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Stephen D. Sugarman

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Justice Roger J. Traynor, Pragmatism, and the Current California Supreme Court

STEPHEN D. SUGARMAN[†]

California Supreme Court Justice Roger J Traynor entered the debated between pragmatists and formalists, siding with the former in both his scholarly writings and in his judicial opinions, especially in torts. In this Article, I explore what I have identified as the leading torts decisions of the California Supreme Court involving personal injury or death in the past twenty years. I first provide background on the rise of strict product liability and an explanation of what I see as the current California Supreme Court's misguided reliance on the Rowland *factors, which promote the treatment of "no breach" cases as "no duty" cases. In Part II, I demonstrate the prominence of pragmatism in the Court's recent decision-making, but not the sort of pragmatic thinking that Traynor expressed. In Part III, I speculate as to how Traynor might have wanted these recent cases resolved based on his pragmatic endorsement of enterprise liability.*

[†] Roger J. Traynor Professor of Law, U.C. Berkeley Law. Many thanks to Hayley MacMillen for superb research assistance.

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I. Setting the Stage

Professor Ursin explores the twentieth-century conflict between what he terms the "pragmatists" and the "formalists" (or "legal process" devotees), situating California Supreme Court Justice Roger J. Traynor in this debate by placing him firmly in the pragmatist camp.[1] Ursin emphasizes Traynor's commitment to "enterprise liability," especially in tort law cases, as reflecting the Justice's pragmatic outlook.[2]

To Ursin, a central difference between the pragmatists and the formalists lies in their respective attitudes toward judicial activism.[3] Pragmatists take into account contemporary social policy considerations when making their decisions in both tort and constitutional law cases.[4] Formalists believe that judges are ill-suited to make these judgments and that judicial decisions should not rest on what are better understood as legislative or administrative considerations. In their view, judges should rely on deeply held basic principles of justice.[5]

However, in the common law personal injury and death cases that make up the heart of tort law, judges are forced to "make" law every time a new set of facts comes before them.[6] Judges from either camp must be activists to some degree. As I see it, the difference in their approaches has to do with what sorts of arguments they believe are appropriate for a court to offer in defense of its decisions.

In 1999, I published an article demonstrating how the conservative-leaning court of the previous thirteen years had turned back the prior tide of pro-plaintiff decisions.[7] A key feature of the torts jurisprudence of the 1986–1999 period was the court's renewed reliance on "rules" governing liability, which were pro-defendant in their nature, and its accompanying rejection of the more open-ended "standard" of "due care" that had increased the role of juries in the more pro-plaintiff era.[8]

In this Article, I explore what I have identified as the leading torts decisions of the California Supreme Court in the twenty years since 1999. I first provide background on the rise of strict product liability and an explanation of what I see as the California Supreme Court's misguided reliance on the *Rowland* factors, which promote the treatment of "no breach" cases as "no duty" cases. In Part II, I examine the leading torts decisions of the past twenty years using Professor Ursin's analytical structure to examine the function of pragmatism in the court's

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1. Edmund Ursin, *Roger Traynor, the Legal Process School, and Enterprise Liability*, 71 HASTINGS L.J. 1101, 1132–1137 (2020).

2. *Id*. at 1130.

3. *Id*. at 1138–1143.

4. *Id*.

5. *Id*.

6. Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455, 455–56 (1999).

7. *Id*. at 455.

8. *Id*. at 461.

decision-making. In Part III, I speculate as to how Traynor might have wanted recent cases resolved based on his pragmatic endorsement of enterprise liability.

A. THE RISE OF STRICT PRODUCT LIABILITY

In Traynor's concurrence in *Escola v. Coca-Cola Bottling Co.* in 1944, perhaps his most famous opinion, he used several highly pragmatic arguments to make the case for what has become known as strict product liability.[9] Gladys Escola, an employee of Tiny's Waffle Shop in Merced, California, had been loading Coca-Cola bottles into a refrigerator when one of the bottles exploded, injuring her hand.[10] There was no evidence linking the explosion to the specific negligence of any employee of the Coca-Cola bottling company that made the product (although there was also testimony that no one at the waffle shop had been careless in handling the bottle, either).[11]

Rather than approach *Escola* as a negligence case, as the majority did, Traynor proposed that it would be far better social policy to impose liability on the makers/sellers of defective products for injuries caused by their products, regardless of whether plaintiffs could prove that those makers/sellers were at fault.[12] This outlook would upend years of tort thinking that had largely cemented the fault principle, expressed in the doctrines surrounding negligence law, as the foundation on which tort claims were analyzed.[13]

Traynor's thinking meshed well with that of Yale Law School Professor Fleming James, Jr., a leader in the academy, who viewed the activities of modern society as an inevitable source of all sorts of accidents in which the injurer might or might not be at fault.[14] Enterprises engaged in activities leading to accidental injuries typically profited from those activities, but all too often, existing doctrine did not hold them legally liable for the injuries they caused. "Enterprise liability" thinking could change this. Specifically, enterprise liability re-envisioned tort law as a mechanism for providing social insurance against the risk of accidental injury and death from defective products. In James's view, endorsed by Traynor, tort law could step in and fill an important gap left by Social Security.[15] Congress had enacted the Social Security Act in 1935 to cover

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9. Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 440–44 (1944) (Traynor, J., concurrence).

10. *Id*. at 437–38 (Traynor, J., concurrence).

11. *See id*. at 438–39 (Traynor, J., concurrence).

12. *See id*. at 440–44 (Traynor, J., concurrence).

13. Strict liability did attach to "abnormally dangerous activities" at this point, but this exception was limited to a small number of acts that imposed the risk of enormous harm to great numbers of people regardless of whether due care had been taken, such as dynamite blasting. RESTATEMENT (FIRST) OF TORTS § 519 cmt. b (AM. LAW INST. 1938).

14. Fleming James Jr., *Some Reflections on the Bases of Strict Liability*, 18 LA. L. REV. 293, 296 (1958) ("[The modern accident] is a far cry from the typical accident of a century ago. It is no longer a matter between neighbors wherein the loss must be borne by one or the other of them. It is usually the by-product of commercial or industrial enterprise, or of motoring.").

15. Fleming James, Jr., *The Future of Negligence in Accident Law*, 53 VA. L. REV. 911, 916 (1967).

retirees' income needs,[16] expanding the program in 1939 to cover the income needs of dependent surviving family members after a covered worker's death.[17] But through the 1940s and 1950s, there was no coverage for the income needs of disabled workers and their families, and there was no national coverage for the health care needs of injured people. By 1960, Social Security began to replace some of the lost income of workers who became totally disabled,[18] but there was and there remains no Social Security coverage for lost income due to partial disability. And, of course, Social Security itself does not address medical expenses.

Traynor and James's view was not altogether original thinking. The idea of holding private enterprises responsible for injuries that arose from their activities had already been deployed by the workers' compensation systems that states began to adopt in the Progressive Era, mainly in the 1910s. Even then, scholars like Jeremiah Smith foresaw that workplace injuries need not be the only ones that a modern social insurance plan could cover.[19] Why not other accidental injuries as well? After all, the worker is in need of compensation whether her injury occurs while she is on the job, at home, or out and about in society. In the period between states' embrace of workers' compensation and Traynor's *Escola* concurrence, several legislative proposals called for expanding the workers' compensation model to, for example, public transport injuries,[20] or to automobile injuries.[21] But these proposals had made no political headway by the middle of the century, adding to the allure of using the common law to bring about enterprise liability via a dramatic expansion of when strict liability would apply.

Formalist thinkers opposed this approach.[22] It seemed to them to involve judges acting too much like legislators. In the formalist view, the role of courts was to stick to tradition and fit their decisions into the existing doctrinal network, even in new sorts of cases. Personal moral responsibility for causing harm to

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16. Social Security Act of 1935, Pub. L. No. 74–271, § 202, 49 Stat. 620, 623 (codified as amended in scattered sections of 42 U.S.C. ch. 7 (2018)).

17. Social Security Amendments of 1939, Pub. L. No. 76–379, §§ 202(c)–(f), 53 Stat. 1364–66 (codified as amended in scattered sections of 42 U.S.C. ch. 7 (2018)).

18. Social Security Amendments of 1956, Pub. L. No. 84–880, § 223(c)(2) 70 Stat. 815, 815 (codified as amended in scattered sections of 42 U.S.C. ch. 7 (2018)) (defining "disability" for the purposes of determining who would be eligible for disability benefits as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration").

19. *See generally* Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235 (1914).

20. *See, e.g.*, Arthur A. Ballantine, *A Compensation Plan for Railway Accident Claims*, 29 HARV. L. REV. 705, 708 (1916) (proposing an insurance system for handling accident claims that would be based on "liability irrespective of negligence" and "liability for a fixed reasonable sum for each injury or loss").

21. *See, e.g.*, Earnest M. Fisher, 42 U. CHI. J. POL. ECON. 130 (1934) (reviewing COMM. TO STUDY COMP. FOR AUTO. ACCIDENTS, REPORT TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES (1932)) (investigating the failure of the common law system to adequately compensate auto accident victims and calling for a system that would issue payments more quickly and reliably).

22. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 536, 366–466 (1958).

others in unreasonably dangerous ways would remain the basic guiding principle in tort cases. Courts might impose affirmative obligations on certain parties to take steps to prevent harm to others, but only in limited settings where the relationship between the parties had always implied that one party had undertaken a duty of care. For example, common carriers and innkeepers had long had common law duties to provide their customers a safe experience. After all, when people traveled away from home, they put their safety in the hands of those who provided them transportation and housing. All sides expected that customers could count on these providers to take reasonable steps to assure customers' safety.

And while then Judge Benjamin Cardozo had held in 1916 that manufacturers could be liable when their lack of due care with respect to their products caused physical harm to people other than their direct customers,[23] this merely conformed product injury law to the otherwise broadly dominant principle of liability based on fault. Before Cardozo's New York Court of Appeals opinion in *MacPherson v. Buick Motor Co.* that year, it was commonly argued that only makers of products that by their very nature were dangerous, such as guns or certain drugs, had a general duty of due care that ran to those injured by the products.

One justification for this was the view that it would be morally inappropriate to hold manufacturers liable for most products once they left manufacturers' hands and were in the hands of buyers, whose product use manufacturers could not control.[24] In his *MacPherson* opinion, Cardozo made clear how poorly this line had been drawn given the reality of modern product marketing.[25] Were Buick to have its way, the only party to which Buick would owe a duty of care would be the Buick dealer, not the eventual car buyer, and the dealer was the least likely party to be injured by a carelessly made vehicle.[26] Still, I think that to call this decision the start of "enterprise liability" would be a mistake. The fact that a product caused its user harm was insufficient to impose liability on the maker; the victim had to demonstrate the maker's carelessness as well, a basic principle the formalists surely could endorse.

In 1963, the California Supreme Court finally adopted strict liability for defective products when Traynor delivered the court's ruling in *Greenman v. Yuba Power Products, Inc.*[27] The decision was issued just as Traynor's colleague William Prosser, who had served as Dean of Berkeley Law, was shepherding the Restatement (Second) of Torts through the American Law Institute. Prosser

23. MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916).

24. U.S. courts had derived a privity "rule" from the English case *Winterbottom v. Wright*, in which the court conjectured that allowing victims of defective products to recover from parties with whom they were not in privity of contract would lead to "the most absurd and outrageous consequences." Winterbottom v. Wright (1842) 152 Eng. Rep. 402.

25. *MacPherson*, 111 N.E. at 1053.

26. *Id.* at 1055.

27. 377 P.2d 897, 901 (Cal. 1963).

pushed the Institute to adopt the Traynor view of product liability, which it did.[28] It is hard to know in this chicken-and-egg situation which came first, rising acceptance of the Traynor view or the Restatement's embrace of it, but in any event, the Traynor and Restatement position quickly swept the nation.[29]

In this era, courts largely employed pragmatic reasoning in favor of victims' claims. The concept of enterprise liability was clearly meant to widen tort law's reach. In product injury cases and beyond, the California Supreme Court substantially broadened tort law in favor of plaintiffs in the period from *Greenman* in 1963 through the judicial retention election of 1986, when the public voted three very liberal justices off the California Supreme Court.[30] Importantly, significant funding for the campaign against them came from corporate defendants in tort cases that objected to how pro-plaintiff the court had become.[31]

With three openings on the court, the Republican then-Governor George Deukmejian was able to appoint more conservative voices to its membership.[32] From 1986 until 2018, well into the second term of Governor Jerry Brown's second round as Governor, the court was dominated by judges appointed by a series of Republican governors.[33]

B. HOW THE MISGUIDED *ROWLAND* FACTORS PROMOTE THE TREATMENT OF "NO BREACH" CASES AS "NO DUTY" CASES

Before turning to the more recent decisions, however, it is necessary to explain why I think our court has embraced a misguided use of conventional tort law language in its opinions. I blame this on the so-called "*Rowland* factors," which the court routinely cites and which I believe are decidedly wrong-headed.[34]

Cases that rest on claims of defendant negligence require the plaintiff to demonstrate that the defendant owed her a duty of due care, that she breached that duty, that the breach caused the plaintiff's injury, and that the injury was fairly within the scope of the risk that the defendant unreasonably took (this latter traditionally known as the "proximate cause" requirement). It is well

28. RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).

29. The evolution of product liability following its appearance in the 1965 Restatement culminated in the American Law Institute's publication of a products-liability-specific Restatement. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (AM. LAW INST. 1998).

30. John H. Culver, *The Transformation of the California Supreme Court: 1977–1997*, 61 ALB. L. REV. 1461, 1466 (1998). Chief Justice Rose Elizabeth Bird and Associate Justices Joseph R. Grodin and Cruz Reynoso had been appointed by Democratic Governor Jerry Brown during his first eight-year stint in office. *Id.* at 1466. The political campaign to remove them focused on their records of voting to overturn death sentences and depicted them as blocking the implementation of the death penalty. *Id.* at 1465. A "tough on crime" mentality on the part of voters swept them out of office. *See id.*

31. For an account of the evolution of public sentiment toward the Bird Court, see PREBLE STOLZ, JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT (1981).

32. Culver, *supra* note 30, at 1466.

33. *See id*. at 1480–85.

34. Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968).

accepted that whether or not a duty of due care is owed is a legal question for the court, but that the other issues are normally for the fact finder—usually a jury, in tort cases. However, it is also well accepted that the trial judge, if asked, has an obligation to decide what otherwise would be a jury question if the judge fairly concludes that no jury could reasonably find other than one way.

These requests are almost all made by defendants, typically through motions for a summary judgment or a directed verdict. Viewing the evidence most favorably to the plaintiff, judges can and should decide for defendants as a matter of law if the only reasonable conclusion is that the plaintiff failed to show a lack of due care on the part of the defendant; that the plaintiff failed to show a causal connection between the defendant's act and the victim's harm; or that the victim's injury was decidedly outside the scope of the risk the plaintiff claimed (or showed) the defendant to have unreasonably taken.

On appeal, the classic issues in negligence cases are these: First, should the trial court have dismissed the plaintiff's complaint at the outset (in response to the defendant's motion) because the defendant did not actually owe the plaintiff a duty to exercise due care to protect her from harm in this setting? Second, should the trial judge have granted the requested summary judgment and/or directed verdict motion because of the self-evidently one-sided nature of the evidence, notwithstanding the fact that the jury decided otherwise, in favor of the plaintiff?[35]

If the case centers on a product liability claim, then one can substitute "product defect" for "due care," and the same structure applies.

The most important takeaway from this basic outline of tort law is that when there is "no duty," the defendant is not required to exercise due care. Put differently, so far as tort law is concerned, it is acceptable for the defendant to act in a way that a jury could find to have been unreasonably dangerous. Most of the time, there is a duty to exercise due care in carrying out one's affairs, but sometimes, and for arguably good reasons, there is no such duty in tort. These are occasions that the judges, and most importantly the highest court judges, are responsible for identifying.

My problem with how our court is going about its business is that it is making "no duty" decisions based on the wrong criteria. Moreover, it is all too often issuing "no duty" determinations that are better understood as determinations that there was no breach as a matter of law.

One further complicating matter needs attention before I explain how the court got on the wrong path. As I have already pointed out, whether the defendant exercised "due care" is normally a jury question. The fallback instruction meant to help jurors answer that question is to tell them to decide what a reasonable person would have done in the circumstances and then to determine whether the defendant conformed to that behavior. This gives juries

35. Sometimes, the trial judge does rule that there was no duty and it is the plaintiff who appeals; other times, the trial judge does grant the defendant's summary judgment/directed verdict motion and it is the plaintiff who appeals, saying the issue should have gone to the jury.

considerable discretion to figure out how they believe reasonable people in their community would act in the circumstances before them. Of course, juries can be influenced by the evidence either side brings to the matter, including evidence as to what is customary practice, for example. Yet, evidence that is persuasive may not be conclusive, as when a jury concludes that industry practice is simply too dangerous to be considered reasonable in the circumstances.

However, tort doctrine also provides that in certain circumstances, high courts may embrace "rules" of conduct that override the more amorphous due care "standard."[36] Rules have advantages: they more precisely let defendants know what is expected of them, and they can make resolving cases easier and more consistent. But they have disadvantages as well: they can become quickly outmoded from a social as well as a technological standpoint, no longer reflecting community consensus as to what constitutes sufficient care. Also, the specificity of rules may mean they work fine for some fact patterns but then seem wrongheaded for new circumstances or ones that were not anticipated when the rules were announced.

In principle, high courts should take these competing considerations into account when deciding whether or not to adopt a rule. A central doctrinal point, however, is that these sorts of rules are specifications as to what is and is not a breach of the duty of due care. Hence, when a court decides to hold in favor of the defendant because the precaution sought by the plaintiff is not required by a rule, it is wrong, or at least misleading, to say that the defendant had "no duty" to take the asked-for precaution (even if this is a natural use of the English language). It is better to say there was "no breach as a matter of law."

The court has especially fumbled this distinction when applying the so-called *Rowland* factors.[37] These factors have their origins in the 1958 case *Biakanja v. Irving*,[38] in which the California Supreme Court set out considerations for determining when a duty is owed.[39] In *Biakanja*, the defendant notary public had prepared a will but failed to have it properly witnessed, leading to financial loss to the decedent's sister when the will was denied probate.[40] The principal question was whether someone other than a professional's client may sue the professional for negligent professional conduct that caused the plaintiff economic harm.[41] The *Biakanja* court cited six factors relevant to determining liability, most of which were affirmed and expanded in *Rowland v. Christian* in 1968.[42]

The *Rowland* factors now dominate the court's determinations of when to impose liability in tort cases. *Rowland* was an extremely important decision, as it threw out the complex set of rules that once governed tort claims when people

36. See the discussion in OLIVER WENDELL HOLMES, THE COMMON LAW 123–24 (1881).
37. Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968).
38. 320 P.2d 16, 19 (1958).
39. *Id*. at 18.
40. *Id.* at 17.
41. *Id.* at 18.
42. *Id*. at 19; *see also Rowland*, 443 P.2d at 567.

were injured on the premises of others. These included separate rules for invitees, licensees, and trespassers, with sub-rules for child trespassers, discovered trespassers, and so on. In *Rowland*, the court concluded that from then on, cases involving plaintiffs injured on others' premises would all be decided under the basic "due care" standard.[43] I have no objection to this conclusion, and the Restatement (Third) has since embraced this outcome as well (with an exception for cases involving "flagrant" trespassers).[44] Indeed, *Rowland* itself was not really a case about duty, but rather a case about how to determine whether or not there has been a *breach* of duty. Nonetheless, the court went out of its way to set out duty/no duty considerations.

My problem is with the *Rowland* factors. According to Professor Ursin, when the court announced these factors, it drew not only on *Biakanja* but also on Dean Prosser's famous torts treatise,[45] the Harper and James treatise,[46] and earlier writing of Dean Leon Green.[47] The court has relentlessly referred to the *Rowland* factors in subsequent decisions.[48] It may seem presumptuous to complain about a set of considerations with such an esteemed pedigree, but the *Rowland* factors are nonetheless misguided: only some of them are properly relevant to deciding whether a legal duty is owed, at the same time as the list omits factors that *are* properly relevant to this determination.

Let us start with the factors that are most clearly out of place. The first is "the foreseeability of harm to the plaintiff," and the second is "the extent of the burden to the defendant . . . of imposing a duty to exercise care."[49] These considerations go not to duty, but to whether there was a breach of due care in the specific case before the court—considerations that normally are for the fact finder to determine. It is well recognized that consideration of whether a defendant was negligent or not should include consideration of the extent of the risk she took (the foreseeability question) and how difficult it would have been for her to take the plaintiff's proposed precaution to prevent the injury (the burden question).[50] Of course, as already noted, the risk could be so small (that is, unforeseeable or only minimally foreseeable) or the burden of precaution so

43. *Rowland*, 443 P.2d at 567.

44. 2 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 (AM. LAW INST. 2012); Stephen D. Sugarman, *Land-Possessor Liability in the* Restatement (Third) of Torts*: Too Much and Too Little*, 44 WAKE FOREST L. REV. 1079, 1082–86 (2009).

45. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971).

46. FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS (1956).

47. Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928); Leon Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255 (1929).

48. *E.g.*, T.H. v. Novartis Pharm. Corp., 407 P.3d 18, 28 (Cal. 2017); Kesner v. Superior Court, 384 P.3d 283, 290 (Cal. 2016); Verdugo v. Target Corp., 327 P.3d 774, 790 (Cal. 2014); Cabral v. Ralphs Grocery Co., 248 P.3d 1170, 1174 (Cal. 2011).

49. Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968).

50. The Restatement (Third) states that conduct is negligent if the "magnitude of the risk" triggered by the conduct, which hinges on both "the foreseeable likelihood of harm and the foreseeable severity of harm that might ensue," outweighs the burden imposed by prevention of the risk. 1 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3(e) (AM. LAW INST. 2005).

great that no jury could reasonably find a breach of the due care standard. If so, provided that the proper motions have been brought, the trial judge (or appellate court, if necessary) can and should rule that there has been no breach as a matter of law. But this is not the same as a ruling that the defendant owed no duty of care to the plaintiff at all and could act unreasonably without fear of tort liability.

A third *Rowland* factor is "the closeness of the connection between the defendant's conduct and the injury suffered,"[51] and this does not properly go to the duty issue, either. Rather, it is just a straightforward way of expressing the "scope of the risk" (or "proximate cause") question. A court may find that the harm suffered by a plaintiff is outside the scope of the risk posed by the defendant's negligence when only one result is plausible, but again, this finding does not mean that the defendant had owed no duty at all to the victim.

A fourth *Rowland* factor is "the degree of certainty that the plaintiff suffered injury."[52] The normal remedy in tort cases is the award of money damages to compensate for the injury. The extent of the harm suffered by the plaintiff is also a question for the fact finder, and if the plaintiff was not in fact injured, no compensatory damages should be awarded. The question of how much harm a specific plaintiff suffered thus also fails to go to the duty issue.

The fifth and sixth Rowland factors are, in my view, of limited value on the duty question. They are "the moral blame attached to the defendant's conduct" and "the policy of preventing future harm."[53] These are two key values that underlie negligence law in general. For the formalists especially, if the defendant's conduct was blameworthy, it makes sense to make her take financial responsibility for the harm she caused. For the pragmatists especially, the threat of tort liability is centrally justified on the grounds that it encourages people to act with due care. Hence, assuming the plaintiff alleges and can then prove the failure to exercise due care, these factors on their own always point in the direction of imposing a duty of due care. But none of the six factors discussed so far go to the crucial question of when it is okay, as far as tort law is concerned, for defendants to fail to exercise due care—that is, the duty question.

Two *Rowland* factors remain. The seventh is "the availability, cost, and prevalence of insurance for the risk involved."[54] Notice how this factor does not go to the facts of the specific case but instead to an unspecified broader class of injuries encompassing the injury at issue. To the extent that the spreading of losses via tort law is seen as relevant to the imposition of tort liability, this factor should matter. It seems to me to be an especially pragmatic concern. From the second half of the twentieth century to the present, there has been a robust market in liability insurance for purchase by enterprises and individuals (the latter via auto insurance and homeowner/renter insurance, and perhaps supplemented by "umbrella" policies that provide additional insurance coverage if the basic policy

51. *Rowland*, 443 P.2d at 567.
52. *Id.*
53. *Id.*
54. *Id.*

limits are insufficient). By pointing to insurance as a relevant factor, the court is signaling the appropriateness of imposing a duty in tort (since a would-be injurer can protect herself in advance via insurance). This factor also indicates the practical reality of tort litigation, in which cases are rarely brought absent a sufficiently deep pocket that is typically not the defendant's but the defendant's liability insurer, even when the defendant is an enterprise.

Notice that this factor does not go to whether a specific defendant has insurance. It has long been the rule that this fact and the fact of how much insurance a defendant has are not to be disclosed to the jury.[55] But again, in the overwhelming majority of tort claims that are tried or settled for anything but a trivial sum, the payer is the insurer and the victim's lawyer is well aware of that (and probably should make sure early on that the client is, as well).

There may be instances in which there is no insurance or no adequate insurance. This could happen, for example, where the defendant has harmed so many people that to compensate all of them would create "crushing" liability that goes beyond practical insurance coverage. One solution to this state of affairs is to combine the claims in some way and allow the victims to share in whatever recovery is possible (such as, up to the policy limit and including any substantial additional assets that an enterprise defendant might have).

But, on occasion, courts have decided that to financially crush certain defendants would be counterproductive. In these circumstances, courts have held that there is no duty at all, or at least no duty to the class of plaintiffs before them. For example, in the 1985 case *Strauss v. Belle Realty Co.* before the Court of Appeals of New York, the plaintiff had fallen and been injured during a blackout caused by Consolidated Edison's gross negligence (as established in an earlier case) but was not a Consolidated Edison customer.[56] As the blackout had ostensibly affected millions of noncustomers, the court sought "to limit the legal consequences of wrongs to a controllable degree" by holding that the power company did not owe a duty of care to the plaintiff.[57] And in *H. R. Moch Co. v. Rensselaer Water Co.* in 1928, the same court held that a company contracted to supply water to a city's fire hydrants was not liable for harm to city residents caused by the company's alleged negligent failure to furnish an adequate supply of water.[58] Justice Cardozo observed that finding such a duty would "unduly and indeed indefinitely extend" liability.[59]

In my view, the reasoning that finding a duty is counterproductive when it would create "crushing" liability is better understood as an example of the eighth and final *Rowland* factor: "the burden . . . to the community of imposing duty to exercise care." Here, finally, we get to what I believe is a factor that truly goes

55. *See* McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 479 (Edward W. Cleary ed., 2d ed. 1972); CAL. EVID. CODE § 1155 (West 2020).

56. Strauss v. Belle Realty Co., 482 N.E.2d 34, 35 (N.Y. 1985).

57. *Id.* at 36 (citing Tobin v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969)).

58. H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 898–99 (N.Y. 1928).

59. *Id.* at 899.

to the question of duty. Put more simply or more broadly, the question is whether having tort liability in cases like the one at issue will do more harm than good. The good in question is the usual supposed good of tort law: compensation for those harmed by the negligence of others and perhaps deterrence of future similar negligent conduct. But when the society-wide consequences of imposing liability would be unacceptable, public policy might call for denying recovery in tort.

When might this happen? It might if allowing recovery would destroy a vital public utility or prevent existing public utilities from entering into new forms of production that are socially desirable. Or it might occur in the context of pharmaceutical drugs or vaccines, where allowing recovery by injured patients might stymie needed medical advancement. Imposing liability in other contexts might prompt people to give up important liberties, such as the freedom to work where and for whom they wish, exercise their free speech rights, or maintain their autonomy by not coming to the aid of strangers with whom they do not want to become involved.

It should be added here that potential defendants might change their conduct in socially undesirable ways not only out of fear of tort liability when they are carelessly causing harm (which one would think they could often avoid by being careful), but also out of fear that they will be found to have been at fault when they were not. A no-duty decision precludes both possibilities.

This balancing of the benefits of tort recovery for the category of victims at stake against the broader social costs of imposing the sort of liability at issue is, in my view, properly done by higher courts. Unlike juries, they are not supposed to be focused on the facts of the specific injury in a case. They are deciding the matter at what I call the "wholesale" level, leaving juries to make decisions (when a duty exists) at the "retail" level.

This is not the only justification for a no-duty ruling in tort, but it is an extremely important one and one that features in many of the court's decisions over the past thirty-plus years. In prior writings, I have identified several possible justifications for a no-duty decision,[60] and I have subdivided the one just raised into two ideas. First, a duty in tort could be precluded because tort law is properly trumped by an important social value. The lack of an obligation in tort to help a stranger in need, even if the rescue were easy, might be justified on the grounds that the imposition on personal liberty would be too great.[61] Or in cases where copycat criminals impose harm by engaging in the same nasty conduct they saw on TV or at the movies the night before, the lack of a tort duty on the part of the broadcaster/director may be justified on the grounds that to impose one would too much inhibit the exercise of artistic freedom and free

60. Stephen D. Sugarman, *Rethinking Tort Doctrine: Visions of a Restatement (Fourth) of Torts*, 50 UCLA L. REV. 585, 613–618 (2002); Stephen D. Sugarman, *Why No Duty*, 61 DEPAUL L. REV. 669, 671–94 (2012) [hereinafter Sugarman, *Why No Duty*?].

61. *See* 2 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 37–44 (AM. LAW INST. 2012).

speech in general.[62] Notice that a good reason for judges to make these decisions is that they can look beyond the specific case before them and out over society at large. Juries, by contrast, may well ignore the wider perspective and simply conclude that it was unreasonable in this instance not to make the simple gesture that would have rescued the victim, or that it was unreasonable in that instance to portray a graphic attack in a particular movie.

Second, courts need to be concerned about the possibility of what I call perverse social responses to the imposition of tort liability. When looking at a given case in isolation, it might seem sensible to conclude that the defendant failed to exercise due care, but what if one is confident that the wider impact of imposing liability in the case would cause people (and enterprises) to act (or fail to act) in ways that are decidedly socially undesirable? We would prefer if people did not react to a threat of tort liability in that way, but if they did, then it might be sensible to sacrifice the interests of one victim to the interests of the broader community. The crushing liability example involving a negligent power company is perhaps one good example of this: better for the victim to lose his case than for Consolidated Edison to go out of business and leave the community without essential public services. Congress acted on similar grounds when it limited the potential tort liability of nuclear power plant operators in the face of the nuclear industry's unwillingness to pursue new technology without protection against potential crushing liability.[63]

I have previously described further contexts in which findings of no duty in tort are justified. One is where the determination that the victim's remedy lies elsewhere than in tort.[64] For example, employees injured on the job in the United States have no ability to sue their employer for negligence; instead, their remedy is in workers' compensation. Second, perhaps spouses complaining of serious emotional abuse by the other spouse should have their remedy in family law, not tort law, thereby preventing many divorces from becoming tort cases as well.[65] Third, the so-called "economic loss rule" generally provides that if a party with whom you are in a contractual relationship negligently causes you financial harm, your remedy is in contract law, not tort law.[66] Fourth, professional athletes who are unionized and have access to disability insurance are perhaps justifiably denied tort remedies against fellow athletes for on-field/on-court injuries on the grounds that their remedies lie elsewhere and that leagues and officials, not juries, should govern conduct during play.[67]

62. *See* Olivia N. v. NBC, 178 Cal. Rptr. 888, 892 (Cal. Ct. App. 1981) (describing as "obvious" the "chilling effect of permitting negligence actions for a television broadcast" alleged to have inspired violence).

63. *See* Price-Anderson Act, 42 U.S.C. § 2210(e) (2018).

64. Sugarman, *Why No Duty?*, *supra* note 60, at 671.

65. *See* Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort*, 55 MD. L. REV. 1268, 1272 (1996).

66. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 3 (AM. LAW INST., Tentative Draft No. 1, 2012). An exception applies to malpractice by professionals such as lawyers and accountants, and tort remedies may be available for intentional misconduct via claim for fraud. *Id.* at §§ 4, 17(b), 17 cmt. b.

67. *See, e.g.*, Karas v. Strevell, 884 N.E.2d 122, 137 (Ill. 2008).

Another justification for no-duty findings is that courts justifiably fear an avalanche of small claims that would swamp the judicial system and crowd out more seriously injured victims if duty were too frequently imposed. This perhaps justifies rules that require a showing of more than the negligent imposition of minor emotional harm (even though there is no such threshold for physical harm claims).[68] In a related vein, some disputes may be ones that courts conclude they (and juries) are ill-equipped to decide sensibly and consistently.[69]

What I emphasize here is that there indeed are possibly convincing arguments that would free classes of otherwise suable defendants from obligations in tort. These are all, in one way or another, pragmatic policy arguments favoring findings of no duty. In all of these settings, so far as tort law is concerned, it is okay to be at fault and cause the victim harm. Jurors might find the defendant liable if left to decide a specific case in any of these settings. But when one or more overriding factors convinces the higher court that allowing tort liability in given circumstances would be unwise, the court will not allow a jury to decide whether to impose liability. It is these considerations, not the *Rowland* factors, that capture what it means for there to be "no duty" in tort.

With this prelude out of the way, I turn now to the decisions of the California Supreme Court in personal injury and death cases over the past twenty years.

II. In Recent California Supreme Court Jurisprudence, Pragmatism Reigns

In reviewing the California Supreme Court's torts decisions over the past two decades, I have identified two dozen reasonably important cases involving personal injury and/or death. In this Part, I show that the court routinely takes social policy considerations into account in coming to its conclusions. In terms of Professor Ursin's dichotomy, the justices are basically all pragmatists now in resolving torts disputes.

However, this does not mean that the court's pragmatism has led it to expand tort liability in order to provide wider compensation to victims of the accidents of the modern age, as Traynor or James's brand of pragmatism encouraged. To the contrary, the court continually repeats its view that it is not tort law's job to provide insurance to victims. Yet it would be wrong to say that the court is simply pro-business, always seeking to protect enterprises from liability. Plaintiffs were successful, after all, in more than a third of the decisions that I reviewed.

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68. 2 Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 47 (Am. Law Inst. 2012).

69. For instance, decisions by courts in most states finding no duty of ordinary due care among sports participants are often justified (at least in part) on the grounds that courts and juries are unable to properly assess whether a given injury was produced by negligence or simply by "ordinary" play. *See, e.g.,* Knight v. Jewett, 834 P.2d 696, 710 (Cal. 1992).

A perhaps surprisingly large share of the cases under review involve people injured on the premises of others, hoping to hold those in charge of the premises responsible for these harms. The court remains firmly committed to the fault principle in these cases. In a wide variety of settings, it tries to determine whether the defendant should properly be held liable (or at least whether a jury should make that decision), or, alternately, whether the plaintiff's case should be flat-out rejected. The results are mixed, which is understandable given the mixture of facts before the court in these disputes.

As I will show, the court unfortunately continues to hand down what it calls "no duty" decisions that are better understood as findings of "no breach." Regardless, throughout these cases the court calls attention to the potential social consequences of holding defendants liable—very pragmatic concerns.

However, the court seems to conflate two different ways of addressing these potential consequences. On the one hand, if the precaution that the plaintiff says the defendant should have taken would clearly have been unreasonably burdensome given the facts of the case, this goes to show that there has been no breach of the due care standard as a matter of law, because no jury could reasonably find that this defendant should have acted in the way the plaintiff proposes. On the other hand, if the jury might reasonably find that a defendant should have taken the identified precaution (and hence bring in a verdict for the plaintiff), but the court pragmatically realizes that imposing liability would cause perverse social responses that would be much worse for the community than denying liability in the specific instance, this can justify a no-duty conclusion. Put differently, in the no-breach cases, liability would ostensibly impose too great a burden on the individual defendant, while in the no-duty cases, it would impose too great a burden on the community. In either category of case, note well how pragmatism can lead to defendant victories, in contrast with how Traynor and James viewed pragmatic concerns as arguments for wider liability.

Many others of the cases I highlight involve product injuries, where the real question before the court is often which of multiple potential parties should take responsibility for a product's harmful consequences. Pragmatic considerations play a large role in resolving that question. (Some of the non-product-injury cases also involve this sort of choice among potential loss spreaders and loss preventers.)

Surprisingly to me, there are few motor vehicle cases in the group under review. In only one was the defendant another motor vehicle operator (or more specifically, the employer of the other motor vehicle operator).[70] Otherwise, the victim was seeking to have someone else take responsibility for the injury, even though a third-party vehicle operator was at fault. This reflects the practical reality that motorists often have no or insufficient liability insurance, meaning

70. Cabral v. Ralphs Grocery Co., 248 P.3d 1170, 1172 (Cal. 2011).

that victims of third-party vehicle operators' negligence frequently need to find an additional party to blame.

A. Cases in Which the Court Predicted Perverse Social Responses as a Justification for Rejecting Tort Liability

In a substantial number of cases, the court predicted that imposing liability on the defendant would lead to social consequences that were so undesirable, they justified findings of no liability. These are no-duty justifications. For example, in *Vasilenko v. Grace Family Church*, the plaintiff was injured when crossing a public road between his church's parking annex and the church itself and sought to hold the church liable.[71] The court predicted that imposing liability in such a setting would cause organizations like churches to give up providing any parking at all, to the serious detriment of parishioners and others.[72]

In *Verdugo v. Target Corp.*, a woman had a heart attack in a Target store and died.[73] Her family brought a wrongful death action, claiming that Target should have had a defibrillator on hand with personnel trained to use it in situations such as this where the victim faced the risk of death before emergency medical technicians arrived.[74] The court predicted that allowing a jury to find Target liable for failing to provide this precaution would force business establishments in general to similarly provide defibrillators, which it viewed as clearly unwarranted.[75]

In both *Johnson v. American Standard, Inc.* and *O'Neil v. Crane Co.*, the issue before the court was whether an adequate warning about a product's danger had been provided.[76] In *Johnson*, the court applied the "sophisticated user defense" to conclude that the plaintiff should have known of the danger even without a warning.[77] And in *O'Neil*, the court concluded that the defendant's well-made products (valves and pipes) were simply not sufficiently involved in causing the plaintiff's asbestos-related disease for the court to fairly hold the defendant responsible for the harm.[78] In both cases, the court also expressed the more sweeping policy concern that requiring additional warnings in cases like these would ultimately be detrimental to consumers overall, because the resulting overabundance of warnings would "invite mass consumer disregard and ultimate contempt for the warning process."[79]

In *Gregory v. Cott*, a specially trained home-helper was cut by a knife during a struggle with a violent Alzheimer's patient and sued the patient and her

71. Vasilenko v. Grace Family Church, 404 P.3d 1196, 1198 (Cal. 2017).
72. *See id.* at 1208.
73. Verdugo v. Target Corp., 327 P.3d 774, 776 (Cal. 2014).
74. *Id.*
75. *Id*. at 793–94.
76. Johnson v. Am. Standard, Inc., 179 P.3d 905, 909 (Cal. 2008); O'Neil v. Crane Co., 266 P.3d 987, 991 (Cal. 2012).
77. *Johnson*, 179 P.3d at 916–17.
78. *O'Neil*, 266 P.3d at 996.
79. *Johnson*, 179 P.3d at 914 (citing Finn v. G.D. Searle & Co., 677 P.2d 1147, 1153 (Cal. 1984)).

husband, who had sought to keep his wife at home and reasonably safe rather than place her in an institution.[80] Finding against the victim, the court predicted that imposing liability in cases like this would discourage people from hiring this sort of in-home help and instead cause people to institutionalize their loved ones, a socially undesirable result.[81] The court employed similar logic in *Priebe v. Nelson*, where the defendant's dog bit an employee at the kennel where the dog was being boarded.[82] The court concluded that, even in the face of a strict liability dog bite statute,[83] dog owners would not be liable to this class of victims (assuming the owners did not fail to disclose any known dangerous tendencies of their dogs). The court reasoned that imposing liability in this case would cause people to avoid using kennels to the widespread detriment of the world of pets and pet care.[84]

I emphasize three things about these examples. First, the court clearly takes pragmatic considerations into account when arguing against tort liability. Second, the court's predictions of the perverse social responses that would result from imposing liability may be backed by plausible hunches, but not the sort of empirical evidence on which an administrative agency and perhaps a legislature would likely rely in deciding what precautions should be required. And third, I am frankly skeptical about the reliability of all of these predictions. It is perhaps ironic that this last point shows that the formalists may have been onto something important in their opposition to importing these sorts of policy considerations into common law decision-making.

At the same time, by denying recovery in these settings, the court is effectively pointing consumers to the legislative or administrative process if they want to see the sorts of precautions plaintiffs are asking for put in place. Indeed, the court was quite explicit about this in *Verdugo,* where it emphasized that the legislature at the time required only health-club-type facilities to have defibrillators and that it was up to legislators to decide if any other facilities would be obligated to do so.[85] But this decision precluded jurors from making the sort of decision they have been making for decades, that is, what level of care should reasonably have been provided in a given setting. Specifically, a jury deciding this case would have had to focus on the costs and benefits of Target making available in-store a product it already sold online.

In my view, the court went off track in treating *Verdugo* as involving the tort duty question, which it clearly did not. At stake in the case was whether or not there had been a *breach* of the duty of due care clearly owed to a customer taken ill on the enterprise's premises.[86] And while a court may in appropriate

80. Gregory v. Cott, 331 P.3d 179, 181–82 (Cal. 2014).
81. *Id.* at 191.
82. Priebe v. Nelson, 140 P.3d 848, 850 (Cal. 2006).
83. CAL. CIV. CODE § 3342(a) (West 2020).
84. *Priebe*, 140 P.3d at 865–66.
85. Verdugo v. Target Corp., 327 P.3d 774, 793–94 (Cal. 2014).
86. Stephen D. Sugarman, *Misusing the "No Duty" Doctrine in Tort Decisions: Following the* Restatement (Third) of Torts *Would Yield Better Decisions*, 53 ALTA. L. REV. 913, 914 (2016).

circumstances find that there was no breach of that duty as a matter of law, the conventional way of disposing of this sort of case is to allow a plaintiff to at least put forward her evidence about how many lives defibrillators would save if placed in stores like the defendant's and what the cost of installing the devices and training employees to use them would be. Perhaps the evidence supporting a requirement that big-box stores like Target have defibrillators would be so weak as to eventually justify a directed verdict for the defendant, but since, for example, it could be shown that Target had (under a legal requirement) put such devices in its stores in Oregon, it seems to me that the matter might well have been left for a jury to resolve.

The court approached *Wiener v. Southcoast Childcare Centers, Inc.* in a similar vein, treating the case as though the defendant owed no duty when what the court was really deciding is that there was no breach.[87] In *Wiener*, someone deliberately drove his car through a chain-link fence around a childcare center, killing two children and injuring others.[88] The defendant in the lawsuit was the childcare center.[89] To justify its conclusion that the center owed the children no duty, the court stressed that the criminal act was unforeseeable.[90] To me, the unforeseeability of the harm does not support a finding of no duty, but rather a finding that as a matter of law, there was no breach of the duty of due care the center clearly owed to the children.

There are other cases where the confusion between the duty issue and the breach issue leaves one wondering just what the court was deciding. In *Castaneda v. Olsher*, for example, the defendant's tenant was injured by a stray bullet on the defendant's property during a fight between gang members, one of whom was another resident of the property.[91] The victim claimed that the defendant was at fault in renting to gang members, but the court held for the landlord, asserting that he "did not have a duty to refuse to rent to applicants his manager thought were gang members."[92] On the one hand, the court's opinion sounds as though it was saying there was no breach (even if the court used the "no duty" phrasing), pointing out that there was no special evidence to suggest that these gang-member tenants were a risk to other tenants [93] The court emphasized that the harm was unforeseeable, and foreseeability goes to the question of whether there was a breach.[94] At the same time, the court predicted that finding liability here would put landlords generally in the untenable position of either engaging in arbitrary housing discrimination (against prospective

87. Wiener v. Southcoast Childcare Ctrs., Inc., 88 P.3d 517, 525 (Cal. 2004).

88. *Id*. at 520.

89. *Id*. at 519.

90. *Id.*at 525 ("[T]he foreseeability of a perpetrator's committing premeditated murder against the children was impossible to anticipate . . . . Without prior similar criminal acts . . . defendants here could not have been expected to create a fortress to protect the children.").

91. Castaneda v. Olsher, 162 P.3d 610, 613–14 (Cal. 2007).

92. *Id.* at 621.

93. *See id.*

94. *Id.* at 621–22.

tenants who were potential gang members) or being held liable for something they could not have reasonably prevented.[95] This second line of argument is a pragmatic one that points to finding no duty. The court's analysis in *Castaneda* shows that its predictions of perverse social responses flowing from tort liability were not necessary for it to find for the defendant in all—or even any—of the cases under review where it did. It could have justified its findings of no liability solely on the grounds that the burdens on the defendants before it would have been too great.

Perhaps arguments about perverse social responses are at least sometimes a makeweight, a possibly inappropriate piling-on of arguments in favor of a position that is otherwise sufficiently justified. For example, in *Gregory*, the knife-grabbing Alzheimer's patient case, and in *Priebe*, the dog bite case, the court pragmatically concluded that, as compared with the defendants who were sued, the employers of these two victims were much better suited to take the appropriate precautions to help their employees avoid injury.[96] This taken alone could justify the no-duty decisions in those cases, without resort to speculative predictions about how the public might undesirably respond were the case decided differently.

Two cases from the group I identified involved recreational injuries. In *Shin v. Ahn*, one golfer sued another for failing to shout "fore" before swinging when the errant ball had then struck the victim.[97] The court invoked its previously announced policy with respect to lawsuits among participants in recreational activities, to wit, that there would be no tort liability for ordinary negligence.[98] The core justification for this no-duty ruling was the court's prediction that exposure to liability in such settings would prompt residents to forego athletic engagement (and, presumably, stay at home in front of their TVs and become unhealthy).[99] *Shin* reiterated the pragmatic nature of the court's concerns and its willingness to sacrifice individual victims of wrongdoing to the promotion of broader social objectives. Once more, I am quite skeptical about the validity of this genre of judicial prediction. After all, there is no indication that residents of Wisconsin, for example, quit engaging in recreational pursuits for fear of tort liability due to the application of ordinary fault principles to such activity.[100] To be sure, the plaintiff in *Shin* might well have had a difficult time

95. *Id.* at 616.

96. Gregory v. Cott, 331 P.3d 179, 181–82 (Cal. 2014); *see also* Priebe v. Nelson, 140 P.3d 848, 865–66 (Cal. 2006).

97. Shin v. Ahn, 165 P.3d 581, 583 (Cal. 2007).

98. *Id*. at 586–87 (citing Knight v. Jewett, 834 P.2d 696 (Cal. 1992)).

99. *Id*. at 587.

100. The Wisconsin Supreme Court's 1993 *Lestina* decision applied a negligence standard to recreational soccer participants' conduct. Lestina v. W. Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993). Wisconsin's legislature then narrowed the application of ordinary negligence law to lawsuits among those engaged in recreational activities by requiring the plaintiff to prove "reckless[]" or "intent[ional]" wrongdoing in settings where there is physical contact between persons in an organized sport involving amateur teams. WIS. STAT. § 895.525 (4m)(a) (2019). But cases with facts like those in *Shin* and *Knight* appear to be still governed by regular fault principles.

proving that a cry of "fore" would actually have made a difference and allowed him to avoid the injury, but that is not the basis on which the case was decided.

In *Nalwa v. Cedar Fair, L.P.*, the plaintiff was harmed by the collision of the bumper car in which she was riding in the defendant's amusement park.[101] Whatever the persuasiveness of the no-duty rule for participants in recreational activities, it hardly applies when the defendant is not another participant, but the enterprise providing the fun.[102] The court dispensed with the victim's claim here by invoking the "assumption of risk" doctrine, always an unhelpful line of argument that obscures whatever element of negligence law is truly at issue.[103] Based on what the court seemingly argued, *Nalwa* is best seen as a no-breach decision. The plaintiff was clearly aware of the risk, and there was no reasonable precaution that the defendant should have taken to reduce that risk.[104] To be sure, the bumper car ride could have been altered so that the cars moved around only at extremely slow speeds to make their bumps exceedingly low in impact, but this would have destroyed the enjoyment of the experience.[105] And indeed, the plaintiff offered no real practical solution to maintain the viability of the amusement ride while reducing its danger (which was rather small, in any event).[106]

This case is very reminiscent of a famous 1929 decision by then Chief Judge Cardozo concerning the "Flopper," an amusement park ride featuring a narrow moving walkway on which participants would sit or stand until they were thrown off balance onto padded side walls.[107] While serious injuries rarely resulted, one unlucky victim fractured his kneecap on the ride and sought to hold the amusement park liable.[108] The Court of Appeal threw his case out, confident that the Flopper was a socially enjoyable ride it did not want to condemn and that the victim had been clearly warned of the possible danger.[109] Hence, there was no breach of the amusement park's duty of due care towards its customers.[110] That Cardozo tossed in the phrase "volenti non fit injuria"[111] was unnecessary and only confusing. Adding what is in effect the assumption of risk defense to his analysis did not clarify it. Plainly, some people who consent to or assume risks are not always barred from recovery in tort. For example, imagine that your doctor tells you she will try to operate on you carefully but that there is always the risk she might commit medical malpractice. If you tell her to go ahead and operate and she does, in fact, commit malpractice, you can still sue

101. Nalwa v. Cedar Fair, L.P., 290 P.3d 1158, 1160 (Cal. 2012).
102. *See id*.
103. *Id*. at 1167.
104. *Id.* at 1164.
105. *Id*.
106. *See id*.
107. Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 173–74 (N.Y. 1929).
108. *Id*. at 174.
109. *Id*. at 174–75
110. *Id*.
111. *Id.* at 174. The expression may be translated as, "To one who is willing, no harm is done."

her for it, even though you assumed the physical risk of your injury. Or if I warn you that the crosswalk you are about to use to go to the other side of the street has been the site of several auto accidents and you cross anyway and are struck by a careless motorist, your tort claim against the motorist is still valid—even though you assumed the physical risk.

So, when does assuming the physical risk result in no liability? One setting is where there was no way to reasonably prevent an accident you were warned about or, in other words, there was no breach of the duty of due care. That fairly describes the Flopper case, where asking the defendant to eliminate the ride, slow it down, or widen its walkway to reduce the risk of falling would destroy the fun that patrons clearly sought. I view the case's outcome as resting on the judgment that avoiding the harm would have been too great a burden in the specific instance (a no-breach conclusion), not as based on a predicted perverse social response (a no-duty conclusion). I say this because relying on perverse social responses as the rationale for finding no liability implies that there is a basis on which a jury could reasonably find the defendant at fault, and I just do not see what reasonable precaution the Flopper operators—or the bumper car operators in *Nalwa*, for that matter—were supposed to have taken.

B. Other Times the Court Extolled the Practical Benefits of Tort Liability

I do not want to leave the impression that pragmatic concerns have only been invoked by the court in recent years in support of defendants. When plaintiffs win, the opinions frequently contain statements by the court about the practical benefits of imposing liability.

For example, in *T.H. v. Novartis Pharmaceutical Corp.*, the plaintiffs sought to hold the original maker of a drug liable for failing to warn of a later-discovered danger, even though the specific drug that harmed the plaintiffs was made by a different, generic drug maker; the original maker had both sold the rights to the product and ceased to manufacture it.[112] The rationale for bringing the action against the brand-name drug developer was that the FDA does not permit makers of generic drugs to update their warnings unless the agency orders them to do so, while brand-name drug developers may unilaterally update their warnings as they discover previously unappreciated negative outcomes and then seek subsequent FDA approval.[113] Once brand-name drug developers change their warnings, generic drug makers may follow suit.[114] The court justified holding the brand-name drug maker liable on practical grounds, arguing that it was "not only in the best position to warn of a drug's harmful effects" but was also "the *only* manufacturer with the unilateral authority under federal law to issue such a warning."[115]

112. T.H. v. Novartis Pharm. Corp., 407 P.3d 18, 23–24 (Cal. 2017).
113. *Id.*; *see also* 21 C.F.R. § 201.80(e) (2020).
114. *See T.H.*, 407 P.3d at 23–24; *see also* 21 C.F.R. § 201.80(e).
115. *T.H.*, 407 P.3d at 31.

The court also emphasized the ability of the defendant to avoid the harm at issue in *Regents of University of California v. Superior Court*, where a UCLA student, who the school knew suffered symptoms of schizophrenia, attacked another student in a classroom.[116] Upholding UCLA's liability for the victim's injuries, the court observed that the school was in the best position to take precautions that would have prevented such an attack.[117] And in *Kesner v. Superior Court*, where the asbestos fibers a worker inadvertently brought home on his clothes led to a household member developing an asbestos-related disease, the court pointed to the defendant's role as an appropriate loss spreader to support its finding of liability.[118] The defense objected to liability in these so-called "take-home" asbestos exposure cases with the pragmatic argument that such liability would "dramatically increase the volume of asbestos litigation, undermine its integrity, and create enormous costs for the courts and community," but the court rejected these predictions.[119] Citing Justice Traynor's concurrence in *Escola*, it asserted that the tort system contemplates that the cost of an injury will "be insured by the [defendant] and distributed among the public as a cost of doing business."[120]

Although the court seems hostile to juries in cases like *Verdugo*, the case involving Target's lack of a defibrillator, at other times it seems quite comfortable with having juries perform their customary role in negligence cases. For example, in *Cabral v. Ralphs Grocery Co.*, the victim was killed when his vehicle crashed into the defendant's truck, which was parked on the shoulder of a freeway as the truck's driver sat inside eating a snack.[121] The defense claimed that imposing liability would cause hungry drivers to keep driving even if their hunger made their driving unsafe, thus creating even greater dangers to others on the road.[122] The court dismissed this concern, stating that the defendant offered "no support for its assertion that juries cannot be trusted to weigh these considerations under the particular facts of each case, as they do in deciding negligence generally."[123]

The court's decision in *Lugtu v. California Highway Patrol* similarly endorsed juries' capability to determine questions of breach.[124] There, the plaintiffs had been pulled over by a highway patrol officer into the center median strip of a highway when they were struck by a truck that had drifted out of its lane of traffic.[125] The court concluded that the question of whether the officer was negligent in selecting the location where he stopped the plaintiffs should

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116. Regents of Univ. of Cal. v. Superior Court, 413 P.3d 656, 660 (Cal. 2018).
117. *See id.* at 668.
118. Kesner v. Superior Court, 384 P.3d at 288, 297.
119. *Id.* at 296.
120. *Id*. at 297 (citing Escola v. Coca-Cola Bottling Co., 150 P.2d 436 (1944) (Traynor, J., concurring)).
121. Cabral v. Ralphs Grocery Co., 248 P.3d at 1173.
122. *Id*. at 1182.
123. *Id.* at 1183.
124. Lugtu v. Cal. Highway Patrol, 28 P.3d 249, 250–63 (Cal. 2001).
125. *Id.*

have gone to the jury (the trial court had granted the defendant summary judgment).[126] The court stated that enforcement officers owe a duty of care when they engage in "'*an affirmative act which places the person in peril or increases the risk of harm*'" during the routine exercise of their authority.[127] Appealing to pragmatism, the defense argued that "juries will be too ready to second-guess police officers in the exercise of their discretion in making traffic stops" and that the risk of liability would undermine effective traffic enforcement and/or impose "inordinate financial liability" on the state.[128] But the court dismissed these predictions, asserting that the considerations officers take into account when making traffic stops could appropriately be assessed by jurors.[129] The question of officer fault, as in negligence cases in general, was left for juries to resolve.

C. Cases Where the Court Chose Among Possible Defendants or Determined That Multiple Defendants Could Be Liable

I have already suggested that *Gregory*, the case involving the Alzheimer's patient, and *Priebe,* the dog bite case, were decided for the defendant, at least in part, because the court believed that parties other than the defendants were in the best position to take appropriate precautions. By contrast, the court had no problem with potential liability for the highway patrol defendant in *Lugtu* even if it was a third party who carelessly crashed into the plaintiffs' vehicle.

Many of the premises liability cases have a similar structure. The plaintiff clearly would have a tort claim against some misbehaving and perhaps even criminal actor but is seeking to recover from the party in control of the property where the harm occurred. Presumably, this is because the otherwise most attractive defendant is judgment-proof. No fundamental problems with holding two different parties theoretically responsible for the same event arise when both should reasonably have acted to prevent it. *Regents of University of California v. Superior Court*, the UCLA student-on-student attack case, nicely demonstrates this. *C.A. v. William S. Hart Union High School District* is similar: there, the plaintiff sued the school district for negligence with respect to its hiring, training, and supervision of an employee who, the plaintiff claimed, sexually abused the plaintiff.[130]

When the court tosses out a plaintiff's claim against a second-best target, it is often because the court simply does not believe that the facts before it can be interpreted to support a finding of fault. *Sharon P. v. Arman, Ltd.* is in this vein: the plaintiff was attacked in the underground garage of the defendant's commercial building, and because there had been no similar past attacks that would have prompted the defendant to install additional safety precautions, the

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126. *Id.*
127. *Id.* at 257 (quoting Williams v. State of Cal., 664 P.2d 137, 140 (Cal. 1983)).
128. *Id.* at 260.
129. *Id.*
130. C.A. v. William S. Hart Union High Sch. Dist., 270 P.3d 699, 702–03 (Cal. 2012).

court found the defendant not liable.[131] Its reasoning was similar in *Wiener*, where the motorist drove his vehicle through the fence around the defendant child care center without warning. [132]

By contrast, the court found it appropriate to hold a second potential defendant liable in at least some product injury cases. For example, in *Ramos v. Brenntag Specialties, Inc.*, component part suppliers were not allowed to escape responsibility under the "component parts doctrine," which shields makers of parts that are integrated into finished products from liability for injuries incurred by those finished products; this is because the claim in *Ramos* was that the specific defects that caused the injury were in the components themselves.[133] And in *Kinsman v. Unocal Corp.*, an oil company landowner was held potentially liable for failing to warn of a hidden hazardous condition that it knew about and which harmed an employee of a contractor that the landowner hired to do work on the premises.[134] Note the contrast with *Johnson*, where a technician's product liability claim against an air conditioning equipment manufacturer was tossed out because the plaintiff was a "sophisticated user" and hence, not entitled to a warning of the risk that the technician's exposure to phosgene gas could cause pulmonary fibrosis.[135]

The major takeaway from this review of important personal injury and death cases decided in the past twenty years by the California Supreme Court is that the opinions are highly practical in their outlook. As the court struggles to apply basic fault principles to premises and motor vehicle injuries and to determine the boundaries of product liability law, the justices realize that simple moral principles often do not point to an obvious solution. Instead, they very often resolve the dispute before them through a pragmatic consideration of the practical implications of a finding for or against the victim.

III. HOW MIGHT JUSTICE TRAYNOR HAVE VOTED IN MORE RECENT CASES?

As Professor Ursin explains in detail, Justice Traynor made clear his belief that it is judges' role, and indeed their duty, to take current societal conditions into account when making decisions, including when interpreting statutes and the Constitution.[136] Traynor believed, among other things, that judges "have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values."[137]

131. Sharon P. v. Arman, Ltd., 989 P.2d 121, 123, 127 (Cal. 1999).

132. Wiener v. Southcoast Childcare Ctrs., Inc., 88 P.3d 517, 525 (Cal. 2004).

133. Ramos v. Brenntag Specialties, Inc., 372 P.3d 200, 205 (Cal. 2016).

134. Kinsman v. Unocal Corp., 123 P.3d 931, 946 (Cal. 2005).

135. Johnson v. Am. Standard, Inc., 179 P.3d 905, 914, 916–17 (Cal. 2008).

136. *See generally* Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230 [hereinafter Traynor, *Law and Social Change*]; Roger J. Traynor, *No Magic Words Could Do it Justice*, 49 CALIF. L. REV. 615 (1961).

137. Traynor, *Law and Social Change*, *supra* note 136, at 232.

In his 1965 article *The Ways and Meanings of Defective Products and Strict Liability,* Traynor outlined how he believed the enterprise liability doctrine, which he had been championing and had finally been adopted by his court two years earlier in *Greenman*,[138] could be extended to cover a much wider range of accidents.[139] Critical of traditional fault-based doctrine, Traynor wrote:

> The development of strict liability for defective products, for industrial injuries covered by workmen's compensation, and for injuries caused by ultra-hazardous activities, presages the abandonment of standing concepts of fault in accident cases. The significant innovations in product liability may well be carried over to such cases. On the highways alone injury and slaughter are not occasional events, but the order of the day, and sooner or later there is bound to be more rational distribution of their costs than is now possible under negligence.[140]

Speaking more broadly, he wrote, "[t]he cases on products liability are emerging as early chapters of a modern history on strict liability that will take long in the writing."[141]

So far, Traynor's predictions have not come to pass. Fault principles still dominate the common law of torts, and strict liability still only applies to defective products and ultra-hazardous activities.[142] To be sure, even as those courts apply the fault principle, enterprise liability thinking has prompted them to expect enterprises to take more responsibility for harms they could have prevented, at least in some cases.[143] However, that is a long way from what I believe Traynor expected and wanted. In this Part, I speculate about what a full embrace of the enterprise liability vision might have meant in my selection of the California Supreme Court's important personal injury and death cases over the past twenty years.

A. PREMISES LIABILITY CASES

It turns out that a very large share of the important recent decisions can be viewed as premises liability cases, where enterprises are sued by their customers (or occasionally others) injured in conjunction with their use of the defendant's property.

In the immediate post-Traynor era, the California Supreme Court significantly liberalized premises liability law, making it much easier for plaintiffs to obtain judgments against landowners.[144] To reiterate the outcome of

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138. Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 1956 TENN. L. REV. 363, 367 (1965) (citing Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1963)).

139. *Id.* at 375.

140. *Id.* (footnote omitted).

141. *Id.* at 376.

142. 1 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 3–17 (AM. LAW INST. 2005); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. §§ 1–2, 20 (AM. LAW INST. 1998).

143. *See generally* Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190 (1996).

144. *See, e.g.*, Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

Rowland, the court eliminated all of the old rules that called for separate treatment of invitees, licensees, and trespassers and concluded that an entrant's status would no longer determine the landowner's liability for the entrant's injuries. Instead, each case would be addressed by the general principles of negligence law.[145] While this made it easier for more victims to win, they still had to prove that the defendant had failed to take due care.[146]

Suppose that we instead applied enterprise liability thinking to premises injuries. The idea is that those carrying on enterprise activities should take responsibility for harms that occur on their property as a cost of doing business, regardless of whether faulty conduct on their part can be demonstrated. Of course, recovery might be reduced if the victim was at fault.[147] And perhaps premises occupiers held liable under enterprise liability could sometimes seek contribution from third parties. But the goal would be to incorporate harms to those who are on an enterprise's premises into the enterprise's cost of doing business, just as workplace injury costs are incorporated via workers' compensation (when the victims are employees) and as product injury costs are incorporated via strict product liability. Indeed, in this vein, Professor Ursin has, in his earlier work, put forward the general case for strict liability for premises injuries.[148]

In looking at recent decisions through an enterprise liability lens, one question to keep in mind is whether the "defect" requirement for product injuries would be carried over to premises injuries. If so, what would qualify as a "defect" not requiring proof of fault? Let's see.

In *Ortega v. Kmart Corp.*, the plaintiff slipped on a puddle of milk on the floor of the defendant's store.[149] The jury found for the plaintiff, whose theory was fault-based: the milk had been on the floor long enough for Kmart, the defendant enterprise, to have discovered it and cleaned it up, but it had failed to do so.[150] The court affirmed, concluding that the matter of adequate notice was a question of fact that the jury could reasonably have decided in the plaintiff's favor.[151]

If enterprise liability thinking were applied to the case, the defendant would be strictly liable for these sorts of harms on its premises. Moreover, it is easy to see how the premises could be deemed defective for having that slippery spot on the floor. The argument for enterprise liability here is that businesses like Kmart financially benefit from consumer traffic in their stores and can readily incorporate the cost of inevitable accidents like the one in this case into their

145. *Id.* at 568.

146. *See id.*

147. Li v. Yellow Cab Co., 532 P.2d 1126, 1243 (Cal. 1975).

148. Edmund Ursin, *Strict Liability for Defective Business Premises—One Step Beyond* Rowland *and* Greenman, 22 UCLA L. REV. 820 (1975); *see also* VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY 170–73 (1995).

149. Ortega v. Kmart Corp., 36 P.3d 11, 14 (Cal. 2001).

150. *Id*.

151. *Id*. at 19–20.

prices, charging each customer slightly more for the goods she purchases in return for what is in effect insurance against the risk that she is the unlucky one who falls and is hurt. Kmart products would thereby more fully reflect Kmart's cost of doing business. Enterprise liability would create a clear financial incentive for Kmart to invest sensibly in measures to reduce this slip-and-fall risk.

Hence, in this case, the outcome of applying enterprise liability thinking would be the same as the outcome the court reached applying fault principles. But other plaintiffs who could not prove that Kmart had adequate notice of the specific spill on which they slipped would succeed under an enterprise liability theory while losing under the fault regime. The court specifically rejected the strict liability solution in this case, asserting that "a store owner is not an insurer of the safety of its patrons."[152] This, I believe, conflicts with how Traynor would have anticipated the evolution of tort doctrine.

Verdugo presents the potential to push the idea of enterprise liability further.[153] The court conceded that Target owed the woman a duty of due care, but it rejected the wrongful death case brought by family members on the grounds that Target had no duty to provide the defibrillator that the plaintiffs claimed would have saved the decedent's life. [154] I have already shown that this case was very dubiously decided and that in any event, the court's conclusion can best be viewed as a finding of "no breach as a matter of law" rather than as a no-duty decision. But the point here is that enterprise liability could impose liability on Target, whether or not it was careless in its failure to have a defibrillator and an operator trained to use it on the premises. In lacking these, Target's premises may be seen as defective. The cost of the customer's death could be internalized into Target's cost of business through the imposition of liability: the survivors of those who have the bad luck of dying in Target and similar stores would be compensated, and such stores would have a direct incentive to provide life-saving devices if their cost was reasonable.

Two cases decided by the court in recent years involved injuries incurred during fights in the parking lots of bars/restaurants.[155] Once more, imposing enterprise liability on businesses like these when injuries occur on their premises would result in strict liability to the victims. After all, the harms took place on the defendants' property. Fights are arguably among the predictable consequences of serving alcohol, and more generally of gathering together people who on occasion will wind up in conflict with one another. Furthermore, one might indeed label a parking lot where one is attacked a defective location. Imposing liability regardless of fault would send a clear signal that this sort of enterprise should try to reduce the risk of violence on its premises, regardless of

152. *Id.* at 14.
153. Verdugo v. Target Corp., 327 P.3d 774, 786 (Cal. 2014).
154. *Id*. at 794–95.
155. Delgado v. Trax Bar & Grill, 113 P.32 1159 (Cal. 2005); *see also* Morris v. De La Torre, 113 P.3d 1182 (Cal. 2005).

whether the specific harm could have been effectively prevented in a given instance. When injuries from third-party violence happen on a business's property, the business's liability insurance would provide recovery to the victim, and the cost of running such a business would slightly rise to cover this tort burden. As a result, the business would raise prices so that customers in effect would be buying insurance against the risk of violent injury when they patronized the business.

In the actual twin cases from 2005, *Delgado v. Trax Bar & Grill* and *Morris v. De La Torre*, the court again stuck firmly to the fault principle.[156] It found that the defendant establishments did owe a duty of due care to protect their patrons from risks of attack by third-party criminal actors on the defendants' premises.[157] But the court also ruled that the precautions fairly demanded of the establishment must only be reasonable actions, such as calling 911 for help in appropriate circumstances, and not unreasonably burdensome actions, such as always having security guards on duty even if there had not been attacks on the premises in the past; even calling 911 could be considered overly burdensome if doing so would be unsafe for the caller.[158] Here again, we can see how enterprise liability thinking would routinely impose tort liability where application of the fault principle requires a fine-grained examination of the facts of each case, with the plaintiffs losing in some cases.

Under enterprise liability thinking, landlords whose tenants are injured by criminal acts on the premises would be liable for that harm. Under current doctrine, as laid out in the *Castaneda* case in 2007, the victim has to prove that the landlord was at fault.[159] In *Castaneda*, a mobile home park resident was injured by a stray bullet fired in the course of a gang fight involving another resident.[160] Again, being shot while at home or in the common area of your rental facility could well lead one to describe the premises as defective. In the same vein as already discussed, landlord liability insurance could compensate victims, with the increased cost of insurance eventually passed on to tenants who in effect would buy protection against the risk that they might be such victims as part of their rent. Rent would more fully reflect the costs associated with the premises, and landlords would have a clear motivation to take steps to reduce risk to renters. By contrast, in *Castaneda*, the plaintiff lost for failure to provide adequate evidence specific to this event upon which a jury might have concluded that this landlord had failed to exercise due care.

Castaneda follows the court's earlier decision in *Sharon P.*, in which the plaintiff, who worked in the commercial landlord defendant's building, was sexually assaulted in the building's underground garage and sued the landlord.[161]

156. *Delgado*, 113 P.32 at 1174–76.
157. *Id*.
158. *Id*. at 1169.
159. Castaneda v. Olsher, 162 P.3d 610, 619 (Cal. 2007).
160. *Id.* at 613–14.
161. Sharon P. v. Arman, Ltd., 989 P. 2d 121, 123 (Cal. 1999).

The court ordered a judgment in favor of the defendant on the grounds that the garage's history made it quite unexpected that such an attack would occur there, and thus, that requiring the defendant to hire a security guard was not a fair burden to impose on it—a classic no-breach decision (albeit one confusingly presented with "no duty" language).[162] Were enterprise liability in place, then the harm to the plaintiff would have been part of the cost of being in the garage business, just as compensating victims of criminal attacks would be a cost of being in the mobile home park business in cases like *Castaneda*.

Wiener is yet another example in this vein.[163] Again, in *Wiener*, a childcare center was sued after someone intentionally drove his vehicle through a chain-link fence around the center, killing two children and injuring others.[164] Again, the court tossed out the case on unforeseeability grounds—in other words, it was a case of no breach, regardless of the language used by the court.[165] Once more, enterprise liability points to labeling the center's premises defective and imposing tort liability on the center. This would not only give childcare businesses vivid incentives concerning the safety of the children in their care but also provide victim compensation through the businesses' liability insurance. The cost would be spread among the families who patronized them, who would in turn gain insurance against the small risk of their child being harmed in such a way.

The two recent recreational injury cases further demonstrate the divergence of an enterprise liability approach from application of the fault principle. In *Nalwa*, where the plaintiff was injured while riding in a bumper car operated by her nine-year-old son at the defendant's amusement park, the victim suffered a broken wrist when her car had a head-on crash with another bumper car during the ride.[166] This could be deemed a defective amusement ride experience leading to strict liability under enterprise liability thinking. Such inevitable accident costs could be imposed on the park operators, with the compensation paid for by the park's insurer and the costs passed on to patrons in the form of higher admission fees. All amusement park customers would thereby in effect buy insurance protection against the off chance of being injured.

So too would enterprise liability thinking approach the injury in *Shin* altogether differently than the court did.[167] *Shin*, which involved the golfer struck by another golfer's ball shot from elsewhere on the course, concerned the application of California's fault rules to lawsuits among participants in recreational activities.[168] In *Knight v. Jewett* in 1992, the court had decided that fellow participants should only be held liable to each other if their conduct is considerably worse than merely negligent—that is, if it is so reckless as to be

162. *Id*. at 132.
163. Wiener v. Southcoast Childcare Ctrs., Inc., 88 P.3d 517 (Cal. 2004).
164. *Id.* at 525.
165. *Id.*
166. Nalwa v. Cedar Fair, L.P., 290 P.3d 1158, 1160 (Cal. 2012).
167. Shin v. Ahn, 165 P.3d 581, 584 (Cal. 2007).
168. *Id.* at 587.

"totally outside the range of the ordinary activity involved in the sport."[169] While often termed an "assumption of risk" case, *Knight* is a no-duty decision: it held that, in so far as tort law is concerned, it is permissible to carelessly injure a fellow recreational participant.[170] The court's dubious justification, discussed earlier, was that fear of being sued would cause Californians to stop engaging in highly socially desirable recreational activities, and in the interest of avoiding this perverse response, individual careless actors would be let off the hook. *Shin* applied *Knight* to golf.[171]

Under enterprise liability thinking, the appropriate lawsuit over the injury in *Shin* would be against the operator of the golf course for an all-too-predictable injury that occurred on its premises, which were thereby arguably rendered defective. The same points already made in the other premises injury examples about cost internalization and safety promotion apply here. This approach might allow the merely negligent golfer to escape responsibility for causing injury, but unlike in *Shin*, the victim would be assured compensation.

As for the two recent cases involving injuries to students hurt on school premises, it seems to me that although the defendant schools were public entities, there is no good reason not to think of them as "enterprises" for purposes of applying enterprise liability. Hence, once more, rather than hinging recovery on proof of negligence by employees of the schools, enterprise liability thinking would simply hold universities and school districts liable for harms to their students that occurred on their premises.

Revisiting the 2018 case, *Regents of University of California v. Superior Court*, the court made clear that the university owed a duty of due care to the victim, and that the trial judge had therefore erred in dismissing the lawsuit.[172] The student who attacked a peer in chemistry lab had been treated for schizophrenia by UCLA health officials.[173] Whether the plaintiff could convincingly show that UCLA was at fault in some way was left for consideration on remand.[174] In *C.A.* in 2012, the court made clear that a school district has a duty to its students to take due care to prevent harm to them, in this case to prevent the sexual abuse of the plaintiff by a school district employee (here stemming from the district's alleged negligence with respect to the hiring, retention, and/or supervision of the employee).[175] Again, whether the school district was actually at fault in this matter was left to be determined at trial.[176] As we have seen throughout this review of premises-based injuries, enterprise liability guarantees victim compensation while fault-based doctrine does not, so

169. Knight v. Jewett, 834 P.2d 696, 710 (Cal. 1992).

170. *See id.*

171. In *Shin*, the victim actually argued that the defendant golfer had acted recklessly, and hence, the matter was sent back to the trial court for that issue to be resolved. *Id.* at 584.

172. Regents of Univ. of Cal. v. Superior Court, 413 P.3d 656, 674 (Cal. 2018).

173. *Id.* at 660–63.

174. *Id.* at 660.

175. C.A. v. William S. Hart Union High Sch. Dist., 270 P.3d 699, 708 (Cal. 2012).

176. *Id*. at 711 (remanding the case).

that in many instances the plaintiff loses the case when fault principles are applied.

Inevitably, there are borderline issues regarding premises liability. *Vasilenko* in 2017 and *Kesner* in 2016, the latter of which I will discuss shortly, nicely illustrate this. In *Vasilenko*, the victim had parked in the defendant church's overflow parking lot on his way to the church.[177] To get to the church itself, he had to cross a busy street, and while doing so, he was struck by a car.[178] He sued the church.[179] Since the injury did not occur on the actual premises of the defendant but rather while the plaintiff was predictably crossing from one portion of the church's premises to another, it is fair to ask whether this is a premises liability case at all.[180]

Since commercial parking lots can sometimes be held liable under the fault system for negligently discharging parkers into oncoming traffic, be it pedestrian or vehicular,[181] it seems to me that operating an overflow parking lot in a way that routinely forces congregants to cross a busy street could be viewed analogously. Once that point is conceded, enterprise liability would assure a victim recovery in tort from the church's insurer for a premises-related injury.

The court, however, adopted a much stronger pro-defendant position in *Vasilenko*, concluding that the church had no duty at all to protect its visitors against traffic accidents on public property.[182] It seems to me that at least some readily imaginable victims could demonstrate fault if permitted to so argue. For example, it does not seem very burdensome for a church to engage a traffic crossing guard for a couple of hours on Sunday before and after services. This would be analogous to the widespread deployment of school crossing guards at busy intersections adjacent to schools without traffic signals before and after school. However, the court was concerned that any possibility of liability at all would cause landowners like the defendant church to stop providing parking lots, to everyone's detriment.[183] Were that prediction true, then perhaps it would be justifiable to deny recovery (under any theory) on the argument that the legal interests of victims like the plaintiff are best sacrificed for the wider social good. Absent evidence to support the court's fears of such a perverse social response,

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177. Vasilenko v. Grace Family Church, 404 P.3d 1196, 1198 (Cal. 2017).

178. *Id.*

179. *Id.*

180. A separate issue raised by enterprise liability is whether a church should be considered an enterprise and held strictly liable in the way that I am assuming commercial actors would be. Since churches can and should obtain liability insurance just like business enterprises, I don't have a problem with putting churches in the same category. They might have to increase member dues and/or solicit more voluntary contributions to cover the tort burden, but in most instances, this would mean that congregation members who pay more would be protected in case they were injured in connection with the church's premises.

181. *But see* Pulka v. Edelman, 358 N.E.2d 1019, 1023 (N.Y. 1976) ("If a rule of law were established so that liability would be imposed in an instance such as this, it is difficult to conceive of the bounds to which liability logically would flow.").

182. Vasilenko, 404 P.3d at 1208.

183. *Id.* at 1202.

however, I think one can be highly skeptical that liability here, including enterprise liability, would lead businesses to stop offering parking.

In considering the appropriateness of imposing liability on the church under an enterprise liability way of thinking, analogous treatment of claims under workers' compensation might be enlightening. For example, in *Lewis v. Workers' Compensation Appeal Board* in 1975, after an employee was injured on public property located between his employer's parking lot and the worksite, he filed a successful compensation claim.[184] In general, under workers' compensation, the "going and coming" rule precludes recovery by workers who are injured on their way to work or on their way home after work.[185] After all, at those times, the employer is hardly in control. But once employees are at work and are then injured, they are covered.[186] In *Lewis*, the court concluded that the employee started work once he entered the parking lot, so he was on the job while routinely traveling between the lot and the business premises, even though that involved crossing a public road.[187]

By contrast, in *General Insurance Co. v. Compensation Appeals Board* in 1976, the court ruled against a worker who arrived at his workplace and parked on a public street in front of the facility where he was then struck by a passing motorist as he got out of his car.[188] The court concluded that this employee had not yet arrived at work and that the going and coming rule therefore blocked his claim.[189] His place of work imposed no requirement or necessity that he park where he did, and so the court did not invoke the "special risk" exception to the going and coming rule, which supports worker recovery in cases where the conditions of employment have subjected a claimant to a heightened risk not otherwise clearly associated with the employment.[190]

These are not easy lines to draw, but it is quite possible that under enterprise liability, the church's responsibility for the safety of its parishioners in *Vasilenko* would begin once they park on church premises—including in the annex lot—and start making their way to the church building itself.[191]

A very different boundary issue arose in the *Gregory* case, where the in-home care worker was injured when the Alzheimer's patient she cared for, a patient the worker knew had violent tendencies, reached for a knife that fell on the care worker's arm as she attempted to restrain the patient.[192] Seeking to preclude liability against the patient or her husband, who had chosen to have her cared for at home rather than in an institution, the court decided that the couple owed no duty to the worker to prevent harms related to the patient's

184. Lewis v. Workers' Comp. Appeals Bd., 542 P.2d 225, 226 (Cal. 1975).
185. *Id.* at 225.
186. *Id.*
187. *Id*. at 229.
188. Gen. Ins. Co. v. Workers' Comp. Appeals Bd., 546 P.2d 1361, 1362 (Cal. 1976).
189. *Id*. at 1364–65.
190. *Id.* at 1364; *see, e.g.*, Greydanus v. Indus. Acc. Comm'n, 407 P.2d 296, 298–99 (Cal. 1965).
191. Vasilenko v. Grace Family Church, 404 P.3d 1196, 1208 (Cal. 2017).
192. Gregory v. Cott, 331 P.3d 179, 181 (Cal. 2014).

Alzheimer's.[193] The court feared—perhaps reasonably, perhaps not—that imposing liability would make people feel compelled to institutionalize their ill relatives, a result that neither the family members of ill people nor society really favored.[194]

The court decided that the better way to think about this matter was to ask where the victim should properly have sought compensation.[195] It concluded that this was through a workers' compensation claim against her employer.[196] Not only would such a claim have assured her compensation, it would have put responsibility for her injury on the employer, the party best positioned to reduce the risk of violence by patients through careful training of its workers. The defendant husband and wife, meanwhile, were not an enterprise. The existence of a relevant enterprise better situated to deal with compensation and risk reduction cut against imposing strict liability on the couple, even though the harm happened on their property.

In somewhat the same vein is the *Priebe* case, where a dog owned by the defendant bit an employee of a kennel where the dog was boarding.[197] The court in this case considered the plaintiff's statutory strict liability claim: existing tort doctrine imposes strict liability on dog owners when their dogs bite third parties.[198] The court concluded that the common law veterinarian's rule, under which dog owners are not liable if their dogs bite or injure veterinarians during treatment, extended to scenarios in which dogs bite or injure kennel workers.[199]

Notice that this is a case of an injury not on the dog owner's premises but on the premises of the plaintiff's employer.[200] Notice, too, that while the dog owner was not an enterprise, the plaintiff was part of one.[201] Like in the case of the Alzheimer's patient,[202] enterprise liability thinking indicates that there is an enterprise best suited to taking precautions against the injury at issue (through worker training) and to compensating those like the victim (its employees). And so, once more, the finger of enterprise liability might well properly point in the direction of the plaintiff collecting from her employer under workers' compensation.

In *Priebe*, the court noted in passing that a different result would follow if the dog owner knew his dog was vicious but failed to warn the kennel staff.[203]

193. *Id*. at 192.
194. *Id*. at 185.
195. *Id*. at 192.
196. *Id*.
197. Priebe v. Nelson, 140 P.3d 848, 850 (Cal. 2006).
198. *See id.* at 855; *see also* CAL. CIV. CODE § 3342(a) (2020) ("The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness.").
199. *Priebe*, 140 P.3d at 856.
200. *Id*. at 850.
201. *Id*.
202. Gregory v. Cott, 331 P.3d 179, 181 (Cal. 2014).
203. *Priebe*, 140 P.3d at 850.

Even a court explicitly applying enterprise liability thinking might similarly conclude that the kennel operators would not be an appropriate party to deal with this problem if they did not know that the dog in their care was dangerous and the owner did.

A similar issue arose in the 2005 case *Kinsman*, where an employee of a contractor who came to the defendant's premises to do some work sued the enterprise-owner of the premises for failing to warn of a concealed hazardous condition on the property.[204] The court agreed that if a negligent failure to disclose could be shown, the victim could recover from the landowner.[205] From the enterprise liability perspective, absent the warning, it might well seem more suitable for the enterprise-owner of the premises to cover the cost of the injury at issue, instead of the enterprise-employer of the victim covering the cost via workers' compensation.

My takeaway is that help-providing businesses like the kennel in *Priebe*, the home care agency in *Gregory*, and the contractor that sent its employee to do work for the defendant in *Kinsman*, are entitled to know of the danger they shoulder before their enterprise is the one into which costs of resulting injuries to their employees are internalized.

Kesner in 2016 involved two similar lawsuits where people who worked with asbestos inevitably brought home asbestos fibers, usually on their clothes, and household members, including a wife and a nephew, were injured by breathing in those fibers.[206] The victims sued the workers' employers.[207] While these were a sort of mixed premises liability/product liability pair of cases, the court observed on the premises side that "liability for harm caused by substances that escape an owner's property is well established in California law."[208] The court concluded that harm to household members was, in general, sufficiently predictable, and that those who used asbestos in their commercial operations should take responsibility for preventing employee household member harm.[209] If they failed to exercise the appropriate due care in this, they would be held liable in tort (the court made clear that only household members and not members of the public in general are to be protected by this conclusion).[210]

From the enterprise liability perspective, once again we can sensibly attach liability to those enterprises from which the deadly asbestos fibers emanated, calling the premises defective when they allow people to leave with the dangerous fibers on their clothes. Hence, under enterprise liability, the *Kesner* defendants would be liable whether or not the plaintiffs could show some specific form of carelessness by the defendant in allowing household member

204. Kinsman v. Unocal Corp., 123 P.3d 931, 946 (Cal. 2005).

205. *Id.* at 937.

206. Kesner v. Superior Court, 384 P.3d 283, 288, 297 (Cal. 2016).

207. *Id*. at 288–89.

208. *Id.* at 301. Why a similar sort of off-premises analysis was not applied in *Vasilenko v. Grace Family Church*, the church parking lot case, is not clear to me.

209. *Id*. at 394.

210. *Id.*

asbestos exposure. Indeed, this is the same strict liability result we reach if we characterize these cases as involving defective product injuries.

A final premises liability case is *City of Santa Barbara v. Superior Court*, where a developmentally disabled child drowned while participating in a city recreational program for disabled children.[211] Under enterprise liability thinking, surely the city could readily be viewed as an enterprise and liable for injuries on city property for the reasons given above. However, a caveat here is that federal and state tort claims acts generally reject strict liability against the deepest of pockets and ablest cost spreaders.

This case, of course, was brought under the fault doctrine. The parents had signed a full waiver of tort liability, which the city had insisted upon as a condition of their daughter's enrollment in the program.[212] The court did not decide whether a waiver of liability for ordinary negligence would be valid, but rather only focused on whether a waiver of claims for gross negligence would be upheld.[213] It concluded that it would not: even the government could not validly obtain a waiver of its liability for gross negligence.[214] The parents here only claimed gross negligence by the counselor who was supposed to be watching their daughter, and so the case was remanded to address this claim.[215]

City of Santa Barbara raises the question of whether an enterprise liability approach would uphold no releases from tort liability, all releases from tort liability, or only some, as the court suggested here. My sense is that enterprise liability is strongly inconsistent with liability waivers, which might routinely be sought in premises injury settings if they were allowed and thereby undermine enterprise liability goals. However, liability waivers can still be useful in this context if parties understand and agree that potential victims can readily obtain relief from a different enterprise than the one presenting the waiver. In this scenario, waivers can help guide courts to the right source of compensation and risk reduction without the courts having to choose among potential defendants.

B. Product Liability Cases

Among the more recent cases are four product liability cases, all of which raise the boundary question: which enterprise should take financial responsibility for the type of accident at issue before the courts? Enterprise liability thinking can sensibly resolve this question as well.

In the 2017 case *T.H.*, minors were injured in utero when their mothers took a generic asthma medication.[216] Their product liability claim rested on the theory that their mothers had not received an adequate warning about the drug's

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211. City of Santa Barbara v. Superior Court, 161 P.3d 1095, 1096 (Cal. 2007).
212. *Id*. at 1097, n.3.
213. *Id.* at 1115.
214. *Id*.
215. *Id*.
216. T.H. v. Novartis Pharm. Corp., 407 P.3d 18, 22 (Cal. 2017).

risks.[217] But this decision concerned their claims against the original developer and seller of the drug, not the maker of the drug their mothers actually used.[218]

Again, the rationale for bringing the action against the brand-name drug developer was that under FDA law, makers of bio-equivalent generic drugs are not allowed to update their warnings unless so ordered by the FDA, whereas brand-name drug developers may unilaterally update their warnings as they discover previously unappreciated negative outcomes and then seek subsequent FDA approval.[219] Once brand-name drug developers change their warnings, generic drug makers may follow suit.[220]

Under current doctrinal thinking, focusing responsibility on the generic drug sellers would leave victims of defective drugs with no legal remedy and would not push the industry toward a norm of rapidly updating warnings. Instead, by imposing an ongoing responsibility on the enterprise that first developed and patented a drug, the law maximizes the chances of prompt updates and provides victims with compensation for harm caused by an enterprise's failure to provide those prompt updates. It might at first seem harsh to hold a company liable for the harm done by a drug it may no longer make or sell. But the thinking here is that after bringing the product to market and profiting from its patent, the initial developer has a responsibility to maintain an appropriate warning via the FDA regime even if it has stopped making the drug and/or sold its rights to make and sell it.

Note, however, that plaintiffs only win under current law if they show that the brand-name company knew or reasonably should have known of the newly discovered dangers of a drug and sent out a warning about them. Under enterprise liability thinking, a drug could be seen as defective simply because it resulted in harm and regardless of whether an inadequate warning had been supplied. This way of dealing with drug injuries would apply not just in the exotic scenario where the company that developed a drug no longer makes or sells it and is nonetheless sued. It would apply to straightforward situations in which a firm markets a drug but is not plausibly aware of the risks it poses and users are injured, or in which a firm markets a drug, the firm is well aware of the risks the drug poses, and users are fully warned against those risks. While product liability law today does not impose the loss on the drug maker in either instance, enterprise liability thinking seemingly would in both—on the grounds that all users will fairly pay somewhat more for the drug so that those among them who have the bad luck to be injured by the drug can be compensated. That said, even under enterprise liability thinking, it is not easy to resolve whether the generic drug maker, the brand-name drug developer, or possibly both would be liable for the drug's harm to victims. Consideration of which party has most control over risk given the FDA rules might point to the brand-name developer,

217. *Id.*
218. *Id.*
219. 21 C.F.R. § 201.80(e) (2020).
220. *See id.*

while consideration of which party can most easily internalize costs might point to the generic drug maker.

In *O'Neil* in 2012, the court decided the matter a different way than in *T.H.*, when the plaintiffs in *O'Neil* sought to corral a party that did not make the actual product that killed a naval officer.[221] The victim died from asbestos, and the lawsuit was brought against the manufacturer of valves and pumps used in aircraft carriers.[222] There was nothing wrong with the valves and pumps; it was the asbestos placed adjacent to them that emitted fibers that in turn killed the naval officer.[223] The court's view was that this death was not properly the responsibility of the valve and pump maker, even if it was the routine heat from the valves and pumps that prompted the release of the asbestos fibers.[224] The responsibility instead was with the employer (from whom the victim's family had the military equivalent of workers' compensation benefits) and/or with whichever company had manufactured the asbestos (which by this time was probably bankrupt).[225] An enterprise liability approach would likely call this the same way.

Johnson in 2008 and *Webb v. Special Electric Co. Inc.* in 2016 both concerned the so-called "sophisticated user" defense.[226] These cases centered on who should have been warning whom. In *Johnson*, a technician developed pulmonary fibrosis from exposure to phosgene gas while maintaining and repairing air conditioning units.[227] He sued the equipment manufacturer for failing to warn him of the danger.[228] The court concluded that, given his training and experience, the victim must have known or should have known of the dangers in the first place, and that the equipment maker thus had no obligation to warn him of them.[229] His remedy was presumably through workers' compensation from his employer. Enterprise liability thinking may well reach the same result. Given their responsibility for training workers to be sophisticated technicians, perhaps employers like the one in *Johnson* are better suited to deal with both risk reduction and compensation than are the makers of equipment that is presumably located on the premises of some customer of the manufacturer.

In *Webb*, another asbestos case, the plaintiff had worked as a pipefitter for Johns-Manville, once a huge player in the world of asbestos but by then long bankrupt.[230] The asbestos that made the plaintiff ill was actually provided to

221. O'Neil v. Crane Co., 266 P.3d 987, 991 (Cal. 2012).

222. *Id.*

223. *Id*.

224. *Id*. at 997, 1005.

225. *Id*. at 1005.

226. Johnson v. Am. Standard, Inc., 179 P.3d 905, 909 (Cal. 2008); *see also* Webb v. Special Elec. Co., Inc., 370 P.3d 1022, 1031 (Cal. 2016).

227. *Johnson*, 179 P.3d at 908–09.

228. *Johnson*, 179 P.3d at 909.

229. *Johnson*, 179 P.3d at 909, 915.

230. *Webb*, 370 P.3d at 1028. *See generally* Craig Calhoun & Henryk Hiller, *Coping with Insidious Injuries: The Case of Johns-Manville Corporation and Asbestos Exposure*, 35 SOC. PROBLEMS 162 (1988).

Johns-Manville by the defendant, Special Electric.[231] Special Electric argued that Johns-Manville was a sophisticated user/intermediary, and so it was Johns-Manville's responsibility to warn its own employees of the dangers of asbestos.[232] While the jury did apportion 49% of the fault in failing to adequately warn to Johns-Manville, it also apportioned 18% to Special Electric for its failure to warn.[233] While one might understandably assume that Johns-Manville knew of the dangers of asbestos and that it was its responsibility to warn its own employees of them (à la the result in *Johnson v. American Standard, Inc.*), the court here concluded that the jury could reasonably find that Special Electric neither "actually and reasonably" relied on Johns-Manville to warn its employees, nor routinely provided adequate warnings to Johns-Manville.[234] Hence, the court upheld the jury's verdict. While the facts are somewhat murky here, my sense is that enterprise liability thinking would point to Johns-Manville and not the defendant as the appropriate enterprise to take responsibility for reducing this injury risk and providing compensation.

The special history of asbestos litigation, in which parties have frantically looked further and further afield for new, solvent defendants to sue, may play a special role in these matters.[235] However, what is worth noting is that asbestos is probably going to be viewed as a defective product from an enterprise liability perspective even if it carries a warning about its dangers, such that its victims are eligible for compensation without proof of fault—such as proof of inadequate warning—from some suitable enterprise participant.

The 2016 *Ramos* case, where the plaintiff sued component part makers for causing his pulmonary fibrosis, is another example of the boundary question.[236] The court's general rule is that when a product is defective, the proper defendant is the final product maker, not makers of component parts. But in *Ramos*, the court concluded that the component parts doctrine was inapplicable since the victim was not complaining about a defective final product, but rather about something specifically wrong with the defendants' component products themselves.[237] Given that the component part makers were best equipped to take precautions against the harm at issue, an enterprise liability approach would likely yield the same result that the court reached here.

C. MOTOR VEHICLE CASES

Revisiting the 2011 case *Cabral*, an automobile driver crashed into a tractor-trailer parked on the side of the road, killing the driver of the

231. *Webb*, 370 P.3d at 1027–28.

232. *Id*. at 1031.

233. *Id*. at 1028–29.

234. *Id*. at 1036, 1038.

235. For an analysis of the role of asbestos litigation in the evolution of asbestos injury compensation, see JEB BARNES & THOMAS F. BURKE, HOW POLICY SHAPES POLITICS: RIGHTS, COURTS, LITIGATION, AND THE STRUGGLE OVER INJURY COMPENSATION (2015).

236. Ramos v. Brenntag Specialties, Inc., 372 P.3d 200, 203 (Cal. 2016).

237. *Id.* at 205–06.

automobile.[238] In the lawsuit brought by his widow, a jury found the tractor-trailer operator 10% at fault and the decedent auto driver 90% at fault.[239] After the appellate court tossed out the verdict, the California Supreme Court reversed, finding that there was adequate evidence for the jury to have properly reached the conclusion it did: parking on the side of the freeway could have been negligence that contributorily caused the accident.[240]

For my purposes, the main point to emphasize is that Traynor envisioned that something would replace the fault-based system for dealing with motor vehicle accidents. He published *The Ways and Meanings of Defective Products and Strict Liability* the same year that Robert Keeton and Jeffrey O'Connell published their detailed proposal for an auto no-fault scheme.[241] Other talk about auto no-fault was in the air at that time.[242] Although Traynor did not focus on this solution, there is every reason to think that he would have supported some sort of first-party insurance replacement for tort law. In 1977, the Canadian province of Quebec adopted a comprehensive auto no-fault plan that remains in place today and which provides prompt and generous compensation to virtually all motor vehicle accident victims, regardless of whether or not some other driver was at fault.[243] But no U.S. state has followed the Quebec model.[244]

In the other motor vehicle case, *Lugtu*, a car was pulled over onto a highway median strip by a highway patrol officer and was struck by a truck that drifted out of its traffic lane.[245] The lawsuit was brought by passengers in the pulled-over vehicle who were injured in the crash against the officer for carelessly choosing a dangerous spot to deal with the driver.[246] The court concluded that the plaintiffs were entitled to have a jury determine whether or not the officer had been at fault.[247] Once more, under an auto no-fault plan like that in Quebec, this would not be a relevant issue. Victims of motor vehicle accidents would simply be compensated regardless of how the accident came about.

With the coming of self-driving vehicles, the prospect of shifting away from our current regime to some sort of no-fault plan or automaker strict liability seems more plausible.[248] One recent proposal involves replacing negligence-

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238. Cabral v. Ralphs Grocery Co., 248 P.3d 1170, 1173 (Cal. 2011).

239. *Id.* at 1172.

240. *Id.* at 1178.

241. Robert E. Keeton & Jeffrey O'Connell, *Basic Protection: A New Plan of Automobile Insurance*, 32 J. RISK & INS. 539 (1965); *see also* Traynor, *supra* note 138.

242. *See, e.g.*, Albert A. Ehrenzweig, *"Full Aid" Insurance for the Traffic Victim—A Voluntary Compensation Plan*, 43 CALIF. L. REV. 329 (1955).

243. Stephen D. Sugarman, *Quebec's Comprehensive Auto No-Fault Scheme and the Failure of Any of the United States to Follow*, 39 LES CAHIERS DE DRIOT 303, 317 (1998).

244. *Id.* at 305.

245. Lugtu v. Cal. Highway Patrol, 28 P.3d 249, 250 (Cal. 2001).

246. *Id*. at 251.

247. *Id*. at 263.

248. Daniel A. Crane et al., *A Survey of Legal Issues Arising from the Deployment of Autonomous and Connected Vehicles*, 23 MICH. TELECOMM. & TECH. L. REV. 191, 260 (2017); Kenneth S. Abraham & Robert L.

based auto liability with a single automaker enterprise liability system that would apply not only to driverless vehicles but to all vehicles.[249] Such a proposal would move the largest category of existing physical injury tort claims out of the fault system and into something that Traynor would probably have applauded.

D. Concluding Thoughts on How Traynor Might Have Viewed Modern Tort Law

We know a lot more about how tort law functions in practice than we did when Traynor was writing about using tort to create a social insurance benefit, and our U.S. safety net, while still containing all too many holes, is now much thicker than it was back then. Were Traynor aware of the enormous administrative costs associated with running the modern tort system, it is uncertain that he would favor using tort in the same way today as he then imagined. A somewhat more comprehensive national health insurance plan than has been achieved via the Affordable Care Act and somewhat more generous Social Security disability benefits than we have today would together go a very long way to providing just what Traynor sought: coverage for the medical expenses of accident victims (and those disabled in other ways) and reasonable replacement of their lost income.

To be sure, tort law also carries compensation for pain and suffering, something that is not normally included in social insurance benefits (although it should be noted that Quebec's auto no-fault plan does provide reasonably generously for pain and suffering to those suffering serious auto injuries).[250] Yet, Traynor might well have seen the absence of pain and suffering compensation as a fair trade-off for prompt and generous compensation for so-called hard economic losses. After all, in the famous *Seffert* case, he objected when a woman, badly injured when a bus carelessly pulled away with her only partially on board, recovered from a jury pain and suffering damages several times as much as her other losses.[251]

Conclusion

In this Article, I have shown that the emphasis on pragmatism espoused by Justice Roger Traynor has prevailed in California tort cases involving personal injury and death. But it has not prevailed in ways that Traynor predicted or likely would have preferred. Over the past twenty years, the California Supreme Court has frequently deployed pragmatic considerations in the service of denying victims tort recovery. The court seems especially taken with its predictions of the doom it believes it would incur were it to hold for certain classes of plaintiffs.

Rabin, *Automated Vehicles and Manufacturer Responsibility for Accidents: A New Legal Regime for a New Era*, 105 VA. L. REV. 127, 154 (2019).

249. Kyle D. Logue, *Should Automakers Be Responsible for Accidents?*, REG., Spring 2019, at 20, 21.

250. Sugarman, *supra* note 243, at 319–320.

251. Seffert v. L.A. Transit Lines, 364 P.2d 337, 339, 344 (Cal. 1961).

While these predictions are pragmatic in nature, they hardly promote the use of tort law to assure compensation of accident victims, especially those victims with claims against enterprises that profit from the activities that cause those accidents (whether or not the individuals carrying out activities on behalf of those enterprises were at fault).

I have registered my doubts here about the reliability of the doomsday predictions offered in support of defendant victories. And I have further registered my strong doctrinal objection to the court's pattern of shoving no-breach decisions into the "no duty" box, thereby depriving juries of their proper opportunity to resolve whether there was a breach of the duty of care a defendant did indeed owe to the plaintiff. This doctrinal clumsiness is at odds with the American Law Institute's perspective as reflected in the Restatement of Torts (Third). In my view, it has also contributed to the scholarly perspective that our court is no longer the leading state judicial body in the resolution of new issues in personal injury and death cases. This turn would have been terribly disappointing to Traynor.

In sum, not only has Traynor's enterprise-liability-oriented pragmatism failed to carry the day, but also the whole wave of doctrinal reform that enterprise liability itself could have led has flattened out. Our court now seems very firmly committed to fault-based tort law for much of its reach in personal injury and death cases. It need not have played out that way.

I also showed that a true embrace of enterprise liability could have resulted in much more sweepingly pro-plaintiff tort law than we now have. Most importantly, this alternate legal landscape could have featured full responsibility of entrepreneurial land possessors (and occupiers) for harms that occur on their premises, regardless of whether they could or should have reasonably prevented those harms. Furthermore, California could easily have moved to treat motor vehicle accident victims as they are in treated in Quebec and some other Canadian provinces—quickly and efficiently providing coverage for their medical expenses, replacing much of their income loss, and even paying out something extra for those suffering major injuries, without regard to the question of fault. Such an approach would leave it to other mechanisms such as the criminal law to punish bad driving where appropriate.

Yet this has not come to pass for now and does not even appear to be a dim light on the horizon, recent political developments notwithstanding. Just as Governor Jerry Brown was finishing his last year in office at the end of 2018, he appointed a fourth member to our court. For the first time since 1986, a majority of the sitting justices were appointed by a Democrat, and indeed, it was not until fairly late in Brown's second round as governor that even two of the sitting justices were his appointees. Will this make a difference in the court's receptivity to enterprise liability thinking? It is difficult to predict, but so far there is no good evidence that the Brown appointees will come to see things as Traynor did.

We really only have early evidence about one of them, and that is Justice Goodwin Liu, a former colleague and personal friend of mine. Justice Liu has written and joined enough opinions by now to suggest that his creative thinking and analysis is adding nuance to a basically fault-dominated regime. That said, in deciding accidental injury cases, he seems far more attentive to the "cheapest cost avoider" principle articulated by Judge and Professor Guido Calabresi as a driver of conduct than to the Traynor view of tort as a compensation device.[252] There are no opinions like Traynor's concurrence in *Escola* to be found in the recent case law.

But who knows? As the new majority of Brown judicial appointees settles in, these four might as a group re-think the suitability of enterprise liability in tort as a way of dealing with personal injury and death cases in the twenty-first century. Possibly Traynor's pragmatism could rise again if we give it enough time. Of course, our legislature, dominated as it is by members of the Democratic Party, could move California law in that direction by statute. But I would not count on that. So long as most of the plaintiffs' personal injury bar is committed to sticking with the status quo, and so long as those lawyers are important campaign contributors to the legislators with the power to initiate changes, the sweeping legislative embrace of enterprise liability Traynor once imagined will likely remain out of reach.

252. *See* Vasilenko v. Grace Family Church, 404 P.3d 1196, 1198 (Cal. 2017); Kesner v. Superior Court, 384 P.3d 283, 290 (Cal. 2016); Gregory v. Cott, 331 P.3d 179, 192–93 (Cal. 2014) (Liu, J., concurring).

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