parties, and loss spreading, and away from conventional notions of "fault." After all, there is a sense in which liability is always "strict," in that someone is always going to pay, either the plaintiff or the defendant.<sup>356</sup> Thus, liability should often be imposed on the party, often a business, most able to implement steps that promote social welfare by enhancing safety, spreading the risk of loss, and ensuring compensation.<sup>357</sup>

In premises liability, as between the landlord and the tenant, liability might most reasonably be placed on the defendant who owns the property, decides how the property should be used, benefits from the income of the property, and determines and controls the level of security. This is in large part because the

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353. *Id.*

354. *Id.*

355. On California's position as a leader in tort law innovation, see James M. Lutz, *Regional Leaders in the Diffusion of Tort Innovations Among the American States*, 27 *PUBLIUS: J. FEDERALISM* 39 (1997); Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 *AM. POL. SCI. REV.* 83 (1985); Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 *AM. POL. SCI. REV.* 975, 977 (1981). On enterprise liability, see WHITE, *supra* note 1, at ch. 6; GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

356. See, e.g., Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 *YALE L.J.* 1055, 1065 (1972) (noting that the traditional assumption of risk "is, and always has been, a kind of plaintiff's strict liability").

357. See WHITE, *supra* note 1, ch. 5-6; see also Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 *DEPAUL L. REV.* 455, 456-57 (2000); Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 *VAND. L. REV.* 1285 (2001).

landlord literally profits from the difference between costs (including security costs) and revenues associated with the use of the property. The law of liability might take account of that incentive structure by asking whether a given property use is appropriate for a given location and whether the landlord has invested sufficient resources in security for a given use.

The defendant landlord charged with inadequate security is not simply being accused of “nonfeasance”; the landlord has created a state of affairs, and done so for reasons of personal profit. That is certainly not a bad thing; indeed, it is a very good thing. Nevertheless, according to the advocates of enterprise liability, it is not in the public’s interest to give the landlord incentives to increase profit by exporting the costs of doing business onto the public. Inadequate investments in security produces a cost savings for the landlord, but only by shifting the risk of harm to tenants and other members of the public—many of them invitees—who use the property.

The prior similar rule reflects the movement away from the “enterprise liability” that White and others have described as the chief characteristic of tort law in the last two decades of the 20th Century.<sup>358</sup> The prior similar rule is distinctly pro-defendant, and immunizes the landlord for the first instance of injury due to inadequate security. Furthermore, given the flexibility in defining what prior incidents are similar, the flexibility creates a larger scope of cases where establishing liability will be a potentially costly gamble for plaintiffs’ counsel, thus deterring some claims that might prevail even under a prior similar rule. In a reversal of the Calabresian calculus, the prior similar rule affirmatively incentivizes the landlord to provide a lower level of security, given that the landlord has every financial reason to reduce costs by limiting spending on security to a level that is unreasonable from a “totality of the circumstances” perspective. The landlord saves money, but that cost does not disappear; rather, it is exported, in the form of increased risk, from the enterprise to the public. It also acts as a disincentive to plaintiffs and plaintiffs’ counsel when contemplating litigation, further eroding the potential social benefits of a liability regime.

Famed California appellate law expert Ellis Horwitz, among others, noted the California Supreme Court’s reversal in the law, but his account does not fully explain it.<sup>359</sup> The oscillations in the law of premises liability demonstrate that, contrary to Horwitz’s implication, this was not a matter of legal formalism. It was not a situation where judges re-thought their previous doctrine and decided it was not working. Instead, new judges rejected the doctrines of previous judges, exemplifying Max Planck’s observation that “[i]t is not that old theories are

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358. On the “unexpected persistence” of negligence-based theories of liability in the last two decades of the 20th century, see WHITE, *supra* note 1, at 244-290.

359. Ellis Horwitz, *An Analysis of Recent Supreme Court Developments in Tort and Insurance Law: The Common Law-Tradition*, 26 LOY. L.A. L. REV. 1145, 1163 (1993) (emphasis omitted) (“Few generalizations, if any, may accurately be stated about the *results* in the California Supreme Court’s decisions since 1987. The *method* by which those decisions are reached, however, is well within what we recognize as the evolutionary common-law process.”).

disproved; it is just that their supporters die out.”<sup>360</sup> This was no mere generational change; this shift also came with party labels. Political interest groups knew a change was possible, and they engaged in strategic participation in litigation to facilitate it. The story of the change in premises liability law is one of a distinctly political revolution in the common law trumped by a political reaction.

A. *A Common Law Revolution and Counter-Revolution with Political Party Labels*

The *Isaacs* decision and the court’s turn toward the totality of the circumstances review was a product of the famously liberal and innovative court of Chief Justice Rose Bird, a court known to be “very willing to expand tort liability for modern policy reasons—primarily that defendants are well-positioned both to protect the public from harm and, when harm does occur, to bear the burden of compensation by spreading losses through liability insurance and/or via the prices they charge for what they sell.”<sup>361</sup> *Ann M.* came before the very different Lucas court, which was “decidedly more conservative than the Bird court.”<sup>362</sup> By the time of *Ann M.*, Calibresian “enterprise liability” thinking was out of favor, and the California Supreme Court opposed theories of liability that were premised on the idea that a defendant “either is well positioned to spread the cost of the accident or . . . to avoid the accident.”<sup>363</sup>

Indeed, the policy oscillation in the law of premises liability in California is a paradigmatic example of what Stephan Sugarman has called the “un-making” of tort law in California.<sup>364</sup> Sugarman attributes the broad-based “turnabout” in California tort law to “a change in court personnel with liberal Democrats, led by Chief Justice Rose Bird, generally replaced with moderate or conservative Republicans.”<sup>365</sup> The change in personnel, Sugarman concedes, provides a “readily understandable political explanation” for the ostensible legal developments in the late 20th and early 21st Century.<sup>366</sup>

The unanimous *Isaacs* decision in February 1985 was handed down by a court made up of:

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360. NEW FRONTIERS IN ECONOMICS 3 (MICHAEL SZENBERG & LALL RAMRATTAN eds., 2004). Or, in the pithy paraphrase of Paul Samuelson, “science advances funeral by funeral.” *Id.* at 4. See also Lawrence Baum, *Membership Change and Collective Voting Change in the United States Supreme Court*, 54 J. POLITICS 3 (1992) (explaining policy changes in civil liberties cases in the U.S. Supreme Court can be explained by shifts in the Court’s membership).

361. Sugarman, *supra* note 358, at 456-57.

362. Yokoyama, *supra* note 51, at 92 n.80.

363. Sugarman, *supra* note 358, at 472.

364. See *id.* at 455.

365. *Id.*

366. *Id.* at 455. Contrast Sugarman’s frank acknowledgement of the partisan nature of this shift with the formalist account in Horvitz, *supra* note 360.

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1. Rose Bird, C. J.—Democratic Appointee (Jerry Brown 1977)
2. Stanley Mosk—Democratic Appointee (Pat Brown 1964)
3. Otto Kaus—Democratic Appointee (Jerry Brown 1981)
4. Allen Broussard—Democratic Appointee (Jerry Brown 1982)
5. Cruz Reynoso—Democratic Appointee (Jerry Brown 1982)
6. Joseph Grodin—Democratic Appointee (Jerry Brown 1982)
7. Malcolm Lucas—Republican Appointee (Deukmejian 1984)

By 1993, the Democratic majority with a single Republican was replaced by a Republican majority with a single Democrat. The *Ann M.* case was decided by a court made up of:

1. Edward Panelli—Republican Appointee (Deukmejian 1985)
2. Malcolm Lucas, C.J.—Republican Appointee (Deukmejian 1984, CJ—Deukmejian 1986)
3. Joyce Kennard—Republican Appointee (Deukmejian 1989)
4. Armand Arabian—Republican Appointee (Deukmejian 1990)
5. Marvin Baxter—Republican Appointee (Wilson 1991)
6. Ronald George—Republican Appointee (Wilson 1991)
7. Stanley Mosk—Democratic Appointee (Pat Brown 1964) (dissenting)

The Sharon P. had a similar Republican-plus-one-Democrat line-up in 1999:

1. Marvin Baxter—Republican Appointee (Wilson 1991)
2. Ronald George, C. J.—Republican Appointee (Wilson 1991)
3. Joyce Kennard—Republican Appointee (Deukmejian 1989)
4. Ming Chin—Republican Appointee (Wilson 1996)
5. Janice Rogers Brown—Republican appointee (Wilson 1996)
6. Kathryn Werdegar—Republican Appointee (Wilson 1994)
7. Stanley Mosk—Democratic Appointee (Pat Brown 1964) (dissenting)

The party affiliation of the appointing governor is a somewhat crude, but nonetheless effective, indicator of the ideological commitments of state appellate judges and justices. Indeed, empirical research supports the conclusion that “[i]n systems where justices are appointed by the governor or legislature” and thus “do not depend upon voters to attain their seats,” justices tend “to mirror the ideology of those controlling state politics at the time of selection.”<sup>367</sup> Thus, “using the partisan affiliations of the judges, or the partisan affiliations of the executives who appointed them, as surrogates for judicial ideology” is part of “a pervasive practice in political science.”<sup>368</sup>

Studies of judges and justices have confirmed the conventional wisdom that there exists “distinctive voting patterns between Democrats and Republicans” and that, not surprisingly, Democratic jurists “are more liberally inclined.”<sup>369</sup> The party affiliation of state supreme court justices is recognized as “an important though imperfect indicator of their ideological orientations,” particularly in states like California, where the justices are initially appointed by the governor.<sup>370</sup>

Useful as such studies have been, party affiliation has several recognized limitations. Partisanship is a simple “D” vs. “R” dichotomy in most of the United States, and some areas are essentially one-party strongholds.<sup>371</sup> Therefore, party identification “does not adequately capture the extraordinary range of preferences that may be present among members of a court.”<sup>372</sup>

Increasingly, sophisticated scholarship has “examine[d] the relationships among judicial selection, individual judicial decision making, and court policy-making,”<sup>373</sup> with several significant studies focusing on the important and

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367. Paul Brace, Laura Langer & Melinda Gann Hall, *Measuring the Preferences of State Supreme Court Judges*, 62 J. Politics 387, 393 (2000).

368. *Id.* at 391.

369. *Id.*

370. *Id.* at 393.

371. *Id.* at 391.

372. *Id.* A key concern identified by Brace et al. is the difficulty in making comparisons between state courts given some degree of ideological diversity among parties in different states. *Id.* at 391-92. That concern is less significant for purposes of this examination of a single state.

373. Craig F. Emmert & Carol Ann Traut, *The California Supreme Court and the Death Penalty*, 22

distinctive Supreme Court of California<sup>374</sup> during the years when premises liability law was undergoing the policy oscillations noted above. This research confirms that, in at least some issue areas of California law, “judges’ values are of overriding importance for explaining judicial decisions in ideologically charged cases.”<sup>375</sup> “[T]he significant impact that value change, via shifts in membership, has on court policy” in California, and the state’s “appointive judicial selection [method provided recent California governors with] opportunities to shape the Court” and “greatly influence judicial policy through the use of the appointment power.”<sup>376</sup>

Some of this work builds on the pioneering study of judicial values on the U.S. Supreme Court by Jeffrey Segal and Albert Cover.<sup>377</sup> Earlier studies had developed measures of justices’ values by using votes in previous decisions to develop attitude scales, and then used those scaled scores to predict, with some accuracy, justices’ votes in subsequent cases.<sup>378</sup> Segal and Cover sought a measure independent of prior existing votes, and generated an independent, though indirect, measure of judicial values through a content analysis of major print media outlets’ reports of perceptions of a future justice’s values at the time of nomination.<sup>379</sup> The study demonstrated “a strong relationship between their measure of judicial values and the justices’ decisions in civil liberties cases.”<sup>380</sup>

Emmert and Traut replicated the Segal and Cover approach in a study of the California Supreme Court, and tested their measure of judicial values in a study of death penalty cases decided by that court between 1977 and 1990.<sup>381</sup> Rather than the simple dichotomous factor produced by studies which rely solely on which of the two major parties the appointing governor belonged to, the Segal-Cover approach generated a more subtle continuous measure, coded -1.0 for conservative justices, 0.0 for moderates, and 1.0 for liberals.<sup>382</sup> The scores calculated by Emmert and Traut are shown in Table 1. Not unexpectedly, the Ronald Reagan appointees were clearly conservative (median and mean = -0.75), the Jerry Brown appointed justices were distinctly liberal (median = 0.93, mean = 0.72), and the George Deukmejian appointees were also clearly conservative (median = -0.64, mean = -0.62).<sup>383</sup>

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AM. POL. Q. 41, 41 (1994). *See also id.* at 43-45 (discussing literature regarding judicial selection, judicial values, decision making, and policy-making); Brace et al., *supra* note 368, at 389-92.

374. Gregory Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83 (1983) (noting that the California Supreme Court ranked the most prestigious of all state high courts in the Twentieth Century).

375. Emmert & Traut, *supra* note 374, at 58.

376. *Id.*

377. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

378. Emmert & Traut, *supra* note 374, at 58.

379. Segal & Cover, *supra* note 378, at 559.

380. Emmert & Traut, *supra* note 374, at 44.

381. *Id.* at 45-59.

382. *Id.* at 45-46.

383. No scores could be calculated for the Pat Brown appointees, Tobriner and Mosk. Emmert & Traut,

Table 1

Ideological Scores of California Supreme Court Justices in Death Penalty Cases, 1977-1990

Justice	Appointing Governor	Liberalism Score
Tobriner (1962-1982)	Pat Brown (D)	—
Mosk (1964-2001)	Pat Brown (D)	—
Clark (1973-1981)	Ronald Reagan (R)	-1.00
Richardson (1974-1983)	Ronald Reagan (R)	-0.50
Bird (1977-1986)	Jerry Brown (D)	0.98
Manuel (1977-1981)	Jerry Brown (D)	0.13
Newman (1977-1982)	Jerry Brown (D)	1.00
Broussard (1981-1991)	Jerry Brown (D)	0.70
Kaus (1981-1985)	Jerry Brown (D)	0.39
Reynoso (1982-1987)	Jerry Brown (D)	0.94
Grodin (1982-1987)	Jerry Brown (D)	0.93
Lucas (1984-1996)	George Deukmejian (R)	-0.92
Panelli (1985-1994)	George Deukmejian (R)	-0.50
Arguelles (1987-1989)	George Deukmejian (R)	-0.91
Eagleson (1987-1991)	George Deukmejian (R)	-0.93
Kaufman (1987-1990)	George Deukmejian (R)	-0.90
Kennard (1989-present)	George Deukmejian (R)	-0.64
Arabian (1990-1996)	George Deukmejian (R)	-0.45

Source: Craig F. Emmert & Carol Ann Traut, *The California Supreme Court and the Death Penalty*, 22 AM. POL. Q. 41, 47 (1994).

According to Emmert and Traut, Jerry Brown’s appointees moved the moderately liberal court of the late 1970s markedly further left.<sup>384</sup> George Deukmejian’s first two appointees (Lucas and Panelli) brought the court’s overall ideological composition somewhat more right.<sup>385</sup> As indicated in Table 2, however, the California Supreme Court housecleaning of 1986 and the appointment of three more Deukmejian justices “shifted the court’s ideological balance sharply to the right.”<sup>386</sup> This effect was so pronounced that Emmert and Traut observed that “changes in the court’s ideological composition can be almost completely explained by knowing the governors who appointed the court members.”<sup>387</sup>

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*supra* note 374, at 46.

384. *Id.* at 48-49.

385. *Id.*

386. *Id.* at 49.

387. *Id.* at 50.

Table 2

Natural Courts, Ideological Composition, and Outcomes in Death Penalty Cases, 1977-1990

Court Members	Court Liberalism Score
D: Bird, Tobriner, Mosk, Manuel, Newman	0.29
R: Clark, Richardson	
D: Bird, Mosk, Broussard, Kaus, Reynoso, Grodin	0.59
R: Richardson	
D: Bird, Mosk, Broussard, Kaus, Reynoso, Grodin	0.53
R: Lucas	
D: Bird, Mosk, Broussard, Reynoso, Grodin	0.41
R: Lucas, Panelli	
D: Mosk, Broussard	-0.39
R: Lucas, Panelli, Arguelles, Eagleson, Kaufman	
D: Mosk, Broussard	-0.35
R: Lucas, Panelli, Eagleson, Kaufman, Kennard	
D: Mosk, Broussard	-0.29
R: Lucas, Panelli, Eagleson, Kennard, Arabian	

Note: "Court liberalism scores are mean scores based on scores of individual members."

Source: Craig F. Emmert & Carol Ann Traut, *The California Supreme Court and the Death Penalty*, 22 AM. POL. Q. 41, 49 (1994).

The shift in judicial values of California justices was paralleled by a shift in judicial policy as reflected in case results, according to Emmert and Traut.<sup>388</sup> As expected, they found a "close correspondence between the justices' values and behavior," with the liberal scoring Brown justices voting to reverse death sentences almost eighty-six percent of the time, while the Reagan justices included in the study voted to reverse almost forty-five percent of the time, and the much more conservative Deukmejian justices voted to reverse less than

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388. *Id.*

twenty-one percent of the time.<sup>389</sup> The Emmert and Traut measure of ideology correctly predicted justices' votes in capital appeals more than seventy-six percent of the time.<sup>390</sup>

Court policy in premises liability law shows a similar pattern. Not surprisingly, the court which handed down the *Isaacs* decision was very close to the liberal peak in the Emmert-Traut data. On the other hand, the court that decided *Ann M.* had two more Republican justices than the most conservative natural court in the Emmert-Traut data set.

Other studies have confirmed the dramatic ideological transformation of the California Supreme Court. Political scientists Paul Brace, Laura Langer, and Melinda Gann Hall have developed a sophisticated index that supplements justices' party affiliation with other factors, such as a state's citizen and elite ideology at the time of appointment, to create a "party-adjusted judge ideology score," or "PAJID," that allowed comparisons across time and between states.<sup>391</sup> Using this "new surrogate measure of the ideological preferences of state supreme court justices in all [fifty] states from 1960 through 1993,"<sup>392</sup> Brace et al. made findings about California which confirm the basic conclusions of the earlier Emmert and Traut study.<sup>393</sup>

PAJID data indicates that California is one of five states (along with Indiana, Wyoming, Arizona, and Minnesota) where ideology accounts for at least half the variation in voting by individual justices in the period between 1960 and 1993, and in California, well more than half.<sup>394</sup> Looking at the courts as a whole, PAJID means for the thirty-three years studied range from a conservative low of 25.03 for the Arizona Supreme Court to a liberal high of 112.07 for the Hawaii Supreme Court, with the average mean score at 46.35, and the California

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389. *See id.* at 47 & tbl.1.

390. *Id.* at 47. Acknowledging that legal factors at least sometimes constrain judicial choice, the authors also tested a logistic regression model which supplemented judicial values with variables for the seven most common arguments raised in the appellate briefs in the death penalty cases they studied, and further refined their model to account for the fact that liberal and conservative justices reacted differently to some of the issues raised by appellants. *Id.* at 57. These more complex models correctly predicted slightly higher percentages of death penalty case outcomes, but "[i]deology continues to explain most of the variation in California Supreme Court death penalty decisions after the effects of legal issues are controlled." *Id.*

391. Brace et al., *supra* note 368, at 398. The PAJID study's authors acknowledge a single measure of judicial ideology may not perform uniformly across various areas of state law. *Id.* at 398. They demonstrate that their new study outperforms simple party identification in accounting for judicial voting behavior in 12 out of 21 areas of law, and is as good as party ID in seven other areas. *Id.* at 399. PAJID was superior in the following areas: victimless crimes, death penalty, criminal sentencing, crime definition, criminal procedure, taxation, government benefits, government finance, local government powers, state government powers, private law economic disputes, and a miscellaneous category. PAJID was as good as party ID in two areas of civil liberties claims, professional regulation and business regulation, government employment, election law, and family law. Interestingly, in terms of a study of premises liability, one of the two areas of law where party ID outperformed PAJID was tort law. (The other was taxation.) The authors note that, without controlling for states, neither measure is particularly strong when focusing on specific areas of law. *Id.*

392. *Id.* at 388.

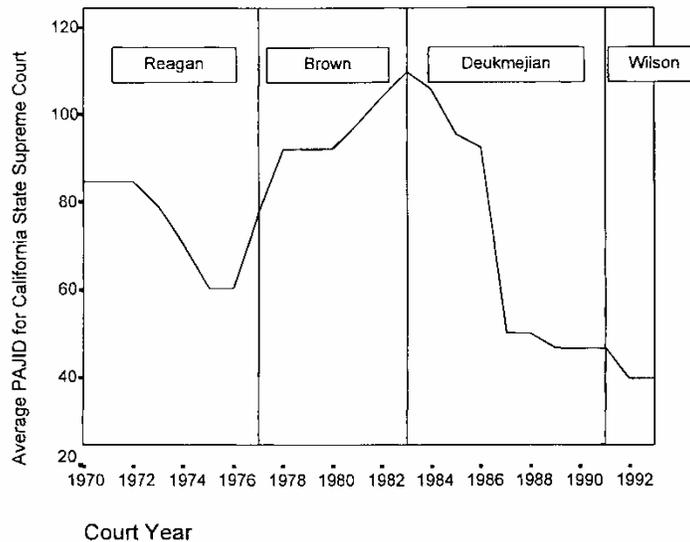
393. *Id.* at 400-01 (noting a 0.95 correlation between PAJID and Emmert-Traut).

394. *Id.* at 400, 403 tbl.3.

Supreme Court's mean a rather liberal 60.04 (seventh most liberal overall).<sup>395</sup>

However, the mean scores understate California's distinctiveness. In fact, California is remarkable for having by far the largest ideological shift on its supreme court in the period between 1970 and 1993.<sup>396</sup> The California Supreme Court's early 1980s score of 130.86 was the maximum liberal score in the study, and only fourteen state supreme courts ever exceeded 100.<sup>397</sup> By the end of the study period in 1993, a mere ten years later, the court had swung a remarkable 119.04 points to a very conservative 11.82.<sup>398</sup>

Average PAJID by Year for California's State Supreme Court 1970–1993



Source: Paul Brace, Melinda Gann Hall & Laura Langer, *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387, 409 fig.4 (2000).

The pro-plaintiff *Isaacs* decision in favor of the totality of the circumstances rule was issued near the height of the court's liberalism, just before the data shows a dramatic cliff in 1986 and 1987, reflecting the profound ideological shift at the time of Governor Deukmejian's post-Bird appointments.<sup>399</sup> By 1993, the year the *Ann M.* decision began the resurrection of the pro-defendant prior

395. *Id.* at 407 tbl.4.

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.* at 409 fig.4.

similar rule, the court had reached its most conservative extreme. If there was any doubt, the studies of judicial ideology confirm the court's remarkable ideological shift, resulting from an overtly political and partisan change in personnel, at the very time the law of premises liability was undergoing its dramatic change in policy.

B. "Litigation Lobbying": Political Dynamics in Private Law<sup>400</sup>

*Amicus* participation in the premises liability counter-revolution in California also reflects the policy-based, political, and even partisan nature of the move from the totality of the circumstances rule to an effective revival of the prior similar rule.

The growing importance of state supreme courts as policymakers combined with the increasing conservatism of the federal courts has led more groups to turn to the state courts to pursue their policy interests, including participation as *amici*.<sup>401</sup> Research indicates that support from *amici* is significantly related to the likelihood of success of the supported litigants, regardless of which party the *amici* supports.<sup>402</sup> "Amicus support from private groups and unaffiliated individuals is strongly related to the success of litigants. The relationship of support by business to litigant success is more modest, but still statistically significant."<sup>403</sup> The policy shift in premises liability reflects this pattern of politicization.

For example, the significance of the *Sharon P.* case was not missed by interested repeat players in California tort litigation.<sup>404</sup> In that case, seven *amicus* briefs were filed in the California Supreme Court, a rather significant amount of "litigation lobbying" of a common law court deciding a private law question, and all *amici* supported the defendant property owner.<sup>405</sup> Two briefs came from conservative legal-activist groups, the Pacific Legal Foundation ("PLF") and the Washington Legal Foundation, and a third came from the Association for California Tort Reform.<sup>406</sup> Three other briefs came from trade associations in the shopping center, parking management, banking, and private security industries.<sup>407</sup>

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400. Nathan Hakman, *The Supreme Court's Political Environment: The Processing of Noncommercial Litigation*, in *FRONTIERS OF JUDICIAL RESEARCH* 199 (Joel B. Grossman & Joseph Tanenhaus eds., 1969) (describing *amicus* briefs as a form of "litigation lobbying").

401. Donald R. Songer & Ashlyn Kuersten, *The Success of Amici in State Supreme Courts*, 48 *POL. RES. Q.* 31, 31 (1995).

402. *Id.* at 40.

403. *Id.*

404. On the significance of "repeat players" versus "one-shotters," see the seminal article by Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974). See also *IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD?* (Herbert M. Kritzer & Susan Silbey eds., 2003) (discussing a thirty-year survey of the impact of Galanter, *supra*).

405. *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 122 (Cal. 1999).

406. *Id.*

407. *Id.*

This represents a recent pattern in premises liability cases before the California Supreme Court: *amicus* briefs generally are filed, and, save for one recent exception, they have always been in support of the landowner defendant.<sup>408</sup> In *Saelzler v. Advanced Group 400*, five *amicus* briefs, all in support of the property owner defendants, were submitted by various groups of landowners, insurance companies, an association of defendants' counsel, and a tort reform public interest group.<sup>409</sup> Two *amicus* briefs were filed in *Wiener* on behalf of an association of schools and by PLF.<sup>410</sup> In *Kentucky Fried Chicken v. Superior Court*, four *amicus* briefs were filed, one each by PLF, the Association for California Tort Reform, insurance company AIG, and franchisor Atlantic Richfield.<sup>411</sup> PLF filed briefs in support of the defendant proprietors in both *Delgado v. Trax Bar & Grill*<sup>412</sup> and *Morris v. De La Torre*.<sup>413</sup> In *Castaneda v. Olsher*, four pro-defendant *amicus* briefs came in from PLF, the California Apartment Association, the Western Manufactured Housing Communities Association, and the Civil Justice Association of California.<sup>414</sup>

No *amici* seem to ever file on behalf of the plaintiff, with the exception of a single *amicus* brief (and 10 minute oral argument) by the Consumer Attorneys of California, an AAJ/ATLA-affiliate plaintiffs' attorney organization, in support of the plaintiff in *Morris v. De La Torre*.<sup>415</sup> However, while only rarely engaging as *amicus*, plaintiffs' advocates in premises liability litigation are clearly aware of the significant policy implications of this litigation, and, like the interests groups lobbying in favor of reforming the law of premises liability, they frequently advocate for their cause in venues such as *Trial* magazine, a house organ of the AAJ.<sup>416</sup>

It is practically significant but politically unremarkable that corporations and trade associations filed briefs in support of their interests. However, the ideological interest groups acting as *amici* are clearly pursuing an ideological policy agenda with a well-established partisan identification. PLF, the primary "friend of the court" in this area of California law, is formally non-partisan, but

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408. An *amicus* brief in support of the landlords was also submitted in the intermediate appellate proceeding in *Pamela W. v. Millsom*, 30 Cal. Rptr. 2d 690, 693-94 (Ct. App. 1994).

409. *Saelzler v. Advanced Group 400*, 23 P.3d 1143, 1144-45 (Cal. 2001).

410. *Wiener v. Southcoast Childcare Ctrs, Inc.*, 88 P.3d 517, 518 (Cal. 2004).

411. *Kentucky Fried Chicken v. Super. Ct.*, 927 P.2d 1260, 1261 (Cal. 1997). See also California Courts—Appellate Court Case Information, *Kentucky Fried Chicken v. S.C.*, Case Number S051085, [http://appellatecases.courtinfo.ca.gov/search/case/briefing.cfm?dist=0&doc\\_id=50964&doc\\_no=S051085](http://appellatecases.courtinfo.ca.gov/search/case/briefing.cfm?dist=0&doc_id=50964&doc_no=S051085) (last visited July 11, 2007) (on file with the *McGeorge Law Review*).

412. *Delgado v. Trax Bar & Grill*, 113 P.3d 1159, 1159 (Cal. 2005).

413. *Morris v. De La Torre*, 113 P.3d 1182, 1183 (Cal. 2005).

414. See California Courts—Appellate Court Case Information, *Castaneda v. Olsher*, Case Number S138104, [http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc\\_id=394702&doc\\_no=S138104](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=394702&doc_no=S138104) (last visited July 11, 2007) (on file with the *McGeorge Law Review*).

415. See California Courts—Appellate Court Case Information, *Morris v. De La Torre*, Case Number S119750, [http://appellatecases.courtinfo.ca.gov/search/dockets.cfm?dist=0&doc\\_id=293864](http://appellatecases.courtinfo.ca.gov/search/dockets.cfm?dist=0&doc_id=293864) (last visited July 11, 2007) (on file with the *McGeorge Law Review*).

416. But see WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (2004) (discussing the relative ineffectiveness of the plaintiffs' bar in advocating in the public media for their ideological agenda).

well-known as one of the leading libertarian/conservative public interest law firms, and its most significant funding comes from the most recognizable names in the Republican Party elite.<sup>417</sup> PLF openly solicits contributions from the same donor lists used by the Republican National Committee, the National Republican Congressional Committee, the National Republican Senatorial Committee, and the Republican State Leadership Committee, but not from Democratic leaning donor lists.<sup>418</sup> The participation of PLF and other ideological interest groups in the “un-making” of the California premises liability law further demonstrates the overtly political and partisan nature of this change in private law.<sup>419</sup>

#### V. CONCLUSION: JUDICIAL POLICY-MAKING OUT OF A FEAR OF JURY PREROGATIVES

California courts have agreed with Prosser that the requirement of duty gives courts the ability to contour liability for reasons of social policy.<sup>420</sup> Premises liability cases, like much else in negligence law, “inevitably raise[s] questions about the social consequences of placing the cost of risk-creating activity on the person engaging in the activity or the person injured by the risk.”<sup>421</sup> Such questions are not reducible to “questions of simple justice between the parties” and make overt the “implicitly ‘public’ dimension” of tort law.<sup>422</sup>

The crucial contest, as in much of public policy, is who will decide how to answer these questions. White has observed the development of tort law since the mid-twentieth century: “judges have had two principal competitors as lawmakers in the decision of torts cases, legislators and juries.”<sup>423</sup> An earlier California Supreme Court admitted that “[t]he history of the concept of duty in itself discloses that it is not an old and deep-rooted doctrine but a legal device of the latter half of the nineteenth century designed to curtail the feared propensities of juries toward liberal awards.”<sup>424</sup> In resolving the question of duty in premises liability, California courts after 1985 advanced their own power by articulating legal formulae that subordinated factual questions of breach and causation, the province of the jury, to legal determinations of duty, the province of the judge.<sup>425</sup>

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417. Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 548-54 (1998).

418. See The Atlantic List Co. “List of Lists,” <http://datacards.atlanticlist.com/market?page=research/category&id=2693> (last visited Mar. 6, 2007) (on file with the *McGeorge Law Review*). Not that PLF is doing anything unusual; for example, the Atlantic List data shows the ACLU targets many of the same donors as the Democratic Party. *Id.*

419. See Sugarman, *supra* note 358.

420. See, e.g., *Hoff v. Vacaville Unified Sch. Dist.*, 968 P.2d 522, 526 (Cal. 1998); *Dillon v. Legg*, 441 P.2d 912, 916 (Cal. 1968).

421. WHITE, *supra* note 1, at 296.

422. *Id.*

423. WHITE, *supra* note 1, at 183.

424. *Dillon*, 441 P.2d at 916.

425. *Id.* at 184.

The courts' formulation is driven by a type of cost-benefit analysis some critics consider incomplete.<sup>426</sup> As Keating notes, there is a "clash between economic 'science'" increasingly relied on by courts and "ordinary moral sensibility," still the quintessential reflex of the jury.<sup>427</sup>

As the survey of California cases has shown, the backlash against the *Isaacs* decision involved Republican-appointed California judges who expressly restructured the duty formulation in order to protect businesses and property owners against what they thought were excessive costs. That formulation, however, does not take seriously a point implicit in the *Rowland* calculus: the risk of rape, death, or serious injury generally justifies "pressing precaution beyond the point of cost justification."<sup>428</sup> Fairness will not allow the law to treat devastating injury as commensurable with a dollar-cost equivalent of just any benefit which might be gained by risking such injury.<sup>429</sup> The distribution of benefits and burdens must be taken into account; the benefit of not being raped, beaten, and or killed is almost literally priceless to the individual at risk, "while costs of going beyond the cost-justified point of precaution, by contrast, may well translate to small—perhaps very small—losses to large numbers of people."<sup>430</sup> Consider whether any man would agree *ex ante* to be beaten into a coma, while his wife is forced to watch, spend weeks in the hospital, and live with a lifetime condition of brain injury (including headaches and personality changes) in exchange for a payment of \$20,000 above medical expenses?<sup>431</sup> Presumably not, but what would be a fair price? And how much would that fair price drive up the cost of a beer at the bar where the beating occurred? That additional cost may well be saved if the duty is not imposed, but is the risk of devastating loss like that suffered by the Delgado family worth making a beer at a bar a few pennies

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426. See, e.g., Robert H. Frank, *Why Is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913 (2000); Henry S. Richardson, *The Stupidity of the Cost-Benefit Standard*, 29 J. LEGAL STUD. 971 (2000).

427. Gregory C. Keating, *Pressing Precaution Beyond the Point of Cost Justification*, 56 VAND. L. REV. 653, 654-55 (2003).

428. *Id.* at 653.

429. Keating notes:

When devastating injury is risked, it is unfair to treat the harm being risked as comparable to any benefit which might be gained, no matter how trivial that benefit is in the lives of those who reap it. Sacrificing an urgent interest—the interest in avoiding premature death or devastating injury—for the sake of trivial gains to others cannot be justified to those whose urgent interests are sacrificed. It is only fair to ask some people to bear a significant risk of devastating injury when the burden of eliminating that risk is comparable to the burden of bearing it. Cost-benefit analysis ignores this. It treats all costs and all benefits as interests which are fungible at some ratio of exchange and aggregates costs and benefits across persons. Cost-benefit analysis supposes that loss of life or health by some can always be offset by increase in wealth to others, no matter how trivial the effect of that increased wealth may be in the lives of those who benefit from it. The mistake here lies not in undervaluing life or health. The mistake lies in assuming that trivial benefits and devastating losses are comparable. They are not, and it is unfair to treat them as if they are.

*Id.* at 660.

430. *Id.* at 698.

431. The illustration is drawn from the facts of *Delgado v. Trax Bar & Grill*, 113 P.3d 1159 (Cal. 2005).

cheaper?

As the New Jersey Supreme Court noted in an early premises liability case, “[w]hether a duty exists is ultimately a question of fairness. . . [i]nvolving a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.”<sup>432</sup> The formalist patina the California courts have placed on their policy choices risks neglecting the wisdom of this old insight, and through judicial assertions of the power to define duty, short-circuits the jury’s power to make determinations regarding breach of duty and causation.

Erecting formalist barriers to jury determinations is not the only, or necessarily the best, response to judicial fear of jury irresponsibility. As early as the first *Restatement*, Francis Bohlen acknowledged the concern that jurors might be “overly sympathetic to plaintiffs in negligence cases, and would ignore social considerations that might dictate against placing the costs of some accidental injuries on defendants.”<sup>433</sup> However, rather than mask the fact that such determinations were inevitable by hiding them under the rubric of questions of law properly the province of the court, Bohlen thought jury instructions should be offered that would caution jurors to “take into account the competing interests at stake and the social consequences of deciding in favor of one interest over others.”<sup>434</sup> The jury’s decision, then, could be said to represent the values of the community<sup>435</sup> which, as a source of public policy, at least has the merits of being a decision made by representatives of the public fully informed as to the facts of a case.

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432. *Goldberg v. Hous. Auth. of Newark*, 186 A.2d 291, 293 (N.J. 1963).

433. *See* WHITE, *supra* note 1, at 310.

434. *Id.* at 311.

435. *Id.*