

CALIFORNIA'S NO-DUTY LAW AND ITS NEGATIVE IMPLICATIONS

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I. INTRODUCTION

In 1984, Kathleen Peterson, a student at the City College of San Francisco was attacked on a staircase by a non-student assailant hiding in foliage.² The California Supreme Court held that the college had a duty to exercise reasonable care to protect students from reasonably foreseeable assaults on campus.³ Twenty-five years later, in 2009, Katherine Rosen, a student at the University of California, Los Angeles, suffered severe injuries after being attacked by another UCLA student during a chemistry laboratory.⁴ UCLA had ample warning of the assailant-student's propensity for violence and the assailant-student had even made threats directed at Rosen to a UCLA

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² *Peterson v. San Francisco Community College Dist.*, 685 P.2d 1193 (1984).

³ *Id.*

⁴ *Regents of the Univ. of Cal. v. Superior Court (UC Regents)*, 193 Cal. Rptr. 3d 447, 450 (Cal. App. 2015).

teaching assistant.⁵ However, the California Court of Appeal held that although the attack may have been foreseeable, UCLA was under no duty to protect Rosen from this attack.⁶

Although these cases seem incompatible, they were both decided according to settled, good law. These cases highlight the anomalous exceptions harbored within California's inconsistent no-duty rule. "The general rule in California is that everyone is responsible . . . 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 . . ." ⁷ However, rather than the parties' focusing on whether the defendant fell below the standard of care, and therefore breached its duty, the parties spend much of their time establishing whether a duty exists. California has partaken in a flawed, fundamental move away from deciding negligence cases based on whether a defendant breached its duty of care. Instead, California courts wrongfully focus on the first element of negligence: whether a duty exists. In doing so, California has created an intricate, inconsistent common law surrounding whether a duty exists. Often, cases are won and lost on summary judgment on whether a duty exists — a question of law. Deciding negligence cases on summary judgment inevitably leads to cases being removed from the hands of the jury.

This article takes the position that California courts should rely more heavily on the general rule that a duty is presumed and, instead, focus their analytical attention on whether the defendant has breached its duty of care. Part II explains the history of negligence law generally. Additionally, Part II explores the history of negligence law specifically in California and the historical background of the promulgation of the no-duty rule. Part III evaluates the consequences of California's reliance on the no-duty rule — mainly the removal of negligence cases from the hands of the jury and California's creation of a complex common law surrounding duty with confusing exceptions. Additionally, Part III looks to the cases that will be heard by the California Supreme Court in its 2017 term that are based on whether a duty exists — exploring how California's reliance on the no-duty rule has led to narrow exceptions being created in what should be

⁵ *Id.* at 453.

⁶ *Id.* at 451.

⁷ *Vasilenko v. Grace Family Church*, (*Vasilenko v. Church*), 203 Cal. Rptr. 3d 536, 540 (2016), quoting CAL. CIV. CODE § 1714, subd. (a) (internal quotations omitted).

a general presumption that the defendant owes a duty. Further, Part III contains a discussion of the implications of the no-duty rule, including how the no-duty rule violates one of the main goals of tort law: deterrence. Lastly, Part IV will conclude and recommend that California should move away from the flawed no-duty rule and instead focus on whether a defendant has breached its duty of reasonable care.

II. HISTORICAL BACKGROUND

A. HISTORY OF NEGLIGENCE GENERALLY

Negligence did not appear as a general system for resolving tort actions until the nineteenth century, mostly after the American Civil War.⁸ Prior to the development of negligence as a cause of action, physical injury or harm to property cases were rooted in trespass law.⁹ In these cases, the relationship between the parties to a case was important for two reasons: first, because that relationship between the plaintiff and the defendant might require that the defendant take affirmative actions to prevent harm to the plaintiff;¹⁰ second, the “standard of care or duty owed by the defendant was implicitly set by accepted community practices and expectations as incorporated in the contract or relationship itself.”¹¹ Given that duties in these cases “tended to find their source in community custom and conduct of the parties, courts naturally did not impose any universal principles of responsibility.”¹² Instead, the courts “imposed liabilities they thought proportioned to the parties’ own contract or expectation.”¹³

Beginning in the nineteenth century, the modern formation of negligence law emerged.¹⁴ Courts began to develop general principles to be applied to personal injury or harm to property cases.¹⁵ Instead of cases being

⁸ DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 121 (2d ed. Practitioner Treatise Series 2011).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See DOBBS ET AL., *supra* note 8, § 122.

judged “by imposing particular duties upon particular callings, courts could simply treat negligence as the basis of liability in all or a large universe of cases.”¹⁶ A tort of trespass was maintained, but negligence became the basis of liability otherwise.¹⁷ Further, negligence did not focus on parties who stood in some special or contractual relationship; negligence was “a general duty of all to all.”¹⁸

In 1850, *Brown v. Kendall* was decided and became the basis of negligence law. In the case, the Massachusetts Supreme Court abolished the rule “that a direct physical injury entailed strict liability.”¹⁹ The court held that a defendant who attempted to beat a dog but unintentionally struck the plaintiff instead, would not be liable for battery in spite of the direct force applied.²⁰ Instead, the defendant would only be liable for battery if his *intention* was to strike the plaintiff, or if he was “at fault in striking him.”²¹ This meant that other direct applications of force, such as “in railroad accidents or industrial injuries, would not automatically subject the defendant to the threat of liability; instead, the plaintiff would be required to prove fault.”²² With the decision in *Brown v. Kendall*, negligence law developed. Courts began to view tort law as a separate area of the law, with the core inquiry being whether the defendant was at fault.²³

In modern law, the term *negligence* merely describes unreasonably risky conduct.²⁴ “A good deal of tort law is devoted to deciding what counts as an unreasonable risk and to deciding as well whether the judge or the jury is the decision maker in particular cases.”²⁵ A negligence case has five elements, which must be proved by the plaintiff by proof of facts or persuasion. The elements are:

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*; see G. EDWARD WHITE, *TORT LAW IN AMERICA* 16 (1980); Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127 (1990).

¹⁹ See DOBBS ET AL., *supra* note 8, § 122; *Brown v. Kendall*, 60 Mass. 292 (1850).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See DOBBS ET AL., *supra* note 8, § 122.

²⁴ *Id.* at § 124.

²⁵ *Id.*

(1) The defendant owed the plaintiff a duty to exercise some degree of care for the plaintiff's safety; (2) The defendant breached that duty by his unreasonably risky conduct; (3) The defendant's conduct in fact caused harm to the plaintiff; (4) The defendant's conduct was not only a cause in fact of the plaintiff's harm but also a "proximate cause," meaning that the defendant's conduct is perceived to have a significant relationship to the harm suffered by the plaintiff, in particular that the harm caused was the general kind of harm the defendant negligently risked; and (5) The existence and amount of damages, based on actual harm of a legally recognized kind such as physical injury to person or property.²⁶

Whether or not the defendant owed the plaintiff a duty to exercise some degree of care for the plaintiff's safety is a matter of law, which is decided by a judge.²⁷ To say that the defendant is under a duty is merely to say "that the defendant should be subject to potential liability in the type of case in question."²⁸ "[D]uty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection."²⁹ Legal scholars have agreed that "[a] general duty of *reasonable* care is by definition not burdensome."³⁰ And in most negligence cases, "the elaborate efforts to describe particular duties are both unnecessary and undesirable."³¹

B. HISTORY OF NEGLIGENCE IN CALIFORNIA

In the 1980s, California "was at the forefront of the movement to sweep aside duty limitations rooted in property and contract law."³² The general rule in California today is that "[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the

²⁶ *Id.*

²⁷ *Id.* at § 255.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at § 255.

³¹ *Id.*

³² Dilan A. Esper and Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265, 289 (2006).

management of his or her property or person”³³ In other words, “each person has a duty to use ordinary care and is liable for injuries caused by his failure to exercise reasonable care in the circumstances”³⁴ However, in 1968, the California Supreme Court decided *Rowland v. Christian*, which set forth factors for a judge to consider in determining whether a duty exists.³⁵ *Rowland v. Christian* spawned an overthrow of the traditional categories — invitee, licensee, and trespasser, by which the duties owed to entrants on real property were determined in the nineteenth century and the first two-thirds of the twentieth century.³⁶

In *Rowland v. Christian*, the defendant told the lessors of her apartment that the knob of the cold-water faucet in the bathroom was cracked and should be replaced.³⁷ A few weeks later, the plaintiff entered the defendant’s apartment and was injured while using the bathroom faucet.³⁸ The plaintiff alleged that the defendant was aware of the dangerous condition on her property and that his injuries were proximately caused by the defendant.³⁹ The defendant moved for summary judgment.⁴⁰

The court looked at the general rule in California, that “[a]ll persons are required to use ordinary care to prevent others being injured as the result of their conduct.”⁴¹ The court then reasoned that

[a]lthough it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy.⁴²

³³ CAL. CIV. CODE § 1714, subd. (a).

³⁴ *Vasilenko v. Church*, 203 Cal. Rptr. 3d 536, 540 (2016), citing *Cabral v. Ralphs Grocery Co.*, 122 Cal. Rptr. 313, 317 (2011) (internal quotations omitted).

³⁵ *Rowland v. Christian*, 70 Cal. Rptr. 97 (1968).

³⁶ See *Esper and Keating*, *supra* note 32, at 276.

³⁷ *Rowland v. Christian*, 70 Cal. Rptr. at 98.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 97.

⁴² *Id.* at 100.

The court then stated factors which should be balanced in determining if the public policy clearly supports an exception to the general rule.⁴³ The *Rowland v. Christian* factors include: (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,⁴⁴ the most important factor being whether the harm to the plaintiff was foreseeable.⁴⁵

The court enunciated a turn away from the traditional categories of duty applied to invitees, licensees, and trespassers, and instead moved to an analysis more centered on the *Rowland v. Christian* factors. The court then concluded that here the correct inquiry was whether, in the management of his property, the defendant acted as a reasonable person in view of probability of injuries to others.⁴⁶ Further, the court concluded that the plaintiff's status as a trespasser, licensee, or invitee was not determinative.⁴⁷ The last issue was whether the tenant had been negligent in failing to warn the plaintiff that the faucet handle was defective and dangerous at the time that the plaintiff was about to come in contact with the faucet handle.⁴⁸ The court remanded for determination of this specific issue.⁴⁹

Since *Rowland v. Christian*, courts have relied on the *Rowland v. Christian* factors to determine whether an exception to the general duty of care rule exists. Today, courts will only make an exception to California Civil Code section 1714's general duty of ordinary care rule "when foreseeability and policy considerations justify a categorical no-duty rule."⁵⁰ Thus, the California Supreme Court intended to create a "crucial distinction between a determination that the defendant owed the plaintiff no duty of

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 105.

⁵⁰ *Cabral v. Ralph's Grocery*, 122 Cal. Rptr. at 319.

ordinary care, which is for the court to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the jury to make.”⁵¹

However, because duty is a live element in every negligence case, as opposed to “[the] general rule in California is that everyone is responsible . . . for [their negligence],” it becomes difficult to know when the issue of duty does or does not arise.⁵² This is where the California courts make their most fatal error: the courts have created very specific factual circumstances where there is no duty, which undoubtedly creates complex and narrow exceptions to what is supposed to be a general presumption of duty. From the precedential narrow factual circumstances where the court has held that the defendant is under *no duty of care as a matter of law*, the courts must then determine whether other narrow factual circumstances are similar enough to the previous narrow factual circumstance to warrant a no-duty ruling. However, this determination of fact is essentially an issue for the jury. Whether or not a duty exists is supposed to be determined on a categorical basis; instead, judges are determining an essentially factual issue, which is reserved for the jury.

Today, many negligence cases are decided on summary judgment on the narrow issue of whether a duty exists. Thus, the *Rowland v. Christian* factors, which were supposed to be used in a very narrow set of circumstances to clear up confusion over the previous invitee, licensee, and trespasser categorical rules, have merely created another complicated area of law.

C. HISTORY OF THE NO-DUTY RULE

Judge William Andrews’ legendary dissent in *Palsgraf v. Long Island Railroad Co.* highlights the long-time debate over the analytical focus on duty rather than breach.⁵³ In *Palsgraf*, a passenger was boarding a train holding a box.⁵⁴ The defendant’s employee, while attempting to help the passenger board the train, knocked the box out of the passenger’s hands, and, unbeknownst to the employee, the box contained some form of bomb, which

⁵¹ *Id.*

⁵² *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 540, quoting CAL. CIV. CODE § 1714, subd. (a) (internal quotations omitted).

⁵³ *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928).

⁵⁴ *Id.*

exploded.⁵⁵ The explosion broke some scales on the platform a considerable distance away, causing the scales to fall and strike the plaintiff.⁵⁶ The issue, among many, was whether the defendant owed a duty of care to a particular person or persons.⁵⁷ Although the appellate court held for the defendant in its majority opinion, which was written by Judge Benjamin Cardozo — disregarding Judge Andrews' fervent dissent — it is Judge Andrews' dissent that represents the majority view today.

Judge Andrews asserted that whenever there is an unreasonable act and some right that may be affected, there is negligence, whether damage does or does not result.⁵⁸ Judge Andrews offered this example: if someone drove down Broadway at a reckless speed, the person is negligent whether or not the person strikes an approaching car.⁵⁹ It is immaterial whether damage occurs; the act itself is wrongful.⁶⁰ Judge Andrews posited that “[t]he measure of the defendant’s duty in determining whether a wrong has been committed is one thing, the measure of liability when a wrong has been committed is another.”⁶¹

The California negligence duty of reasonable care is supposed to be predicated upon “our common status as human beings” rather than narrow exceptions announced by judges.⁶² Duty “is owed by everyone to everyone else and it is ordinarily triggered simply by acting in a way that poses a ‘reasonably foreseeable’ risk of harm to anyone else.”⁶³ In contrast to duty, breach “is an inquiry into whether a defendant exercised reasonable care in light of all of the foreseeable risks at hand.”⁶⁴ Additionally, when the harm that the plaintiff suffers is not expected, this issue is best explored in the element of proximate cause, not duty.⁶⁵ Using this accurate explanation of

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 102, quoting Justice Holmes, *Spade v. Lynn & B.R. Co.*, 52 N.E. 747, 748 (1899).

⁶² Dilan A. Esper and Gregory C. Keating, *Putting “Duty” In Its Place: A Reply to Professors Goldberg and Zipursky*, 41 LOY. L.A. L. REV. 1225, 1255 (2008).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

the roles of the negligence elements, California should recognize that there is “a general duty of all to all” and focus any additional inquiry of foreseeability or unexpected harm into the appropriate elements.⁶⁶

Palsgraf represents the beginning of a debate over the duty-versus-breach analysis in negligence law. Judge Cardozo’s interpretation of duty has splintered the element of duty into an “indefinite and ill-defined set of duties.”⁶⁷ This splintering of duty has blurred the lines between duty, breach, and proximate cause.⁶⁸ Although California technically follows Judge Andrews’ dissent, California has fallen into Judge Cardozo’s “indefinite and ill-defined set of duties.”⁶⁹ California should revert to following Judge Andrews’ advice, and focus on the breach analysis.

III. IMPLICATIONS OF THE NO-DUTY RULE

California’s reliance on the no-duty rule has created a multitude of problems. In a series of sharp dissents, Justice Joyce Kennard advanced a concise description of one basic problem with California’s reliance on the no-duty rule: it treats problems of breach as problems of duty.⁷⁰ Because the element of duty is a matter of law for the court to determine, California has essentially removed negligence cases from the jury by deciding these cases on whether a duty exists. Second, the old saying *hard cases make bad law* rings true. California courts have carved out narrow and complex exceptions to the duty element in order to protect plaintiffs and defendants. Because the case could not be decided on the more fact-specific, jury-dependent, inquiry of whether the defendant breached their duty, the court defaulted to creating narrow exceptions in whether a defendant owes a duty. The difficulty in burying the duty element in exceptions is very

⁶⁶ See DOBBS ET AL., *supra* note 8, § 122; WHITE, *supra* note 18, at 16; Kaczorowski, *supra* note 18, at 1127.

⁶⁷ See Esper and Keating, *supra* note 62, at 1255 (internal quotations omitted).

⁶⁸ *Id.*

⁶⁹ See DOBBS ET AL., *supra* note 8, § 122; WHITE, *supra* note 18, at 16; Kaczorowski, *supra* note 18, at 1127.

⁷⁰ See Esper and Keating, *supra* note 32, at 323, citing Parsons, 936 P.2d at 101 (Kennard, J., dissenting); Ky. Fried Chicken of Cal., Inc. v. Superior Court (KFC), 927 P.2d 1260, 1275 (cal. 1997) (Kennard, J., dissenting); Knight v. Jewett, 834 P.2d 696, 714 (Cal. 1992) (Kennard, J., dissenting).

apparent in 2017, when the California Supreme Court is set to hear two cases on the very limited issue of whether a duty exists.

Lastly, California courts' reliance on strange and anomalous exceptions to the general rule of presumption of duty has led to courts' analyzing narrow exceptions to determine if a certain factual pattern fits into one of the narrow exceptions previously espoused by the courts. This has led to inconsistent holdings, which go against one of the main goals of tort law: deterrence.

A. REMOVING CASES FROM THE HANDS OF THE JURY

"When duty is a live issue in every case, it is impossible to draw a principled line between the provinces of judge and jury."⁷¹ California's reliance on the no-duty rule has led courts away from a determination of whether the defendant fell below the standard of care and breached their duty. Instead, courts now focus on the issue of whether a duty exists, delving into intricate analyses of special relationships,⁷² the difference between dangerous landscape versus dangerous fraternity brothers,⁷³ or any of a multitude of other narrow exceptions rooted in duty. In doing so, California courts have taken many negligence cases out of the hands of the jury.

Negligence law divides determinations into two parts: duty is a matter of law decided by the judge, and breach is a matter of fact decided by the jury. In negligence cases, "[j]uries are in part a well-chosen instrument for determining whether the defendant did in fact act reasonably and in part an intrinsically fair way of resolving reasonable disagreement about what care was due."⁷⁴ "They are a well-chosen instrument because juries represent a form of collective judgment particularly appropriate to negligence cases."⁷⁵ Judges are better suited than jurors to ruling on questions of law, or to ruling on issues of whether an expert's testimony is admissible or whether the question does in fact call for hearsay. However, when it comes to determining reasonableness, jurors are likely better suited. In determining whether

⁷¹ See Esper and Keating, *supra* note 62, at 1255.

⁷² Crow v. State of Cal., 271 Cal. Rptr. 349, 359 (Cal. App. 1990).

⁷³ Peterson v. San Francisco Community College Dist., 685 P.2d 1193 (1984); Furek v. Univ. of Delaware, 594 A.2d 506, 522 (Del. 1991).

⁷⁴ See Esper and Keating, *supra* note 62, at 1279.

⁷⁵ *Id.*

a driver acted unreasonably in changing lanes too slowly on the freeway, a judge is not better suited to make this determination:⁷⁶

The consensus of twelve citizens, many of whom drive on similar freeways and have had the common experience of driving too slow for a fast lane, as well as the experience of driving behind someone who was doing so, is a reliable index of the reasonableness of a driver's actions in those situations.⁷⁷

However, when courts decide negligence cases solely on the issue of duty, while considering the *Rowland v. Christian* factors, they are removing the jury inquiry from the case. “When reasonable people might reasonably disagree over the application of the law articulated by judges to the facts of a particular case, courts do not have the legitimate authority to decide the matter.”⁷⁸ Instead, it is the essential role of the jury to decide issues over which reasonable people can differ. According to the California Constitution, “[t]rial by jury is an inviolate right and shall be secured to all.”⁷⁹ By wrongly removing negligence cases from the hands of the jury, California courts are violating a party's *inviolable right* to trial by jury.

B. CALIFORNIA'S SUPREME COURT DOCKET 2017

California's reliance on a no-duty rule has created a difficult to navigate common law surrounding the element of duty. Because of this, the California Supreme Court is constantly hearing cases on whether a duty exists, attempting to smooth out inconsistencies in the current law. For the 2017–18 term, the California Supreme Court will be hearing two cases on the issue of whether a duty exists: *Regents of the University of California v. Superior Court* and *Vasilenko v. Grace Family Church*.⁸⁰ Both of these cases could be decided easily by holding that the general rule applies: “that everyone is responsible . . . for an injury occasioned to another by

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ CAL. CONST. art. 1, § 16.

⁸⁰ *Regents of Univ. of California v. S.C.*, 364 P.3d 174 (2016); *Vasilenko v. Grace Family Church*, 381 P. 3d 229 (2016).

his or her want of ordinary care or skill in the management of his or her property or person”⁸¹

1. *UC Regents*

Katherine Rosen, a student at the University of California, Los Angeles (UCLA), suffered severe injuries after being attacked by another student, Damon Thompson, during a chemistry laboratory.⁸² Beginning in the fall of 2008, Thompson began submitting complaints that students were making sexual advances toward him, calling him names, and questioning his intelligence.⁸³ Thompson warned the dean of students that if the university failed to discipline the students, the matter would likely “escalate” and would cause Thompson to act in a manner that would incur undesirable consequences.⁸⁴ After Thompson sent emails to multiple professors alleging that students were attempting to distract him by making offensive comments, Thompson was encouraged to seek medical help at UCLA’s Counseling and Psychological Services (CAPS), an on-campus center with trained psychologists who address the mental health needs of students.⁸⁵

In February, Thompson informed his dormitory resident director that he heard clicking sounds he believed came from a gun.⁸⁶ Thompson told the resident director that his father had advised him that he could hurt the other residents in response to these incidents.⁸⁷ Thompson stated that he had thought about it but decided not to do anything.⁸⁸

The resident director contacted campus police in response to the incident.⁸⁹ Finding no gun, the officers recommended that Thompson undergo a medical evaluation.⁹⁰ At the psychiatric evaluation, Thompson

⁸¹ *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 540, quoting CAL. CIV. CODE § 1714, subd. (a) (internal quotations omitted).

⁸² *UC Regents*, 193 Cal. Rptr. 3d at 450.

⁸³ *Id.* at 451.

⁸⁴ *Id.*

⁸⁵ *Id.*; UCLA COUNSELING AND PSYCHOLOGICAL SERVICES, <http://www.counseling.ucla.edu> (last visited Mar. 20, 2016).

⁸⁶ *Id.*

⁸⁷ *Id.* at 451–52.

⁸⁸ *Id.* at 452.

⁸⁹ *Id.*

⁹⁰ *Id.*

complained of auditory hallucinations, paranoia, and a history of depression.⁹¹ Thompson agreed to take antipsychotic drugs and attend outpatient treatment at CAPS.⁹²

Psychologist Nicole Green believed that Thompson was suffering from schizophrenia but concluded that he did not exhibit suicidal or homicidal ideation and that he had not expressed any intent to harm others.⁹³ Thompson did, however, inform another psychologist that he had previously experienced general ideations of harming others, clarifying that he had never formulated a plan to do so, nor identified a specific victim.⁹⁴

In June 2009, Thompson was involved in an altercation in his dormitory.⁹⁵ According to campus police, Thompson had knocked on the door of a sleeping resident and accused him of making too much noise and then pushed him.⁹⁶ When the sleeping resident informed Thompson that he had not been making noise, Thompson pushed him again stating, “this is your last warning.”⁹⁷ As a result of the incident, Thompson was expelled from university housing and ordered to return to CAPS when the fall quarter began.⁹⁸

During the summer quarter, Thompson sent letters to two chemistry professors alleging that students and university personnel had made negative comments about him.⁹⁹ Although the letters named several individuals, Thompson reported that he intended to ignore the comments and refrain from reacting.¹⁰⁰ When the fall quarter began, Thompson made similar complaints to another chemistry professor.¹⁰¹

On October 6th, a chemistry teaching assistant (TA) reported another incident involving Thompson.¹⁰² According to the TA, Thompson alleged

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 453.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

that a student called him stupid.¹⁰³ Thompson described the student's physical appearance to the TA and insisted that he be provided with the name of the student.¹⁰⁴ The TA told Thompson that he had been present in the laboratory when this incident allegedly occurred and had not heard anyone say anything derogatory about Thompson.¹⁰⁵ The TA informed the professor that Thompson's behavior had become a weekly routine.¹⁰⁶ The professor informed the assistant dean of students who expressed concern that Thompson had identified a specific student in his class whom he believed was against him.¹⁰⁷

On the morning of October 7th, a second chemistry TA emailed the same professor to report that a student from another section (later identified as Thompson) had accused students of verbal harassment.¹⁰⁸ The TA had been present during the incident and did not hear or see any harassment.¹⁰⁹

Two days later, on October 9th, at approximately 12:00 noon, Thompson was working in a chemistry laboratory when he attacked student Katherine Rosen with a kitchen knife.¹¹⁰ When campus police arrived, Thompson told them "they were out to get me" and complained that the other students had been "picking on him."¹¹¹ Thompson also stated that he had been "provoked" by students in the lab who were insulting him, explaining that similar incidents had happened on "several occasions in the past."¹¹²

Rosen told investigating officers that she had been working in the chemistry laboratory for approximately three hours prior to the attack and did not remember having any interactions or conversations with Thompson.¹¹³ Rosen recalled kneeling down to place equipment in her chemistry

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 453–54.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

locker when she suddenly felt someone's hands around her neck.¹¹⁴ Rosen looked up and saw Thompson coming at her with a knife.¹¹⁵ Rosen said she only knew Thompson from the chemistry laboratory and had never insulted him or otherwise provoked him.¹¹⁶

A TA informed an investigating officer that Thompson had approached him on several occasions to complain about students "calling him stupid."¹¹⁷ The TA also stated that on one occasion, Thompson had identified "Rosen as being one of the persons that called him stupid."¹¹⁸

The California appellate court held that, although the attack may have been foreseeable, colleges and universities are under no duty to protect students from physical attacks by other students.¹¹⁹ The California Supreme Court granted the petition for review on January 20, 2016.¹²⁰

a. Appellate Court's Legal Reasoning

The *UC Regents* court was not acting erratically in holding that there was no duty in this specific instance. In fact, the *UC Regents* court was following California law. Currently, the California courts impose a duty on a university if an attack on a student occurs due to a dangerous physical condition on the property,¹²¹ but not if a student threatens another student and carries out that threat.¹²² For example, if an assailant hides in a foreseeably dangerous staircase, behind foliage, and attacks a student, the college is under a duty to have acted reasonably in preventing the attack.¹²³ However, if a student informs university personnel of his intent to attack someone in a chemistry lab and then carries out the foreseeable attack, the university is under *no duty* to have acted reasonably in protecting the student.¹²⁴ This anomalous distinction is not supported by any reasonable explanation, but is a result of California's reliance on the no-duty rule.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *UC Regents*, 193 Cal. Rptr. 3d 447, 450 (Cal. App. 2015).

¹²⁰ *Regents of Univ. of California v. S.C.*, 197 Cal. Rptr. 3d 129 (2016).

¹²¹ *Peterson v. San Francisco Community College Dist.*, 685 P.2d 1193 (1984).

¹²² *UC Regents*, 193 Cal. Rptr. 3d at 450.

¹²³ *Peterson v. San Francisco Community College Dist.*, 685 P.2d at 1193.

¹²⁴ *UC Regents*, 193 Cal. Rptr. 3d at 450.

This reasoning derives from *Crow v. State of California* (“*Crow*”). In *Crow*, the plaintiff had been assaulted by another student while attending a beer party in a student dorm room.¹²⁵ The plaintiff brought suit against the university for her injuries.¹²⁶ The court held that universities do not owe a duty based on a special relationship between student and school.¹²⁷ Instead, the court reasoned that institutions of higher education differ from grammar and high schools because of the non-compulsory attendance and the goal of allowing college students to regulate their own lives.¹²⁸ Later cases relied on *Crow*’s reasoning, holding that institutions of higher education are not under a duty to protect their students from student violence.¹²⁹

The *UC Regents* case highlights a few confusing variations of the no-duty rule as it pertains to students. First, grammar and high school students are owed a duty of care by their schools.¹³⁰ Second, university students are not owed a duty based on their special relationship between school and student.¹³¹ Third, university students are owed a duty if they are attacked because of a dangerous physical condition on the property.¹³² And fourth, university students are not owed a duty if they are attacked by another student, provided it is not a student who is hiding behind a dangerous physical condition on the property.¹³³

b. Other States Have Successfully Moved Away from These Exceptions in College or University Negligence Duties

According to the appellate court in *UC Regents*, California courts rely on these anomalous distinctions concerning when the university will owe its students a duty because the courts are attempting to prevent the

¹²⁵ *Crow v. State of Cal.*, 271 Cal. Rptr. at 351.

¹²⁶ *Id.*

¹²⁷ *Id.* at 359.

¹²⁸ *Id.*; however, California courts do recognize an exception for grammar and high school students. If this fact pattern were to happen to students at a grammar or high school, the special relationship exception would apply and the school would owe a duty of reasonable care to the victim-student.

¹²⁹ *Ochoa v. Cal. State Univ.*, 85 Cal. Rptr. 2d 768 (Cal. App. 1999); *Tanja H. v. Regents of Univ. of Cal.*, 278 Cal. Rptr. 918 (Cal. App. 1991).

¹³⁰ *Crow v. State of Cal.*, 271 Cal. Rptr. at 359.

¹³¹ *Id.*

¹³² *Peterson v. San Francisco Community College Dist.*, 685 P.2d at 1193.

¹³³ *Regents of Univ. of California v. S.C.*, 197 Cal. Rptr. 3d 129 (2016).

regulation of college students' lives by universities and colleges.¹³⁴ However, other states have successfully imposed a duty on colleges to protect students from negligence, which has not led to close regulation of college students' lives. For example, in *Nero v. Kansas State University*, a student was sexually assaulted in a residence hall by another student.¹³⁵ The *Nero* court looked to California precedent but determined that "a university has a duty of reasonable care to protect a student against certain dangers, including criminal actions against a student by another student or a third party if the criminal act is reasonably foreseeable and within the university's control."¹³⁶ Therefore, the court imposed a duty of reasonable care on the university.¹³⁷

Similarly, in *Furek v. University of Delaware*, a university student was severely injured in a fraternity hazing event conducted by other students.¹³⁸ The court imposed a duty on the university and held that, although the university is not an insurer of the safety of its students nor a policeman of student morality, the university has a duty to regulate and supervise foreseeable dangerous activities occurring on its property, which extends to the intentional activities of students.¹³⁹

California courts previously reasoned that imposing a duty on colleges to protect students from student-on-student attack would lead to the college's too closely regulating the adult lives of college students.¹⁴⁰ However, other states, such as Kansas and Delaware, have imposed a duty on colleges to protect their students from only foreseeable violence from other students.¹⁴¹ Because these institutions of higher education are only responsible for preventing foreseeable student-on-student violence, this does not require burdensome regulation of adult student lives. "A general duty of *reasonable* care is by definition not burdensome."¹⁴² Instead, colleges and

¹³⁴ *Id.*

¹³⁵ *Nero v. Kansas State Univ.*, 861 P.2d at 768.

¹³⁶ *Id.* at 780.

¹³⁷ *Id.*

¹³⁸ *Furek v. Univ. of Delaware*, 594 A.2d at 522.

¹³⁹ *Id.*

¹⁴⁰ *UC Regents*, 193 Cal. Rptr. 3d at 460.

¹⁴¹ *Furek v. Univ. of Delaware*, 594 A.2d at 522; *Nero v. Kansas State Univ.*, 861 P.2d at 780.

¹⁴² See DOBBS ET AL., *supra* note 8, § 255.

universities are merely being required to prevent *foreseeable* harm from befalling their students.

The argument that California colleges and universities should not be under a duty to prevent student-on-student attacks is baseless. Imposing this duty will not require burdensome regulation of adult college students' lives because there is only a duty to protect against foreseeable violence, not all violence. Additionally, a duty to use reasonable care falls far short of regulating student lives.¹⁴³ The general rule in California is that “[e]veryone is responsible . . . 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”¹⁴⁴ In other words, “each person has a duty to use ordinary care and is liable for injuries caused by his failure to exercise reasonable care in the circumstances”¹⁴⁵ These narrow exceptions to determine whether the college or university owes a duty are unnecessary and merely lead to complex exceptions within what is *supposed to be* a general presumption of a duty of reasonable care.

c. UC Regents at the California Supreme Court

The California Supreme Court will hear *UC Regents* in the 2017–18 term. Currently, there are too many narrow exceptions surrounding whether a college or university will owe a duty to its students. The California Supreme Court has the opportunity to begin to undo the complex common law surrounding narrow exceptions to duty in the context of negligence on college campuses. However, if the California Supreme Court does not abjure reliance on the no-duty rule, and instead push courts to focus on the issue of breach and whether the defendant fell below their standard of care, *UC Regents* will merely provide another narrow exception within the court's negligence duty analysis.

2. Vasilenko v. Church

California's reliance on the no-duty rule not only creates confusing situations regarding college and university negligence liability. In *Vasilenko v.*

¹⁴³ *Id.*

¹⁴⁴ CAL. CIV. CODE § 1714, subd. (a).

¹⁴⁵ *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 540, citing *Cabral v. Ralphs Grocery Co.*, 122 Cal. Rptr. at 317 (internal quotations omitted).

Grace Family Church (“*Vasilenko v. Church*”), Aleksandr Vasilenko was hit by a car and injured while crossing Marconi Avenue in Sacramento.¹⁴⁶ At the time the plaintiff was injured, he was crossing a busy five-lane road on his way from an overflow parking lot, controlled and staffed by the defendant Grace Family Church, to an event at the church.¹⁴⁷

The trial court held that there was no duty as a matter of law because the defendant did not control the parking lot.¹⁴⁸ Conversely, the Court of Appeal held that the location of the overflow lot, which required the defendant’s invitees who parked there to cross a busy street in an area that lacked a marked crosswalk or traffic signal in order to reach the church, exposed those invitees to an unreasonable risk



GRACE COMMUNITY CHURCH —
AERIAL VIEW OF THE CHURCH
SHOWING THE OVERFLOW PARKING
LOT IN THE FOREGROUND.

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of injury offsite, thus giving rise to a duty on the part of the defendant.¹⁴⁹ Thus, the appellate court overturned the Superior Court, and held that the defendant owed a duty to the plaintiff to protect him from the dangerous condition of the property.¹⁵⁰ The California Supreme Court granted the petition for review on September 21, 2016.¹⁵¹

a. Legal Reasoning of the Appellate Court

The general rule for landowners is that “[t]hose who own, possess, or control property generally have a duty to exercise ordinary care in managing the property in order to avoid exposing others to an unreasonable risk of

¹⁴⁶ *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 538.

¹⁴⁷ *Id.*

¹⁴⁸ *Vasilenko v. Drury*, 2013 WL 12108463.

¹⁴⁹ *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 538.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

harm.”¹⁵² Usually, “a landowner has no duty to prevent injury on adjacent property.”¹⁵³ However, dangerous condition on property cases are much more difficult than they seem. Courts often draw distinctions between holding that a duty exists, or holding that as a matter of law no duty exists, depending on whether the risk on the adjacent property was unreasonable,¹⁵⁴ how much control the defendant exerted over the adjacent property,¹⁵⁵ or whether the defendant created the danger.¹⁵⁶

The court in *Vasilenko v. Church* first looked to a similar case, *Barnes v. Black*. In *Barnes v. Black*, a child died after the “big wheel” tricycle he was riding veered off a sidewalk inside the apartment complex where he lived, traveled down a steep driveway and into a busy street where he was struck by an automobile.¹⁵⁷ The sidewalk and the driveway were within the apartment complex, and the four-lane busy street was not.¹⁵⁸ The defendant-landowner argued that he owed no duty to the plaintiff because the injury occurred on a public street and not on the land owned or controlled by the defendant.¹⁵⁹ The plaintiff argued that the defendant-landlord “[owed] its tenants a duty of reasonable care to avoid exposing children playing on the premises to an unreasonable risk of injury on a busy street off the premises and [the defendant] failed” to negate the duty of care.¹⁶⁰

The court held for the plaintiff, imposing a duty on the defendant. The court held that

[a] landowner’s duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or

¹⁵² *Id.*, citing *Alcaarez v. Vece*, 60 Cal. Rptr. 2d 448 (1997).

¹⁵³ *Id.*, citing *Steinmetz v. Stockton City Chamber of Commerce*, 214 Cal. Rptr. 405 (1985).

¹⁵⁴ *Barnes v. Black*, 84 Cal. Rptr. 2d 634, 636 (Cal. App. 1999).

¹⁵⁵ *Steinmetz v. Stockton City Chamber of Commerce*, 214 Cal. Rptr. 405 (1985) (holding that the host of a business party could not be held liable for a criminal assault on a guest that occurred in a nearby parking lot that the host neither owned nor controlled).

¹⁵⁶ *Brooks v. Eugene Burger Management Corp.*, 264 Cal. Rptr. 756 (1989) (holding that the landlord owed no duty to plaintiff to provide fencing or some other means of confining minors to the subject premises).

¹⁵⁷ *Barnes v. Black*, 84 Cal. Rptr. 2d at 636.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site.¹⁶¹

The court determined that even though the child was injured on a *public* street, over which the defendant had no control, this was "not dispositive under the *Rowland* analysis."¹⁶² Further, the court determined that the defendant did not negate the other *Rowland v. Christian* factors, including a failure to introduce evidence that the injury was not foreseeable or that the slope of the driveway or configuration of the sidewalk or play area were not closely connected to the injury.¹⁶³

In *Vasilenko v. Church*, similar to *Barnes v. Black*, the "salient fact is that [the defendant] did not control the public street where [the plaintiff] was injured, but that it *did* control the location and operation of its overflow parking lot, which [the plaintiff] alleges caused or at least contributed to his injury."¹⁶⁴ The court in *Vasilenko v. Church* held that *Barnes v. Black* was very on-point in that the defendant in both cases failed to show that the *Rowland v. Christian* factors had been negated and also failed to show that the defendant did not possess the relevant level of control.¹⁶⁵

Next, the court in *Vasilenko v. Church* distinguished *Nevarez v. Thriftmart*. In *Nevarez v. Thriftmart* the defendant was a grocery store hosting their grand opening.¹⁶⁶ The plaintiff was struck by a car while crossing the street to attend the grand opening.¹⁶⁷ The court held that as a matter of law, there was no duty because the plaintiff was struck on a public street, where the defendant had no control.¹⁶⁸ The court reasoned that "[t]he power to control public streets and regulate traffic lies with the State

¹⁶¹ *Id.*; Additionally, the court held that the fact that the child was injured on a public street over which the defendant had no control was "not dispositive under the *Rowland* analysis," and that the defendant should have offered more evidence of the *Rowland* factors weighing in his favor.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 542.

¹⁶⁵ *Id.*

¹⁶⁶ *Nevarez v. Thriftmart*, 87 Cal. Rptr. 50, 53 (Cal. App. 1970).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

which may delegate local authority to municipalities . . . and only the State . . . or local authorities, when authorized, may erect traffic signs or signals, all other persons being forbidden to do so . . . with some few exceptions.”¹⁶⁹ Additionally, the court pointed out that the defendant also could not “lawfully use barricades to block off traffic on [the street where the accident occurred] or any other abutting street since, to do so, undoubtedly would constitute a public nuisance.”¹⁷⁰ Therefore, the defendant could not have had control over the public street, and the court held there was no duty as a matter of law.¹⁷¹

In *Vasilenko v. Church*, the issue again arises: does a defendant owe a duty when the plaintiff is harmed on an adjacent public street? Here, the trial court held that the defendant did not owe a duty to protect the plaintiff on the public street. The trial court reasoned that the plaintiff “was injured while walking across a public street, not owned or controlled by” the defendant.¹⁷² And therefore held, as in *Nevarez v. Thriftmart*, that “a landowner has no duty to warn of dangers beyond his or her own property when the owner did not create those dangers.”¹⁷³

Conversely, the appellate court reasoned that the defendant did not control the public street where plaintiff-Vasilenko was injured, but it *did* control the location and operation of its overflow parking lot, which gave rise to a duty.¹⁷⁴ The court noted that “while [the Church] may not have had a duty to provide additional parking for its invitees, its maintenance and operation of an overflow parking lot in a location that it knew or should have known would induce and/or require its invitees to cross [the street] created a foreseeable risk of harm to such persons.”¹⁷⁵ Additionally, the court noted that the defendant did not negate any of the relevant *Rowland v. Christian* factors.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 54.

¹⁷² *Vasilenko v. Drury*, 2013 WL 12108463.

¹⁷³ *Id.*, citing *Swann v. Olivier*, 28 Cal. Rptr. 2d 23 (1994); *Brooks v. Eugene Burger Management Corp.*, 264 Cal. Rptr. 756 (1989) (holding that the landlord owed no duty to plaintiff to provide fencing or some other means of confining minors to the subject premises).

¹⁷⁴ *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 544.

¹⁷⁵ *Id.*

b. Replacing a Confusing System with an Equally Confusing System

California was the first state to replace the categories of invitee, licensee, and trespasser with a single standard of reasonable care in *Rowland v. Christian*.¹⁷⁶ Prior to *Rowland v. Christian*, California used a categorical approach drawn from property law to determine the duties owed by landowners to those on their property.¹⁷⁷ The three categories were business invitees, licensees, and trespassers.¹⁷⁸ Business invitees were distinct from the other categories because they conferred an economic benefit on the landowner.¹⁷⁹ Because of this, business invitees were owed the ordinary duty of reasonable care.¹⁸⁰ Conversely, a landowner's social guests were classified as licensees, who were *not* owed a duty of reasonable care.¹⁸¹ Instead, a landowner merely owed licensees a duty to warn of dangers, which were not "open and obvious."¹⁸² Lastly, trespassers, individuals who entered a landowner's property without the permission of the owner, were owed no duty of care at all.¹⁸³

In *Rowland v. Christian*, these categories of land entrants were abolished.¹⁸⁴ There, the California Supreme Court reasoned that by "carving further exceptions out of the traditional rules relating to the liability of licensees or social guests," most jurisdictions ended up with a confusing, unreliable common law.¹⁸⁵ The court held that continuing to evaluate cases based on the rigid categories of land entrants would add to the "confusion, complexities, and fictions . . . [of the] common law distinctions."¹⁸⁶

The dissent in *Rowland v. Christian* was concerned that this would lead to determinations on a case by case basis — arguably the goal of the majority. The majority was seeking a move away from the rigid rules of invitees,

¹⁷⁶ *Basso v. Miller*, 352 N.E.2d 868, 872 (N.Y. 1976) (noting that *Rowland v. Christian* was the first California Supreme Court case that abandoned the common law distinctions and adopted the simple rule of reasonable care under the circumstances).

¹⁷⁷ See, e.g., *Oettinger v. Stewart*, 148 P.2d 19, 22 (Cal. 1944).

¹⁷⁸ *Id.*

¹⁷⁹ See *Rowland v. Christian*, 443 P.2d at 565.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² See generally *id.*

¹⁸³ See *Fernandez v. Consol. Fisheries, Inc.*, 219 P.2d 73, 77 (Cal. App. 1950).

¹⁸⁴ *Rowland v. Christian*, 443 P.2d at 569.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

licensees, and trespassers, which lead to “confusion, complexities, and fictions.”¹⁸⁷ However, rather than follow through with the majority’s goal of reducing narrow exceptions, later courts merely replaced the invitee, licensee, and trespasser exceptions with other exceptions rooted in duty. As demonstrated by *Vasilenko v. Church*, the California courts now rely on very narrow exceptions relating to whether a duty exists. These narrow exceptions should be removed, and any issue of foreseeability and control should instead be evaluated as to whether the defendant breached their duty — making this a case-by-case *jury* determination, as the majority in *Rowland v. Christian* hoped — rather than whether the defendant owed a duty to the plaintiff.

c. Vasilenko v. Church at the California Supreme Court

The California Supreme Court will hear *Vasilenko v. Church* during the 2017–18 term. *Vasilenko v. Church* provides an opportunity for the California Supreme Court to alter the way that the courts approach premises liability negligence claims. The court should hold that the issue present in this case goes to whether the defendant breached its duty, rather than whether the defendant owed the plaintiff a duty. As a general matter, as the appellate court in this case suggests, the defendant should owe the plaintiff a general duty of reasonable care. If the California Supreme Court does not abjure reliance on the no-duty rule, and instead continues to focus the court’s attention on issues of breach rather than whether the defendant fell below their standard of care, *Vasilenko v. Church* will merely provide another narrow exception within the court’s duty analysis.

C. CALIFORNIA’S ANOMALOUS DUTY CATEGORIES UNDERMINE THE GOALS OF TORT LAW

One of the main goals of tort law is deterrence.¹⁸⁸ In order to deter defendants, wrongful defendants must be consistently held liable, and therefore deterred in order to reach this goal. However, a defendant will not be deterred when the inquiry for negligence is bogged down in the legal

¹⁸⁷ *Id.*

¹⁸⁸ *Cenco, Inc., v. Seidman & Seidman*, 686 F.2d 449 (Ct. App. 1982); Jane A. Dall, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 508 (2003).

issue of whether a duty exists, instead of inquiring more appropriately into whether the defendant has breached their duty or if the harm suffered by the plaintiff was proximately caused by the defendant.

For example, in *UC Regents*, UCLA failed to prevent foreseeable violence against one of their students by another student during a UCLA chemistry laboratory. If the California Supreme Court holds that UCLA does not owe a duty to the victim-student, then UCLA has no incentive to prevent foreseeable violence against their students, and UCLA's unreasonable conduct will not be deterred. Alternatively, if UCLA were subject to a large jury verdict or settlement following a failure to protect its students from foreseeable violence, then UCLA's unreasonable conduct would be deterred, satisfying the first goal of tort law.¹⁸⁹

Currently, the California appellate court suggests that universities and colleges may "adopt policies and provide student services that reduce the likelihood" of violent incidents occurring on their campuses; however, the court does not even encourage the adoption of these policies.¹⁹⁰ Here, UCLA is in the best position to implement policies and programs that protect their students, whereas students are unable to bear the burden of protecting themselves from attacks by other students.

Similarly, in premises liability cases, if landowner-defendants presumed that they would owe a duty to the general public, they would be deterred from falling below the standard of care. In *Vasilenko v. Church*, the Superior Court held that as a matter of law the defendant-church had no duty to prevent the harm that befell the plaintiff because the defendant did not control the overflow parking lot.¹⁹¹ On appeal, the court held oppositely, that as a matter of law a duty does exist.¹⁹² In order to deter the defendant from foreseeably risking harm to people traveling from the overflow parking lot to the church, it is necessary that the defendant owe a duty. Here, the defendant-church is in the best position to provide for crossing guards, a marked crosswalk, or other features to protect the churchgoers from foreseeable harm. Without the imposition of a duty, the church and similar defendants will be under-deterred, which infringes on one of the main goals of tort law.

¹⁸⁹ *Id.*

¹⁹⁰ *UC Regents*, 193 Cal. Rptr. 3d at 461.

¹⁹¹ *Vasilenko v. Drury*, 2013 WL 12108463.

¹⁹² *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 538.

IV. RECOMMENDATION

This article proposes that California courts should seek to end their reliance on the no-duty rule, and instead focus the courts' attention on whether the defendant has breached its duty of reasonable care to the plaintiff. In doing so, California will move away from the inconsistent and arbitrary no-duty rule which currently exists in California. The "[d]uty doctrine must be used to fix the boundaries among contract, tort, property, and legally unregulated conduct, and to articulate the more particular standards of care owed by certain positions, or incurred by certain undertakings."¹⁹³

California should return to the general rule that "[e]veryone is responsible . . . 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"¹⁹⁴ In other words, "each person has a duty to use ordinary care and is liable for injuries caused by his failure to exercise reasonable care in the circumstances"¹⁹⁵ In doing so, California will return negligence cases to the jury and refocus the analysis on whether a defendant has breached their duty of care, rather than litigating the intricacies of the no-duty rule in front of a judge. In California, the duty of reasonable care is supposed to be predicated upon "our common status as human beings" rather than narrow exceptions announced by judges.¹⁹⁶ Duty "is owed by everyone to everyone else and it is ordinarily triggered simply by acting in a way that poses a 'reasonably foreseeable' risk of harm to anyone else."¹⁹⁷ In contrast to duty, breach "is an inquiry into whether a defendant exercised reasonable care in light of all of the foreseeable risks at hand."¹⁹⁸ Additionally, when the harm that the plaintiff suffers is not expected, this issue is best explored in the element of proximate cause, not duty.¹⁹⁹ Using this explanation of the roles of the negligence elements, California should recognize

¹⁹³ See Esper and Keating, *supra* note 32, at 273.

¹⁹⁴ CAL. CIV. CODE § 1714, subd. (a).

¹⁹⁵ Vasilenko v. Church, 203 Cal. Rptr. 3d at 540, citing Cabral v. Ralphs Grocery Co., 122 Cal. Rptr. at 317 (internal quotations omitted).

¹⁹⁶ See Esper and Keating, *supra* note 62, at 1255.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

that there is “a general duty of all to all” and focus any additional inquiry of foreseeability or unexpected harm on the appropriate elements.²⁰⁰

As legal scholars have expressed, “[t]he elaborate balancing test of *Rowland* is misplaced.”²⁰¹ “A general duty of *reasonable* care is by definition not burdensome.”²⁰² Additionally, the imposition of a general duty of reasonable care does not “leave juries free to bring in irrational verdicts, because the judge remains free to direct a verdict when, on the facts of a particular case, reasonable people could not differ.”²⁰³ The California Supreme Court can begin to remedy the anomalous exceptions in whether a duty exists in the 2017–18 Supreme Court term, by utilizing the two duty cases before the court. The California Supreme Court should hold that a duty generally exists and move the more specific inquiry into whether the defendant breached their duty. By doing so, the California Supreme Court will begin to redirect the analysis to the jury question of whether the defendant breached its duty of reasonable care to the plaintiff.

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EDITOR’S NOTE

As of the end of 2017, the Supreme Court had scheduled *Regents of the University of California v. Superior Court (Rosen)* for oral argument on January 3, 2018, and had issued a unanimous decision in *Vasilenko v. Grace Family Church* in favor of the appellant church (No. S235412, November 13, 2017) that concludes with the statement:

Vasilenko argues that the Court of Appeal’s decision should be affirmed on the alternative ground that the Church voluntarily assumed a duty to assist him in crossing Marconi Avenue. This argument was not presented to the trial court, and although the parties briefed it before the Court of Appeal, that court found the Church owed Vasilenko a duty under Civil Code section 1714 and

²⁰⁰ See DOBBS ET AL., *supra* note 8, § 122; WHITE, *supra* note 18, at 16; Kaczorowski, *supra* note 18, at 1127.

²⁰¹ See Esper and Keating, *supra* note 32, at 327.

²⁰² See DOBBS ET AL., *supra* note 8, § 255.

²⁰³ *Id.*

did not reach the alternative argument. We granted review only on the issue of a landowner's duty to its invitees when it directs those invitees to use its parking lot across the street. We decline to address whether the Church, by its alleged actions, voluntarily assumed a duty. The Court of Appeal on remand may consider this argument if Vasilenko elects to pursue it.

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