A New Burden of Proof in Negligence Actions Involving Statutory Violations

Donald F. Morey
A NEW BURDEN OF PROOF IN NEGLIGENCE ACTIONS INVOLVING STATUTORY VIOLATIONS?

The topic of proximate causation has probably spawned as much controversy in legal literature as has any other subject in the field of torts. Nevertheless, one facet of the law relating to proximate causation had until recently been well settled—in a negligence action, the plaintiff had the burden of proving that the defendant's negligence caused the injury or harm which was suffered. In a negligence action, the plaintiff is generally required to prove four separate elements: (1) that defendant owed him a duty of care; (2) that defendant breached that duty; (3) that plaintiff suffered some actual harm; and (4) that such harm was proximately caused by the defendant's breach of the duty of care. The first two elements, if proven, establish the negligence of the defendant; however, for the plaintiff to recover damages the remaining two elements must also be established by the plaintiff.

The behavior of a defendant—to constitute negligence—must fail to conform to a required standard of conduct, usually that of a reasonably prudent man. The determination as to whether a particular defendant has or has not been negligent—whether he has or has not acted as would a reasonable man under the same or similar circumstances—is one of fact left for the jury.

Certain types of behavior are proscribed by statute, and the statutory standard is adopted as defining what is proper conduct in determining negligence. In negligence actions involving statutory violations, negligence is deemed established as a matter of law in California.

3. Id. § 30, at 143.
4. Id.
5. Id. § 37, at 207.
6. "[I]t is... generally held that those who violate such ordinances are liable for resulting injury to others. The standard of conduct of a reasonable man may be established by a statute or ordinance. The violation of such a legislative enactment may be negligence in itself if the plaintiff is one of a class of persons whom the statute was intended to protect and the harm which has occurred is of the type which it was intended to prevent." Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 416, 218 P.2d 17, 21 (1950).
if the jury finds that the defendant acted in the manner proscribed by the statute. The finding of negligence alone, however, is not enough to support a verdict for plaintiff. The harm to the plaintiff and the causal relationship—proximate cause—between the negligence and the harm suffered must still be established. Therefore, as a general rule, the plaintiff must establish both negligent conduct and proximate causation to win the lawsuit.

In the recent California case of Haft v. Lone Palm Hotel, the state’s highest court developed an exception to this general rule and held that when the defendant, a public pool owner, violated specific statutory provisions—failing to provide either a lifeguard or a sign warning that no lifeguard was present—the defendant had the burden of proving that his violation was not a proximate cause of the plaintiff’s injuries. Although the court in Haft relied heavily on a legislative policy peculiar to the statutory provision involved, its determination may well have significant ramifications in California tort law.

This note will discuss the judicial interpretations of California Health and Safety Code section 24101.4 as a standard of conduct in negligence actions and will analyze the court’s holding in Haft which changed the traditional view that the plaintiff bears the burden of proof as to the issue of proximate causation. The note will analyze the public policy considerations implicit in the court’s decision and will also consider some of the problems that may be faced by the court should the reasoning underlying Haft be extended to other negligence actions.

Background and Decisions of the Lower Courts

Mr. and Mrs. Morris Haft and their five year old son were vacationing in Palm Springs, California, at the defendant’s hotel. The hotel office, a number of units, and a swimming pool were located on the east side of a major thoroughfare; other units and two pools—one for adults and a wading pool for children—were located on the west side. Mr. Haft and his young son were using the pool across the street from the hotel office and were the only persons present in the pool area. Another hotel guest testified at trial that he had observed Mr. Haft and his son first in the wading pool and then later in the big pool, and that when he returned to the pool area a half hour later, he discovered the

---

7. Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 763, 478 P.2d 465, 468, 91 Cal. Rptr. 745, 748 (1970); PROSSER, supra note 2, § 36, at 200.
8. PROSSER, supra note 2, § 36, at 193.
10. Id. at 765, 478 P.2d at 469, 91 Cal. Rptr. at 749.
11. Id. at 774 n.19, 478 P.2d at 476 n.19, 91 Cal. Rptr. at 756 n.19.
12. Id. at 761-62, 478 P.2d at 467, 91 Cal. Rptr. at 747.
bodies of both Mr. Haft and his son on the bottom at the deep end of the large pool. After an unsuccessful attempt to retrieve the two bodies, the guest telephoned the hotel switchboard operator who called the police and fire departments; subsequent efforts to revive the two victims were unsuccessful.

Mrs. Haft filed suit against the hotel owner alleging that his negligence in failing to provide lifeguard services had resulted in the death of her son and husband. The plaintiff's task was made particularly difficult because there was no direct evidence to establish the circumstances surrounding the two deaths. The plaintiff did, however, produce uncontradicted evidence that the defendant had violated numerous statutory provisions regarding the swimming pool area and also established that the defendant had been previously cited for similar violations. Six specific statutory violations by the defendant were highlighted by the court: (1) failure to post a sign warning that children were not to use the pool without an adult present, (2) failure to provide a lifeguard, or to post a sign advising swimmers that a lifeguard was not present, (3) omission of required depth markings on the edge of the pool to indicate the depth of the pool or the slope of the pool to the bottom, (4) failure to provide a chart with instructions for emergency mouth-to-mouth resuscitation, (5) failure to provide a list of emergency telephone numbers, and (6) failure to maintain several twelve-foot life poles at poolside.

The plaintiff had attempted to introduce the prior statutory violations as evidence of the willfulness of the defendant in his violation of these code provisions. All such evidence, including two of the reports of earlier inspections by the county health department notifying defendant of these violations, was excluded by the trial court.

The jury found the defendant not liable for the two deaths, and

13. Id.
14. Id.
15. Id. at 763, 478 P.2d at 468, 91 Cal. Rptr. at 748.
19. See id. § 7829.
20. See id.
21. See id.
22. 3 Cal. 3d at 778, 478 P.2d at 479, 91 Cal. Rptr. at 759.
23. These reports did not specify which of the two pools was the site of the various violations; as a result, the reports were ruled too remote for jury consideration, and the trial court instructed that they be disregarded. Id. On appeal it was determined that such an instruction alone was reversible error, since defendant's knowledge of the safety requirements was a crucial issue. The reports would have tended to establish his knowledge of the violations. Id. at 779, 478 P.2d at 480, 91 Cal. Rptr.
the court of appeal affirmed the jury verdict. The plaintiff then sought and obtained a hearing by the California Supreme Court.

**Statutory Interpretation by the Supreme Court**

The supreme court initially reviewed Health and Safety Code section 24101.4 and held that the express wording of the statute was the key to determining the extent of the defendant's liability for the statutory violations:

Lifeguard service shall be provided for any public swimming pool which is of wholly artificial construction and for the use of which a direct fee is charged. For all other swimming pools, lifeguard service shall be provided or signs shall be erected clearly indicating that such service is not provided.\(^2\)

The defendant had argued that his statutory obligation regarding lifeguard service would have been satisfied if he had erected a sign notifying swimmers of the absence of a lifeguard.\(^2\) The defendant thus reasoned that since the two decedents were alone in the pool area, the absence of a lifeguard would have been obvious and the absence or presence of a sign advising that no lifeguard was present could not have had any effect. The defendant concluded that his liability should be limited to only the consequences flowing from his failure to post an adequate sign. Since it could not be shown that the mere presence of a sign would have deterred the swimmers or prevented the two deaths, the defendant contended that he should not be held liable merely for failing to post the required sign.\(^2\)

\(^{24}\) CAL. HEALTH & S. CODE § 24101.4 (West 1967) (emphasis added). Lifeguard service is defined by Health and Safety Code section 24100.1 to mean "the attendance, at all times that persons are permitted to engage in water-contact sports, of one or more lifeguards who hold Red Cross or Y.M.C.A. senior lifeguard certificates or have equivalent qualifications and who have no duties to perform other than to superintend the safety of participants in water-contact sports."

Code provisions applicable to public swimming pools may be found both in article three of the Health and Safety Code and in title 17, subchapter five, group six of the Administrative Code. Health and Safety Code section 24102 authorizes the state department to "make and enforce such rules and regulations pertaining to public swimming pools as it deems proper." Title 17 section 7775 of the Administrative Code defines the public pools to which such regulations apply as "all pools, as defined herein, except private pools maintained by an individual for the use of his family and friends. These regulations shall apply to, but are not limited to, all commercial pools, real estate and community pools, pools at hotels, motels, resorts, auto and trailer parks, auto courts, apartment houses, clubs, public or private schools, and gymnasia and health establishments."

\(^{25}\) 3 Cal. 3d at 767-68, 478 P.2d at 471-72, 91 Cal. Rptr. at 751-52.

\(^{26}\) Id. at 768, 478 P.2d at 472, 91 Cal. Rptr. at 752.
The plaintiff, on the other hand, argued that section 24101.4 imposed a statutory duty on public pool owners, like the defendant, to either post a sign or to maintain lifeguard service. Moreover, the plaintiff contended that the liability of the defendant for not having posted a sign warning that no lifeguard was present should be measured in terms of the absence of a lifeguard rather than the absence of a sign. The plaintiff had sought specific jury instructions to this effect in the trial court, but the court merely set forth the statutory language, without interpretation, in the instructions given to the jury.

As previously discussed, the jury returned a verdict for the defendant, and the verdict had been upheld by the court of appeal. Significantly, the court of appeal did not base its affirmance upon the issue of statutory construction and, indeed, suggested in dictum that the plaintiff's interpretation of the statute was possibly correct. Nevertheless, the court of appeal held that since the plaintiff had failed to insist on proper jury instructions during the trial, this issue could not be raised for the first time at the appellate level.

The California Supreme Court, however, found that the plaintiff had properly presented the issue of statutory interpretation to the trial court and also concluded that the final instructions to the jury were improper in that the absence of definite guidelines by the trial judge encouraged speculation by the jury on a legal issue. The supreme court suggested that the trial judge should have instructed the jury that the defendant, as owner of a public swimming pool, owed a primary obligation to have a lifeguard present at the pool. Therefore, the absence of a lifeguard, and not merely the failure to post a sign, was held to be the standard to be used in determining the liability of pool owners who violated section 24101.4. In its interpretation of the statute, the court emphasized that the regulatory provisions applied to all

27. Id. at 766, 478 P.2d at 470, 91 Cal. Rptr. at 750.
28. Id. at 766 n.10, 478 P.2d at 470 n.10, 91 Cal. Rptr. at 750 n.10.
30. On the question of statutory interpretation the district court of appeal noted that "[i]f the matter were properly before us we might very well hold that the defendants cannot escape from the consequences of the wrongful omission to provide lifeguard service by pointing to the fact that they did not comply with the statutory substitute either. But the point is not available to plaintiffs: at their request the court instructed the jury [by simply reading the statute]. . . . The error was invited." 83 Cal. Rptr. at 316.
31. Id.
32. 3 Cal. 3d at 766 n.10, 478 P.2d at 470 n.10. 91 Cal. Rptr. at 750 n.10.
33. Id.
34. See id.
35. Id. at 767-68, 478 P.2d at 471, 91 Cal. Rptr. at 751.
public pools. This interpretation is the result of fifty years of prior judicial policy requiring public pool owners to provide lifeguard service.\textsuperscript{36}

Under the prior cases, the classification of a pool as public was based on the size and nature of the pool operations rather than on whether or not a fee was charged.\textsuperscript{37} In interpreting section 24101.4, the supreme court pointed out that there were two different categories of public pools—those for which a direct fee was charged and those comprising all the "others."\textsuperscript{38} Because the defendant pool owner did not charge a direct fee, his pool properly belonged in the "all other" category.\textsuperscript{39}

\textsuperscript{36} In Flora v. Bimini Water Co., 161 Cal. 495, 119 P. 661 (1911), plaintiff sued defendant for negligence where her son drowned in defendant's public pool. The court recognized the existence of a duty of "one maintaining a swimming or bathing establishment frequented by the public" to provide lifeguard service. The court expressly avoided the question of duty, noting that since defendant had provided lifeguards "it is immaterial whether it be said that the duty of furnishing such protection arises, as matter of law, or that the necessity for such provision is, in each case, a question of fact for the trial court or jury." \textit{Id.} at 498, 119 P. at 662.

In Rovegno v. San Jose Knights of Columbus Hall Ass'n, 108 Cal. App. 591, 291 P. 848 (1930), defendant's only negligence was failure to provide a lifeguard. The court held that defendant was not relieved of this duty by posting a sign that bathers were to use the pool at their own risk. \textit{Id.} at 597-98, 291 P. at 850.

In a similar case, the district court of appeal determined that "the mere presence of signs stating that the bather used the pool at his own risk would not affect the duty of appellants to have a qualified life guard on life-guard duty at the pool." Lindsey v. De Vaux, 50 Cal. App. 2d 445, 456, 123 P.2d 144, 150 (1942).

In the only case before Haft to interpret Health and Safety Code section 24101.4, a state appellate court held that "[l]ifeguard service must be provided for any 'public swimming pool' for the use of which a direct fee is charged, and \textit{for all others} lifeguard service must be provided unless a sign is posted indicating that such service is not provided." Lucas v. Hesperia Golf and County Club, 255 Cal. App. 2d 241, 248, 63 Cal. Rptr. 189, 194 (1967) (emphasis added).

37. The court looks at the physical size and the number of persons having access in determining if the pool is public or private. The court in Rovegno applies this criteria in the following passage: "While it is true [the pool owner] constituted a private corporation and a private association, respectively, they were in fact maintaining and managing a swimming pool of large dimensions, to which some six hundred or seven hundred persons, together with their invited guests, had access. In such circumstances we believe that the amount of care with which they were chargeable would approximate the amount chargeable to the proprietor of an institution to which the public generally was invited." 108 Cal. App. at 597, 291 P. at 850. The fact that a direct fee is not charged is not determinative. \textit{See} Askew v. Parker, 151 Cal. App. 2d 759, 312 P.2d 342 (1957), where a religious institution issued an invitation to the teenagers of the community to use its pool. There the court looked at the size of the large and indeterminate group given access to the pool in reaching the conclusion that the pool was public.

\textsuperscript{38} 3 Cal. 3d at 767-68, 478 P.2d at 471, 91 Cal. Rptr. at 751.

\textsuperscript{39} \textit{Id.} at 766 n.8, 478 P.2d at 470 n.8, 91 Cal. Rptr. at 750 n.8.
The court noted that although the statute could have been worded by the legislature to limit the duty of such "others" to the mere posting of a sign warning that no lifeguard was present, the legislature clearly chose to require the higher standard for both types of pools. The court appears to have arrived at this strict statutory interpretation by reasoning that the code provision allowing pool owners to post a sign could not have been intended by the legislature to condone a pool owner's complete inaction. The court thus concluded that the mere posting of a sign which was provided in the statute could not have been intended to excuse the pool owner of all obligation to potential pool victims, nor intended to allow a defendant to avoid liability by showing he had observed neither the lifeguard requirement nor its substitute. Such an interpretation of the statute was found to be unacceptable by the court, since a negligent defendant would be allowed to effectively escape liability by inaction and this was found to clearly undermine the legislative purpose behind the statute—to minimize the danger of accidental drownings in public pools.

In support of this interpretation of the statute the court cited a court of appeal case, *Lucas v. Hesperia Golf and Country Club*, decided some four years earlier, in which section 24101.4 had been similarly interpreted. *Lucas* involved a negligence action for the wrongful death of a minor in a country club swimming pool. As in *Haft*, no fees were charged for the use of the pool and there had been no lifeguard present; the evidence conflicted as to the presence of the required sign. Without extended discussion, the court interpreted section 24101.4 to require the presence of a lifeguard, and this determination by the court was not questioned by the defendant. The key issues in *Lucas* differed from those in *Haft*, however, and involved: (1) the status of the plaintiff as an invitee and (2) whether or not the defendant's pool was public or private. The court's assertion in *Lucas* of a statutory requirement to have a lifeguard present appears not to

40. See text accompanying notes 24-29 supra.
41. The court noted that the legislation comprising Health and Safety Code sections 24000-109 had been passed in order to minimize "the considerable hazards emanating from the growing number of unregulated swimming pools." 3 Cal. 3d at 767, 478 P.2d at 471, 91 Cal. Rptr. at 751. In particular, section 24101.4 was enacted because "the Legislature was sufficiently concerned about one particular safety issue—lifeguard service—that it elected to establish the prevailing requirements itself." Id.
42. 3 Cal. 3d at 67-68, 478 P.2d at 471-72, 91 Cal. Rptr. at 751-52.
43. Id. at 768, 478 P.2d at 471-72, 91 Cal. Rptr. at 751-52.
44. 255 Cal. App. 2d 241, 63 Cal. Rptr. 189 (1967).
45. Id. at 246, 63 Cal. Rptr. at 192.
46. Id. at 251, 63 Cal. Rptr. at 195.
47. Id. at 248-49, 63 Cal. Rptr. at 193-94.
have been contested by any of the parties in the action and does not appear to have received any judicial consideration.

The court in Haft stated that the statutory lifeguard requirement had been designed to provide protection for swimmers in public pools, and the legislature had apparently believed this purpose could best be effectuated by discouraging inept or careless swimmers from using the pools except during hours when emergency assistance would be available. The court concluded that since the harm that occurred in Haft was exactly the type the statute sought to prevent, the defendant's failure to provide either lifeguard service or a sign warning that no lifeguard was present violated the statutory duty of care owed to the decedents.

Under California law, when a plaintiff has established that the defendant owed a statutory duty of care and that the defendant has violated this duty of care, the burden of offering a preponderance of exculpatory evidence on the issue of negligence ordinarily shifts to the defendant. Essentially, the courts have described this situation as producing a rebuttable presumption that the defendant acted negligently. In Haft the supreme court pointed out that since the uncontroverted evidence of defendant's statutory violations created the presumption of negligence, the trial court should have pronounced the defendant negligent as a matter of law. Since the trial judge had allowed the case to go to the jury on the issue of negligence, the court held this to be reversible error.

The Issue of Proximate Causation

As a general rule of tort law, once the defendant's negligence has been established, the plaintiff has surmounted the first of two major obstacles. The second aspect—often as difficult for the plaintiff as proof of negligence itself—is substantiation on the issue of proximate causa-

48. 3 Cal. 3d at 770-71, 478 P.2d at 473, 91 Cal. Rptr. at 753.
49. Id. at 769 n.13, 478 P.2d at 473 n.13, 91 Cal. Rptr. at 753 n.13.
50. Id.
52. This presumption is not conclusive and may be overcome by evidence showing that, under the circumstances, the conduct in question was excusable, justifiable, and reasonable for a person of ordinary prudence. See Satterlee v. Orange Glenn School Dist., 29 Cal. 2d 581, 588-89, 177 P.2d 279, 283 (1950). This position is unique to California. Other jurisdictions hold either violation of statute is negligence per se or merely evidence of negligence. Prosser, supra note 2, § 36, at 200-01.
53. 3 Cal. 3d at 763-65, 478 P.2d at 468-70, 91 Cal. Rptr. at 748-50.
54. The plaintiff has traditionally carried the burden of proof on the issue of proximate causation as well as negligence. Prosser, supra note 2, § 41, at 236.
In *Haft*, the plaintiff was assisted by the traditional rule that an inference of proximate cause was raised because of defendant's negligence in failing to supply lifeguard service, and this inference was unaffected by the lack of direct evidence as to what had actually occurred. Despite the inference that defendant's negligence was the proximate cause of the decedents' deaths, the issue was properly submitted as a question of fact to the jury. Since the jury in *Haft* had found for the defendant, the defendant had argued before the supreme court that the jury's verdict finding him not liable must be accepted as conclusively establishing the plaintiff's failure to prove that the statutory violation by the defendant had proximately caused the deaths of the two swimmers. The defendant further pointed out that the court of appeal had sustained the jury's verdict, and had also ruled that plaintiff was barred from raising the issue of proximate causation on appeal. The supreme court rejected the defendant's arguments on the basis that the trial court had incorrectly ruled on the plaintiff's motions. The supreme court reasoned that since the jury had not been given the correct interpretation of the statutory lifeguard provisions by the trial judge, the jury had been prevented from deciding the proximate cause issue under the appropriate standard, and the plaintiff was thus not foreclosed from bringing up the issue of proximate cause on appeal. With the stage thus set, the supreme court turned its attention to the issue of proximate causation.

The plaintiff had argued that defendant's negligence should be

55. See Gonzalez v. Derrington, 56 Cal. 2d 130, 133, 363 P.2d 1, 2, 14 Cal. Rptr. 1, 2 (1961).
58. PROSSER, supra note 2, § 45, at 290.
59. 3 Cal. 3d at 765, 478 P.2d at 470, 91 Cal. Rptr. at 750.
60. Id. at 765, 478 P.2d at 470, 91 Cal. Rptr. at 750.
61. 83 Cal. Rptr. at 316. See note 31 supra.
62. 3 Cal. 3d at 765, 478 P.2d at 470, 91 Cal. Rptr. at 750. The plaintiff's formal request for instructions merely asked that section 24101.4 be read verbatim. Id. at 766 n.10, 478 P.2d at 470 n.10, 91 Cal. Rptr. at 750 n.10. However, earlier the plaintiff's counsel explicitly moved that both the issues of proximate cause and negligence be taken from the jury and be decided by the court as a matter of law. Id. at 764 n.6, 478 P.2d at 468 n.6, 91 Cal. Rptr. at 748 n.6. The judge's refusal to take these issues from the jury was held to be sufficient for plaintiff's appeal. Id. at 775, 478 P.2d at 477, 91 Cal. Rptr. at 757 (issue of proximate cause); id. at 777, 478 P.2d at 479, 91 Cal. Rptr. at 759 (issue of contributory negligence).
63. Id. at 771 n.17, 478 P.2d at 474 n.17, 91 Cal. Rptr. at 754 n.17.
considered the proximate cause of the two deaths under the reasoning of the court of appeal in *Whinery v. Southern Pacific Co.* In that case the plaintiff had brought a negligence action for wrongful death against a railroad. The decedent had been killed in an auto-train collision, and it had been established that the train was exceeding the statutory speed limit. The court held that the railroad was negligent as a matter of law because of the statutory violation; however, the court carefully pointed out that this did not necessarily establish proximate cause—that the railroad's negligence had caused decedent's death.

As in *Haft*, the critical issue was whether the railroad's negligence had proximately caused the decedent's death, and there was almost no direct evidence relating to this issue. The appellate court held that since plaintiff's evidence showing the defendant's negligence was uncontroverted, reasonable men could not differ as to whether the railroad's negligence had proximately caused the decedent's death, and therefore proximate cause was also held to be established as a matter of law. The effect of the court's holding was to give summary judgment on the issue of liability against the defendant.

The plaintiff in *Haft* urged the supreme court to adopt the reasoning of *Whinery* and to find defendant's negligence the proximate cause of the two deaths as a matter of law. The supreme court did not agree that the absence of any other explanation for the drownings would necessarily establish that the defendant's statutory violation had proximately caused the two deaths. Instead, the court enunciated a new rule as to the burden of proof regarding proximate causation: when the plaintiff proved the defendant's statutory violation, the burden of proof shifted to the defendant to prove that its negligence was not the cause of the two deaths. The supreme court held that the defendant had not sustained his burden of proof that the statutory violation was not the proximate cause of the deaths and thus reversed and remanded the case. The court emphasized that the case was being remanded for retrial "[b]ecause the obligation of defendants to bear the burden on this issue was not clearly defined at the time of the trial."

---

65. 6 Cal. App. 3d at 128, 85 Cal. Rptr. at 650.
66. *Id.*
67. *Id.* at 128, 85 Cal. Rptr. at 650-51.
69. 3 Cal. 3d at 765, 478 P.2d at 469-70, 91 Cal. Rptr. at 749-50.
70. *Id.* at 775, 478 P.2d at 477, 91 Cal. Rptr. at 757.
71. *Id.*
In its decision the California Supreme Court did more than merely reverse the procedural positions of plaintiff and defendant on the issue of proximate cause. Before the Haft court's new approach to proximate causation, a plaintiff was required to shoulder the entire burden of proof as to proximate cause. He was assisted in overcoming his burden of proof by an inference of causation that arose from the defendant's negligent violation of the statutory duty of care. 72

An inference is merely a deduction which the law allows to be made from another fact or group of facts otherwise established, i.e., if fact A is established by evidence, the jury may deduce that fact B exists. 73 The jury is not compelled to draw the conclusion suggested by the inference even in the absence of contrary facts. 74 Thus, before Haft the defendant was not required to produce any evidence to obtain a favorable verdict, but the jury could find for the plaintiff on the basis of this legal inference.

In Haft the court shifted the burden of proof on causation to the defendant by replacing this inference with a presumption. While an inference is an allowable deduction, a presumption is a mandatory deduction that is "to be made from . . . facts . . . otherwise established," i.e., if fact A is established by evidence the jury must find that fact B exists. 75 It is "forced upon the jury" in the absence of sufficient evidence to the contrary. 76

To understand the mechanics of shifting the burden of proof one must remember the bifurcated system of presumptions in California. 77 California recognizes two types of presumptions—those affecting the burden of proof and those affecting the burden of producing evidence. 78 Most jurisdictions and the Model Code of Evidence recognize only those affecting the burden of producing evidence. 79

The practical effect of the two types is different. The presumption affecting the burden of producing evidence is the weaker of the two. It is only an initial assumption in the absence of any contrary evi-

72. See text accompanying note 56 supra.
73. CAL. EVID. CODE § 600 (West 1966); see In re Estate of Braycovich, 153 Cal. App. 2d 505, 512, 314 P.2d 767, 771 (1957); Sanders v. MacFarlane's Candies, 119 Cal. App. 2d 497, 500, 259 P.2d 1010, 1012 (1953).
75. CAL. EVID. CODE § 600 (West 1966).
77. See Comment, California Evidence Code: Presumptions, 53 CALIF. L. REV. 1439 (1965) [hereinafter cited as Presumptions].
78. CAL. EVID. CODE § 601 (West 1966).
79. Presumptions, supra note 77, at 1441.
dence, i.e., evidence sufficient to support a verdict.\textsuperscript{50} If there is any contrary evidence the jury weighs "the inferences arising from the facts that give rise to the presumption against the contrary evidence."\textsuperscript{981}

If the presumption affects the burden of proof it not only acts to impose the burden of producing evidence but also the burden of persuasion as well.\textsuperscript{82} Thus the presumption affecting the burden of proof is more durable since it does not vanish with the mere introduction of contrary evidence.\textsuperscript{83} To overcome this presumption the party against whom it operates must produce sufficient evidence negating the presumed fact to convince the jury of that fact's nonexistence.\textsuperscript{84}

One can readily see that in \textit{Haft} the result would have been the same no matter which presumption the court had imposed since defendant had no evidence to rebut the presumption. Indeed, imposition of a presumption affecting the burden of producing evidence would have resulted in only a minimal departure from previous law.

Although the effect of the two presumptions in \textit{Haft} would have been the same, the policy basis for their application is different. All presumptions have a basis of probability, convenience and social policy.\textsuperscript{85} The two presumptions in California are distinguishable by the social policy they implement.\textsuperscript{86} A presumption affecting the burden of producing evidence is applied merely to facilitate the determination of a particular issue.\textsuperscript{87} A presumption affecting the burden of proof implements some recognized social policy broader in scope and extrinsic to the particular issues in a particular case.\textsuperscript{88} In California presumptions affecting the burden of proof are both statutory and nonstatutory thus allowing both legislative and judicial implementation of social policy.\textsuperscript{89} In \textit{Haft} we have a judicial recognition and implementation of a social policy.

An amicus curiae brief filed in \textit{Haft} had urged the court to impose strict liability when pool owners violated safety statutes in order

\textsuperscript{80} CAL. EVID. CODE § 604, Comment (West 1966).
\textsuperscript{81} Id.
\textsuperscript{82} Presumptions, supra note 77, at 1444.
\textsuperscript{83} Id. at 1444-45.
\textsuperscript{85} Presumptions, supra note 77, at 1447.
\textsuperscript{86} Id. at 1447-49.
\textsuperscript{87} CAL. EVID. CODE § 603, Comment (West 1966).
\textsuperscript{88} Presumptions, supra note 77, at 1472.
\textsuperscript{89} Id. at 1492.
to more fully implement the legislative intent of the pertinent statutes. The court refused to adopt a policy of strict liability on the basis that to do so would have required substantial revisions in the long established policy of allowing contributory negligence to be asserted as a defense in negligence actions predicated on violations of safety statutes. The court briefly discussed the “relative culpability of the parties,” however, there was no indication that the court intended to acknowledge any standard of comparative negligence, so as to apportion damages according to the relative fault of the parties. There was no mention of any such attempt of apportionment in Haft, and the primary issue in the case was not the relative fault of the defendant and the decedents but whether the defendant’s negligence had caused the deaths. In this context, the comments by the court regarding the relative culpability of the parties appear to have been in the nature of a policy justification for shifting the burden of proof from an innocent plaintiff to a negligent defendant. The court also remarked in a footnote that its holding in Haft was “consistent with the emerging tort policy of assigning liability to a party who is in the best position to distribute the losses over a group which should reasonably bear them.” However, this dictum by the court was made with reference to the issue of negligence and not to the economic issue of risk distribution for injuries resulting from negligence.

Negligence of the Decedents as a Defense

Some of the confusion generated by the court’s language as to the underlying policy basis of the decision in Haft was possibly due in part to the defendant’s contention that the decedents had been contributorily negligent. Two separate issues in this regard had to be overcome by the court: first, whether the young son could have been deemed contributorily negligent, and second, whether the father’s negligence, if any,
could have constituted a superseding cause, overriding the defendant's negligence.

The trial court had instructed the jury on the issue of decedents' contributory negligence as follows:

\[
\text{If you find from a preponderance of the evidence that either decedent was guilty of negligence which contributed as a proximate cause of his death, no recovery may be had by the plaintiffs for the death of that decedent who was contributorily negligent.}
\]

The supreme court held that such instructions by the trial court were erroneous, in that the jury should have been instructed that the young son could not be deemed contributorily negligent as a matter of law. 96 97

The court noted that some evidence had been presented at trial that the young son was not a good swimmer; however, evidence also suggested that had the child been alone, rather than under his father's control, he possessed the requisite intelligence and experience to appreciate the dangerous situation. 98

The court found that on the basis of the evidence brought out at trial that at the time of the tragedy the young child was under the direct supervision and care of his father. 99 On this basis, the court concluded that the young child had not acted independently in entering the defendant's swimming pool and thus could not be deemed to have acted negligently. The court noted that no prior cases in California or elsewhere, for that matter, had ever held a young child negligent for following the directions of his parent. 100 Since the child could not have been independently negligent, the court reasoned that any fault attributed to him by the jury could only have been imputed to the child because of the negligence of his father. 101 The court concluded that imputation of a parent's negligence to his child would not only be an unfair reason to bar the child's recovery, but California courts had long repudiated the imputation of parental negligence to children. 102 The court ordered that the issue of the young son's contributory negligence be withdrawn from the jury upon remand of the case to the trial court.

The court noted authority allowing imputation of the contributory negligence of one parent to the other parent in suits involving recovery for injuries to the children, so as to bar recovery for the benefit of the

96. Id. at 775-76, 478 P.2d at 477-78, 91 Cal. Rptr. at 757-58, quoting the trial court's instructions to the jury.
97. Id. at 775, 478 P.2d at 477, 91 Cal. Rptr. at 757.
98. Id. at 776, 478 P.2d at 477, 91 Cal. Rptr. at 757.
99. Id.
100. Id. at 777, 478 P.2d at 478-79, 91 Cal. Rptr. at 758-59. Generally minors have been found contributorily negligent only in situations where they have acted without, or contrary to, parental instructions. Id.
101. Id.
102. Id. at 770-71, 478 P.2d at 473-74, 91 Cal. Rptr. at 753-54.
Since the widow in *Haft* was co-plaintiff, the father's contributory negligence, if established, could have precluded recovery under this theory. However, the court concluded that the doctrine of interspousal imputed negligence was inapplicable in *Haft* because the negligent spouse could not benefit from the recovery since he was dead, and there was therefore no more reason to impute negligence to the non-negligent spouse than to the injured child. The defendant in *Haft* had also contended that since the father had acted negligently in allowing his young son into the big pool and in entering it himself with the knowledge that he was not a good swimmer that such negligence constituted a superseding cause and barred any recovery for the two deaths. The court rejected defendant's argument regarding the father's possible negligence as a superseding cause on the basis that the likelihood of a careless, unskilled swimmer overrating his capacity was a foreseeable risk—in fact, the very one the statute was designed to minimize. Moreover, the type of injury sustained was precisely that which could be reasonably foreseen to occur if the statute were violated. The court thus concluded that the father's possible negligence was foreseeable and should not have been submitted to the jury as a basis for denying recovery by the plaintiff for either victim's death.

The court's analysis of the father's possible negligence as foreseeable, and thus not a bar to plaintiff's recovery did not mean, however, that contributory negligence could not be considered as a defense. Although foreseeable negligence, against which the defendant bore the statutory duty to guard, could not have constituted a superseding cause, any unforeseeable negligence by the father might still have justified a defense of contributory negligence. Of course, no such negligence had been shown by defendant at the trial, but the court held that the defendant should be allowed the opportunity to pursue the issue on retrial.

---

104. 3 Cal. 3d at 770 n.15, 478 P.2d at 474 n.15, 91 Cal. Rptr. at 754 n.15. See note 94 supra.
105. Id. at 769, 478 P.2d at 473, 91 Cal. Rptr. at 753; *See Restatement (Second) of Torts* § 441 (1965).
106. 3 Cal. 3d at 769-70, 478 P.2d at 471, 91 Cal. Rptr. at 751.
107. Id. at 769 n.13, 478 P.2d at 471 n.13, 91 Cal. Rptr. at 751 n.13.
108. Id. at 770, 478 P.2d at 473, 91 Cal. Rptr. at 753.
109. For a discussion of the defense of contributory negligence see *Prosser, supra* note 2. § 65.
110. 3 Cal. 3d at 772 n.18, 478 P.2d at 475 n.18, 91 Cal. Rptr. at 755 n.18.
Formulation of the Haft Policy

The supreme court compared the situation in Haft to that of other California tort cases where the burden of proof as to proximate causation had been shifted from plaintiff to defendant. The court chose as illustrative the cases of Summers v. Tice,111 Ybarra v. Spangard112 and several other cases involving multiple tortfeasors.113 Each of the cited cases involved a situation where the issues of negligence and proximate causation were so clear as not to be at issue; the primary issue in these cases was the fact that there had been a number of negligent defendants and the plaintiff was unable to conclusively prove which of the negligent defendants had proximately caused the resulting harm.114 The decisions in Summers, Ybarra, and similar cases in which the burden of proof was shifted to the defendant, were based on the same judicial policy: if the collective result of the independent acts of individual defendants has caused injury to the plaintiff and thereby rendered impossible a determination of the extent to which each was responsible, total liability should be imposed upon each defendant unless he can supply the facts necessary to absolve himself.115 Presumably, in these cases, the courts have reasoned that it would be better to hold liable a negligent defendant who did not actually cause plaintiff's injuries than to deny plaintiff an effective remedy.116 Application of

111. 33 Cal. 2d 80, 199 P.2d 1 (1948).
114. In Summers two defendants simultaneously shot in plaintiff's direction who was struck by the pellet from one of their shotguns. In Ybarra, a hospital patient under anesthesia was injured by someone on the medical staff, but he could not prove which individual had actually caused the injury.

Among the many representative multiple tortfeasor cases were two cited by the court in Haft. In one, Fibreboard Paper Prods. Corp. v. East Bay Union of Machinists, 227 Cal. App. 2d 675, 39 Cal. Rptr. 64 (1964), defendant's illegal conduct plus other nontortious factors combined to cause damage to the plaintiff. In the other, Apodaca v. Haworth, 206 Cal. App. 2d 209, 23 Cal. Rptr. 461 (1962), plaintiff was injured in a chain reaction rear end collision in the fog. The entire series of collisions took place within a matter of seconds, so that it was virtually impossible to assert conclusively which defendant caused which of plaintiff's injuries.

115. “Where... there is evidence that two or more persons independently contribute to a result and it is impossible to determine the extent to which each contributed to the result, the burden is upon the defendants to absolve themselves of liability.” Apodaca v. Haworth, 206 Cal. App. 2d 209, 214, 23 Cal. Rptr. 461, 464 (1962).
116. Indeed, Justice Traynor characterized the shift of the burden of proof in Summers as having been based on the policy that “it is preferable to hold liable a
this evolving judicial policy has, however, been limited to cases of multiple defendants; and even then this judicial approach has not been applied when the evidence was sufficient to show which of the several negligent defendants "immediately inflicted the injuries."  

The court's analogy of the situation in Haft to Summers, Ybarra or the other cited cases is unclear since those decisions really centered on the problem of apportioning damages when the collective acts of a group caused plaintiff's injury.  In contrast, there was only one defendant in Haft, so no issue of damage apportionment existed. The sole issue was whether or not the defendant's acts had caused the injury. Although the cases with which the court compared Haft often involved different factual and legal issues, there was one significant point of similarity: in each, an innocent plaintiff sought to collect from a clearly negligent set of defendants. The court in Haft might have been alluding to this type of relationship in referring to the "relative culpability of the parties."  

The crux of the decision in Haft thus appears to have been this special relationship between a grossly negligent defendant and an innocent plaintiff. The defendant's numerous violations of the swimming pool safety statutes were viewed by the court as sufficiently culpable to justify the shifting of the burden of proof to the defendant. The court further noted as justification for shifting the burden of proof that the defendant was at least partially responsible for the lack of evidence as to the specific cause of the deaths—had there been a lifeguard present, the court concluded, there would have been eyewitness testimony. However, the court appears to have mentioned this point to demonstrate that the defend-
ant in *Haft* was even more culpable insofar as the creation of the evidentiary void than the defendants in cases like *Summers*. The court noted that the shift in the burden of proof to the defendant in *Summers* was premised on a judicial preference to find a negligent defendant liable, even though he may not have caused plaintiff's injuries, than to deny an innocent plaintiff relief because of an insufficiency of evidence establishing which of the negligent defendants caused the injury. In *Haft*, the court found similar justification for shifting the burden of proof to effectuate a judicial policy favoring the recovery for an innocent plaintiff, when there was a "substantial probability" that the negligence of the defendant caused the plaintiff's injuries and was at least partly responsible for the evidentiary void as to what had actually happened.

**Extension of the Haft Rule to Future Cases**

The facts in *Haft* revealed so unmistakably a pattern of neglect by the defendant that one may question whether the court's holding was predicated on that basis alone. The following factors present in *Haft* seem likely to be the key to possible future application of the judicial policy enunciated in the case: (1) the defendant's negligence was at least a partial cause of the plaintiff's lack of evidence, and (2) there was a "substantial probability" that the defendant's negligence caused the injuries complained of. Although these two elements may not have been the sole determinants in *Haft*, they may suggest the scope of the rule established therein.

Even though the first of these factors would be readily determinable in appropriate cases in which there was no direct eyewitness testimony, the second factor—that there was a "substantial probability" that defendant's negligence caused plaintiff's injuries—as justification for the policy of shifting the burden of proof to the defendant may prove troublesome in future cases. The court seems to have used the term "substantial probability" to describe a relationship between defendant's negligent act and the plaintiff's injuries. Under the court's reasoning in *Haft* it appears that the plaintiff must establish as "substantially probable" that the defendant's negligence caused the harm complained of, and once this has been established he has fulfilled his burden with regard to proximate causation and the burden then shifts

---

122. *Id.* at 773, 478 P.2d at 476, 91 Cal. Rptr. at 756.
123. *Id.* at 774 n.19, 478 P.2d at 476 n.19, 91 Cal. Rptr. at 756 n.19.
124. *Id.*
125. See text accompanying notes 12-21 *supra*.
126. 3 Cal. 3d at 774 n.19, 478 P.2d at 476 n.19, 91 Cal. Rptr. at 756 n.19.
127. *Id.*
128. See text accompanying notes 121-24 *supra*.
to defendant to escape liability. Regrettably, the court is unclear as to what causal relationship will satisfy the "substantially probable" test between the defendant's negligence and the plaintiff's injury in order for the burden of proof regarding causation to be shifted to the defendant. The causal relationship in *Haft* was based on the rule of California law that the defendant's statutory violation in failing to provide a lifeguard established negligence as a matter of law and this in turn gave rise to a strong inference of proximate causation. The court found that the inference of such causal relationship was "substantially probable" and justified shifting of the burden of proof to the defendant to negate such causation. The scope to be given the policy behind the *Haft* decision will of necessity be determined by future construction of the standard of "substantially probable" causation. In *Haft* the defendant was negligent as a matter of law and attention centered on the causal relationship between the negligent act and the injury. The question remains whether the *Haft* rationale, which was based on "considerations of policy and justice" and "the relative positions of the parties," will be equally applicable in cases when the defendant is not deemed negligent as a matter of law. Insofar as "considerations of policy and justice" are concerned it would seem to matter little whether a defendant was merely negligent or negligent as a matter of law. There would appear to be no policy justification for prohibiting the application of the policy behind the *Haft* decision to cases where plaintiff's evidence raises an inference rather than a presumption of negligence. The negligence of the defendant would, of course, be a question of fact to be settled by the jury, and if the jury determined that there was no negligence then there would be a verdict for the defendant. However, if the jury found that the defendant was negligent, then there would appear to be no reason for distinguishing this plaintiff from the plaintiff in *Haft* in which case the court, to be consistent, should shift the burden of proof to *negate* proximate causation to the defendant. If the policy of the California courts is, as *Haft* seems to say, to favor the innocent plaintiff over the negligent defendant, there would appear to be no sound objection to applying the *Haft* rationale to the broad range of California negligence actions since, by definition, the negligent defendant will be the more culpable party. Such a policy, if applied by the California courts will signal a major change in tort law—a change which may be more in tune with a California society that is changing and becoming increasingly concerned with the morality and fairness of individual actions.

*Donald F. Morey*