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EVOLUTION OF THE DUTY OF CARE:
SOME THOUGHTS†

James P. Murphy*

Professor Murphy offers his views on the emerging and yet uncertain area of duty of care in tort law. He sees an evolution occurring in the courts' approach toward a generalized rule of duty defined by foreseeability. He does not purport to examine each and every thread in this complex evolutionary fabric, but rather attempts to lay the groundwork by examining the path followed in England and contrasting it to the dual American development of duty defined by particularized relationships (privity of contract or special relationship under Restatement (Second) of Torts § 315) and of duty defined by foreseeability despite the absence of such relationships. Professor Murphy sees this bifurcated history intersect and commingle in the Tarasoff cases, with the generalized duty emerging as the true victor.

INTRODUCTION

Nearly a hundred years have passed since Heaven v. Pender1 proposed a rationale of duty of care separate from that which rested on trespass and contract. The rationale proposed would operate without the help of these two primal sources from which, in a remarkable pattern of cross-germination, the operating rules dealing with human conduct in relation to the negligence concept had taken their origin. The rationale proposed was novel, different; but it was more than that. It was revolutionary. This rationale was that duty hinges on foreseeability, nothing more and nothing less.

This capacity for the revolutionization of tort law was recognized immediately by some who were unfriendly to the implications of Heaven v. Pender; they berated it handily. But the law is an accommodating, moderating body. Limited and qualified, the case took its place on that shelf of old bottles we call precedent. Life went on. Acts of momentary neglect took lives and limbs, as they do still on a grander scale. It may be time to attempt to fit Heaven v. Pender and its offspring and kin into an evolutionary scheme; this Article is an attempt. Beginning with a survey of the historical roots of duty here and in England, and then considering the Restatement of Torts special relationship proviso, the Article concludes with an examination of cases on the cutting edge of duty of care evolution, offering a few thoughts on a likely sequel.

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THE ORIGIN OF THE DUTY OF CARE:
RELATION AND FORESEEABILITY

Lord Esher’s famous words in *Heaven v. Pender*\(^2\) constituted the first statement of the modern concept of duty in tort law.

> [W]henever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.\(^3\)

His analysis relied almost wholly upon the idea of relationship. He wondered if there was not some fundamental source of duty of care, a source that subsumed the duty arising out of contract and also out of active trespassory negligence.\(^4\) What was the relation, he asked, between the pilots of two ships approaching each other on a collision course, when one or both of the pilots realized the peril of the situation?\(^5\) His answer was that a relation arose at that very instant when the danger was or ought to have been perceived, and the relation defined the duty. In this way, Lord Esher formulated his "larger proposition,"\(^6\) governing liability irrespective of contract.

Applied to the hypothetical of the pilots and the ships, the larger proposition treated the lives of the two pilots as if they intersected briefly in time and space, and this relation and the concomitant duty continued until the intersection terminated, the ships slid by each other unharmed, and the danger was past.\(^7\) The source of this new relation did not derive from contract law. Lord Esher himself suggested that it was founded in humanism and perhaps in natural law when he stated that "every one ought by the universally recognized rules of right and wrong, to think so much with regard to the safety of others who may be jeopardized by his conduct."\(^8\)

An earlier American case, *Thomas v. Winchester*,\(^9\) played at least some part in the formulation of Lord Esher’s opinion.\(^10\) In this case, a manufacturer of drugs negligently labelled as dandelion extract a jar of belladonna, a poisonous substance. By normal chain of sale the jar of belladonna came into

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2. *Id.* (Lord Esher was previously known as Brett, M.R.). In *Heaven v. Pender*, the defendant, a dock owner, contracted with a shipowner to provide a stage so that the ship's sides might be painted. Plaintiff, the painter, was injured when a rope broke and the stage fell. Although the plaintiff was not in privity of contract with the defendant, he brought a cause of action for his injuries. The lower court denied relief. *Id.* at 504.

3. *Id.* at 509

4. *Id.*

5. *Id.* at 508-09.

6. *Id.* at 509.

7. *Id.* at 508.

8. *Id.*

9. 6 N.Y. 397 (1852).

the hands of a physician who prescribed it to his patient. The manufacturer's
defense to the patient's suit was that he was a remote vendor of the medi-
cine and that he had no "privity or connection" with the physician's pa-
tient. Because there was no relation, there was likewise no duty. This was
the orthodox position. The defendant at most would admit a duty to its
immediate buyer; however, the court ignored the contract of sale. The duty
of care, said the court, arose not from the original sale of the article, but
rather from the nature of the business and the defendant's knowledge that
death or great bodily harm would be the natural and inevitable consequence
of placing a falsely labelled poison on the market. There was, moreover, a
direct relationship between the manufacturer and the patient; it was not
necessary to trace the defendant's obligations into a series of transactions
leading from the manufacturer finally to the injured plaintiff, or to decide
whether the original duty may have been attenuated at successive points in
the chain. The duty was to the whole world, not in the literal sense, as no
more than a few persons could possibly partake of the contents of the mis-
labelled jar, but in the more important sense that by manufacturing drugs
for human consumption the defendant had voluntarily entered into an incho-
ate or potential relationship which might be activated at any time.

Like Lord Esher's opinion in *Heaven v. Pender*, the court in *Thomas v.
Winchester* was primarily concerned with human safety: "So highly does the
law value human life, that it admits of no justification wherever life has been
lost and the carelessness or negligence of one person has contributed to the
death of another." Thus, without pronouncing or articulating Lord Esher's
"larger proposition," the New York court had applied its principle in a
pragmatic American way thirty years before *Heaven v. Pender*.

When, in 1916, Justice Cardozo wrote his opinion in *MacPherson v. Buick
Motor Co.* besides relying upon *Heaven v. Pender*, he referred to

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11. 6 N.Y. at 407.
12. Id. at 408-10.
13. Id. at 409. This phrase originated from an older criminal case, Regina v. Swindall, 175
Eng. Rep. 95, 97 (N.P. 1846). In *Swindall*, the court relied upon principles of criminal law
when it reasoned that a chemist who negligently mislabels and sells a poison thereby causing a
death not only is guilty of manslaughter, but also breaches a tort duty. It was the spirit of the
analogy to criminal law, rather than its logic, that struck the *Swindall* court. Id.
14. Curiously, a case factually similar to *Heaven v. Pender* was decided in New York one
year before that decision: *Devlin v. Smith*, 89 N.Y. 470 (1882). A third party had negligently
constructed scaffolding for the use of plaintiff's employer, and the plaintiff-employee fell to his
death. In both *Heaven v. Pender* and *Devlin* the defense asserted was that there was no privity
of contract between the decedent and the scaffold builder. The *Devlin* court, in holding that the
case fell within the principle of *Thomas v. Winchester*, stated that liability rested "not upon any
contract or direct privity ... but upon the duty which the law imposes on every one to avoid
acts in their nature dangerous to the lives of others." Id. at 477. Although the *Devlin* court thus
recognized that liability hinged on duty, the *Heaven v. Pender* court was the first to articulate
that the source of the duty was foreseeability.
infra.
16. 217 N.Y. at 388, 111 N.E. at 1052.
Thomas v. Winchester as a landmark and as having laid the foundations in this branch of the law. The precise holding of MacPherson, in fact, was to ease the restrictive view that the principle of Thomas v. Winchester was limited to poisons, explosives, and things of a convulsive or violent nature. The wheel of an automobile, if negligently made, could have as much capacity for danger as a deadly poison or dynamite.

Lord Esher's larger proposition applies with an equal amount of logical force to both acts and omissions. Grounded in ethics and a concern for human safety, instead of in positive undertakings, assumptions of duty, or contractual obligations, the larger proposition is blind to the distinction between action and non-action. It requires every person to take affirmative precautions for the safety of others. A similar regard is noticeable in MacPherson, where the court, in effect, told the defendant, "You must take specific actions: you must inspect and test the wheels if you plan to put them on automobiles that you intend to sell to the public." The judicial process had become a mechanism to teach the members of the body politic how they could live safer and therefore better lives. Nevertheless, the doctrine of

17. Id. at 387, 111 N.E. at 1052.
18. Id. Accord, Hodge & Sons v. Anglo-American Oil Co., 12 Lloyd's List L.R. 183 (Ct. of Appeals 1922). The court observed:
   Personally, I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf.
   Id. at 187.
19. This was implicit in the MacPherson holding that negligence would lie when there was either a commission of a negligent act or omission of a duty. The facts in MacPherson indicated an omission, and the contest centered on the question of whether or not there was a duty to inspect. Thus, because an automobile is manufactured with component parts that are often produced by outside sources, and because the automobile manufacturer is responsible for the finished product, it has an affirmative duty to determine whether, as a whole, the car is in safe operating condition. 217 N.Y. at 390, 111 N.E. at 1054. Similarly, in Thomas v. Winchester, it is probable that had the defendant demonstrated that he had maintained control over his operation and taken reasonable steps to minimize the risk of mislabelling, he might have refuted the allegations of negligence.
20. Cardozo's "duty of vigilance" offers a mechanism by which the obligation to take affirmative measures for the safety of others might be translated into specific actions. The duty of vigilance arguably raises the general, or reasonable person, standard of care. As such it is the natural corollary of the duty to take affirmative action. It does not simply describe, it prescribes. The vigilance standard is akin to the trustee's standard of care: to use the same care and prudence that one would use when dealing with his or her own affairs. See G. Bogert, The Law of Trusts and Trustees § 541 (2d rev. ed. 1978); Restatement (Second) of Trusts § 174 (1959). Trust cases often employ the words duty to exercise vigilance when describing the trustee's standard of care. See, e.g., Grace v. Corn Exch. Bank & Trust Co., 287 N.Y. 94, 102, 38 N.E. 449, 452 (1941) (bank under no duty to exercise vigilance to protect estate from possible embezzlement by trustees); Anderson v. Blood, 152 N.Y. 285 (1897) (beneficiaries of estate have strict duty of vigilance in case of intending purchaser).

The addition to the reasonable person standard of an element that requires the actor to reflects on how he or she would wish to be treated thus revolutionizes the concept of duty. It firmly implants on the duty concept the lesson of the Golden Rule, or as Confucianism calls
Heaven v. Pender did not receive acceptance overnight, even in England, and American courts have not yet realized the ultimate implications of MacPherson or Thomas v. Winchester.

In England, Lord Buckmaster, dissenting in Donoghue v. Stevenson in 1932, fairly represented the feeling of many when he said that Heaven v. Pender "should be buried so securely that [its] perturbed spirits shall no longer vex the law." But the majority opinion was seminal. The plaintiff had suffered from shock and gastroenteritis when a snail emerged from a bottle of gingerbeer that she had already half drunk. Before coming into the plaintiff's hands, the sealed bottle had passed from the manufacturer to a distributor, to a storekeeper, who finally sold it to her. The chain of possession was much the same as in Thomas v. Winchester. In Donoghue v. Stevenson, Lord Atkin enunciated the so-called "neighbor principle."

Like Lord Esher before him, he wanted to fashion a succinct yet workable concept of relationship giving rise to duty of care. The neighbor relationship, simple, straightforward, yet containing moral and humanitarian overtones, was Atkin's prototype. In ordinary, everyday life the relationship that exists among neighbors is not an established, definite human relationship, such as those existing between husband and wife, child and parent, creditor and debtor, or employer and employee. It lacks explicit and objective qualities. Still, it is more than a relationship of one man to the world at large, or of one man to a corporate humanity.

Lord Atkin's proposition was that one must take reasonable precautions to avoid acts and omissions that can be reasonably foreseen as likely to injure a

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21. Lord Esher himself supposedly qualified the "larger proposition" of Heaven v. Pender in Le Lievre v. Gould, (1893) 1 Q.B.D. 491, where he stated that "[a] man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them." Id. at 497. See also Earl v. Lubbock, (1905) 1 K.B.D. 253 (driver injured by a wheel disengaging from a van which the driver's employer was bound by contract with the driver to keep in repair; held that no duty existed). Such minor limitations and qualifications, not unusual after a bold principle has been pronounced, typify the two steps forward-one step backward syndrome characteristic of the judiciary's handling of the duty issue. Justice Cardozo followed just such a pattern after MacPherson in Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928). See notes 41-57 and accompanying text infra.

22. See notes 43-59 and accompanying text infra.


24. Id. at 576 (Buckmaster, L.J., dissenting). Lord Tomlin, his co-dissenter, wanted to know where it would all end. He envisioned and shrank back from the prospect where every person injured in a railway accident caused by a defective axle might have a cause of action against the manufacturer of the axle. To him the prospect was appalling. Id. at 600. This was an example of "the most absurd and outrageous consequences" and "the infinity of actions" that Lord Abinger had warned against nearly a century before in Winterbottom v. Wright, 152 Eng. Rep. 402, 404-05 (Ex. 1842), when it was held that an injured coachman, not in privity with the negligent repairer of the coach, could not recover.

25. See notes 9-11 and accompanying text supra.


neighbor. A neighbor, according to Atkin, was any person "so closely and
directly affected by my act that I ought reasonably to have [him] in contem-
plation as being so affected when I am directing my mind to the acts or
omissions which are called in question." He understood this proposition
to be the same doctrine that Lord Esher laid down in Heaven v. Pender. Because
the manufacturer intended his commodity to be consumed, he had
placed himself in a relationship with all potential customers. From that rela-
tionship arose the duty of care.

The effect of Donoghue v. Stevenson was to melt slowly away any further
opposition to Heaven v. Pender. By 1978, it could finally be said with no
small degree of certainty that in England a duty of care did not depend
upon fitting a set of facts into the confines of a previously established rule or
a particular situation; there was no general "no duty" rule. Duty depended
upon whether there was "a sufficient relationship of proximity or
neighbourhood" such that negligence on the part of one person would likely
cause harm to another. If there was such a relationship, then the only mat-
ter left for consideration was whether policy considerations should reduce or
limit the scope of duty. The gist of Heaven v. Pender was that relationship
meant foreseeability of harm resulting from one's acts or omissions, and it
presumed an interest in human welfare.

The American Venture: Ascend and Retreat

In the United States, the path of development from a "no duty" rule to a
presumption of duty has been less clearly defined than in England. In
Thomas v. Winchester, there was no articulation of the foundation of duty
beyond the court's observation that Winterbottom v. Wright was inappli-

29. Id. at 580.
30. Id. at 599.
W.L.R. 1024 (noted in 93 L.Q. Rev. 488 (1977) and 36 Cambridge L.J. 245 (1977)).
33. Id. the Anns court set forth the bifurcated analysis to be undertaken in evaluating the
duty issue.

First one has to ask whether, as between the alleged wrongdoer and the person
who has suffered damage there is a sufficient relationship of proximity or neighbour-
hood such that, in the reasonable contemplation of the former, carelessness on his
part may be likely to cause damage to the latter—in which case a prima facie duty
care arises. Secondly, if the first question is answered affirmatively, it is neces-
sary to consider whether there are any considerations which ought to negative, or
to reduce or limit one scope of the duty or the class of person to whom it is
owed. ...
cable because a poison, unlike a stagecoach, is inherently dangerous.\textsuperscript{a} The court made no attempt to invoke a positive basis for a relationship between the injured patient and the manufacturer. Even Justice Cardozo in \textit{MacPherson v. Buick Motor Co.}\textsuperscript{b} preferred to broaden the rule in \textit{Thomas v. Winchester} to include, besides explosives and poisons, things whose nature is such as to reasonably place life and limb in peril when negligently made.\textsuperscript{c} A wheel with a weak spoke was one such thing of danger.\textsuperscript{d} Yet, it is a truism that anything can be dangerous to human life.\textsuperscript{e} Although Cardozo enlarged the rule in \textit{Thomas v. Winchester} by expanding the field of things likely to result in injury, he failed to deal in terms with the relationship between the parties.

Twelve years after the \textit{MacPherson} decision, in 1928, Cardozo again had an opportunity to theorize about the foundations of duty in \textit{H. R. Moch Co. v. Rensselaer Water Co.}\textsuperscript{f} The defendant contracted with the city to provide water for its inhabitants. A fire occurred, and because of the water company's negligent failure to furnish an adequate supply of water under the proper pressure, the firemen were unable to prevent it from spreading to plaintiff's building.\textsuperscript{g}

The company was in the business of supplying water to meet the needs of the city, and knew that one use of the water of critical importance to the city and its inhabitants was in putting out fires. To establish a \textit{Heaven v. Pender} relation between the water company and the injured plaintiff, it would have been unnecessary to go beyond the definition of a fire hydrant. Likewise, under \textit{Donoghue v. Stevenson}, the plaintiff was clearly a "neighbor" of the water company; the latter ought reasonably to have considered the owners of buildings with regard to its negligent omission to provide water to extinguish fires. It was reasonably foreseeable to the waterworks that a failure to provide water could very likely lead to the loss of life and property. These circumstances created a direct relationship, which was activated when defendant's negligence exposed plaintiff to risk.\textsuperscript{h}

Cardozo, however, denied the existence of the relationship.\textsuperscript{i} Without saying so, he reverted to \textit{Winterbottom v. Wright}. The water supply contract was with the city, not with the plaintiff, who was thus not in privity.

\begin{thebibliography}{9}
\bibitem{36} 6 N.Y. at 408-10.
\bibitem{37} 217 N.Y. 382, 111 N.E. 1050 (1916).
\bibitem{38} Id. at 387, 111 N.E. at 1052.
\bibitem{39} The exception created in \textit{MacPherson} has today swallowed the rule. A long series of decisions following \textit{MacPherson} held that a seller is liable in negligence for any product that may reasonably be expected to be capable of inflicting substantial harm if defective. The courts have found that many products satisfy this standard. \textit{See}, e.g., Smith v. S.S. Kresge Co., 79 F.2d 361 (8th Cir. 1935) (hair combs); Sheward v. Virtue, 20 Cal. 2d 410, 126 P.2d 345 (1942) (chair); Simmons Co. v. Hardin, 75 Ga. App. 420, 43 S.E.2d 553 (1947) (sofa bed); Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946) (perfume).
\bibitem{40} \textit{See}, e.g., cases cited in note 39 \textit{supra}.
\bibitem{41} 247 N.Y. 160, 159 N.E. 896 (1928).
\bibitem{42} Id. at 163, 159 N.E. at 896-97.
\bibitem{43} \textit{See} notes 25-29 and accompanying text \textit{supra}.
\bibitem{44} 247 N.Y. at 166-69, 159 N.E. at 898-99.
\end{thebibliography}
with the water company. The Moch plaintiff was in no better position than the injured coachman in Winterbottom v. Wright.

Cardozo voiced the fear that the assumption of one relation would lead to the involuntary assumption of a series of new relations "inescapably hooked together,"46 a kind of lineal privity bursting forth into an array of entirely new obligations at each link in the chain.47 His rationalization of the case on tort principles depended largely upon characterizing the alleged negligence of the defendant as nonfeasance.48

45. 247 N.Y. at 168, 159 N.E. at 899. The decision was plainly based upon a concern for the "crushing burden," id. at 165, 159 N.E. at 897-98, that would fall on the water companies if liability were imposed, a position that finds adherents exactly a half-century after Moch. See, e.g., Libbey v. Hampton Water Works Co., 118 N.H. 500, 389 A.2d 434 (1978). The fear that liability will be "unduly and indefinitely extended" and the consequent judicial dread of the "crushing burden" is a monotonously repeated theme which is played, with little variation, in case after case where unwilling courts are faced with the challenges of new situations. See, e.g., Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979) (city not liable to injured student for negligently failing to discover a fire code violation); Donohue v. Copiague U. Free School Dist., 64 A.D.2d 29, 407 N.Y.S.2d 574 (1978) (school system not liable for negligent failure to teach former student to read), aff'd, 47 N.Y.2d 440, 418 N.Y.S.2d 375 (1979); Kornblut v. Chevron Oil Co., 62 A.D.2d 831, 407 N.Y.S.2d 498 (1978) (decedent had flat tire on a state thruway in 92° heat; within hour state trooper stopped and reported disabled vehicle to defendant and informed decedent assistance would arrive in 20 minutes; defendant had contract with state to provide assistance to disabled vehicles within 30 minutes of notification; defendant failed to appear and after waiting two more hours decedent, with help of wife and son, changed tire but suffered heart attack in so doing) (Cardozo's "crushing burden" argument in Moch cited with approval in denial of liability), aff'd, 48 N.Y. 853, 424 N.Y.S.2d 429, 400 N.E.2d 368 (1978); Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968) (city not liable when young woman who had repeatedly sought and been refused police protection was murdered by ex-suitor who had repeatedly threatened her life) (in dissent by Justice Kearing, "crushing burden" argument castigated and called a myth). But see Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958) (city liable for negligent failure to provide police protection to informant) ("crushing burden" argument and predictions of dire financial consequences rejected by majority).

To the "crushing burden" argument, and to the "outrageous consequences" and "infinity of actions" that terrified Lord Abinger in Winterbottom v. Wright, the best reply comes in the words of Justice Musmanno in Doyle v. South Pittsburgh Water Co., 414 Pa. 199, 215-19, 190 A.2d 875, 884 (1964), where the court, declining to follow Cardozo's lead in Moch, stated:

Throughout the entire history of the law, legal Jeremiahs have moaned that if financial responsibility were imposed in the accomplishment of certain enterprises, the ensuing litigation would be great, chaos would reign and civilization would stand still. It was argued that if railroads had to be responsible for their acts of negligence, no company could possibly run trains; if turnpike companies had to pay for harm done through negligence, no roads would be built; if municipalities were to be financially liable for damage done by their motor vehicles, their treasuries would be depleted. Nevertheless liability has been imposed in accordance with elementary rules of justice and the moral code, and civilization in consequence, has not been bankrupted, nor have the courts been inundated with confusion.

46. 247 N.Y. at 168, 159 N.E. at 899.

47. Id. at 167-69, 159 N.E. at 898-99. Cardozo stated that a previously existing relationship was necessary before there could be recovery for nonfeasances or omissions, with the one exception of "instruments of harm," such as the automobile with rotten spokes in MacPherson. Id. at 168, 159 N.E. at 898. Thus, he defined the concept of relationship to exclude from its operation relations not containing privity. The result was effectively to immunize the water company from liability.
Superficially, this characterization seems reasonable because the plaintiff had alleged that his loss resulted from a failure to supply enough water. Yet, whether the failure to provide water enough to put out the fire is characterized as an act of commission or omission, or as a misfeasance or a nonfeasance, is irrelevant. The question can only be of semantic interest because it is unanswerable. Moch and MacPherson are similar in that the final end of both defendants' alleged negligence was a condition fraught with foreseeable potential for harm, in one case an insufficient supply of water, in the other a wheel with weak spokes. In MacPherson, the plaintiff isolated a specific act, inspection, which could have minimized the possibility of wheels with weak spokes. In Moch, the plaintiff, having no knowledge at all of the intricacies of operation of a water company, alleged simply the condition which had so obviously caused his loss. The factual genesis of this condition may have originated in specific, directed, physical acts that were so positive and affirmative as to approach recklessness. Without technical knowledge of the operation of a waterworks, it was impossible for the plaintiff or anyone else to say what negligent acts or omissions may have caused insufficient pressure and supply at hydrants.

If, in its legal effect, characterizing the failure to provide sufficient water at the hydrant as an omission is correct, then the whole law of negligence may be accurately described as dealing solely with omission and nonfeasance: the failure to exercise reasonable care. In reducing the problem to an analysis of misfeasance and nonfeasance, Cardozo's decision merely returns circuitously to the old "no duty" rule when the relationship between the wrongdoer and the injured is not forged by contractual privity. The opinions of Cardozo in MacPherson and Moch typify the discontinuity characteristic of the treatment and evolution of the duty concept in the

48. See notes 49 & 50 infra.

49. If we turn to physics for an answer, and take the example of a train crashing into a station because of the inattentiveness of the engineer, it is possible to characterize his negligent conduct both as a misfeasance and a nonfeasance. He negligently failed to turn off the steam valve at the proper time in order to bring the train to stop. He has therefore omitted to do something which he ought to have done: a nonfeasance. The result is that steam continues to flow from the boiler, the engine continues to turn the wheels, and the train smashes into the station, an occurrence which though originating physically in a non-act or non-deed, has all the positive qualities of a misfeasance. To treat this accident as a nonfeasance would be absurd, and Cardozo approvingly cited Kelly v. Metropolitan Ry. Co., [1895] 1 Q.B. 944, which made the same point. He was willing to grant that a passenger could recover from the railway in that example. But to an injured party there is no difference between the engineer who negligently fails to turn off the steam and the waterworks employee who negligently fails to turn on the water. In Moch, liability depends curiously not so much on affective human agency as it does upon the medium through which it operates.


51. See cases cited in note 53 infra.

52. See generally Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791 (1966).
Although Cardozo purported to limit MacPherson narrowly, the principle on which it was based, being identical to Lord Esher's "larger proposition" and Lord Atkin's "neighbor principle," quickly emerged as a potent force in American law. In Moch, on the other hand, there seemed a disappointing affirmation of the privity of Winterbottom v. Wright. The attachment to Winterbottom and Moch continues to co-exist with the progeny of MacPherson in American tort law.

If there was any doubt about the position American courts would take on the basic question posed by the two cases, it was largely settled in 1934 by

53. For cases following MacPherson, see note 40 supra. An equally long line of decisions follow Moch's requirement that privity of contract is needed before liability will be found. See, e.g., City of Jamestown v. Pennsylvania Gas Co., 1 F.2d 871 (2d Cir. 1924) (gas company not liable when it failed to provide gas and injuries resulted); McClendon v. T.L. James & Co., 231 F.2d 802 (5th Cir. 1956) (highway contractor who began work not liable for failure to post warnings about bad conditions on the road); Earl E. Roher Transfer & Storage Co. v. Hutchinson Water Co., 182 Kan. 546, 322 P.2d 810 (1958) (water company not liable for injuries when it failed to provide water); East Coast Freight Lines v. Consolidated Gas, Electric, Light & Power Co., 187 Md. 385, 50 A.2d 246 (1946) (company not found liable for injuries which resulted when company failed to light the streets); Reimann v. Monmouth Consol. Water Co., 9 N.J. 134, 87 A.2d 325 (1952) (water company not liable for injuries when it failed to provide water).

54. 217 N.Y. 382, 385, 111 N.E. 1050, 1051 (1916).


56. 247 N.Y. at 164-66, 159 at 896, 897-98. Justice Cardozo also stated that the person seeking reparation must show that the benefit of the contract to him or her is primary and immediate. Id. at 164, 159 N.E. at 899. In other words, because the plaintiff was not in privity with the water company, the plaintiff had to show that the company intended to be answerable to individual members of the city. Under the Moch analysis, the injured coachman in Winterbottom and the plaintiff in Moch shared equal status: no privity of contract. In other words, if the purchaser of the coach had been injured rather than the third-party coachman, there would have been grounds for an action in tort against the manufacturer. Similarly, if the city had suffered damage to a public building as the result of the water company's alleged negligence, it is clear that the city could have recovered. In reality, however, neither plaintiff was in privity with the supplier. Thus, both were denied recovery.

A few years later, in a seminal and influential article, Harper & Kime, The Duty to Control the Conduct of Another, 43 Yale L.J. 886 (1934), the authors, in approving of Cardozo's treatment of the concept of relationship in Moch, stated that there was no duty to exercise reasonable care with regard to omissions and nonfeasances except where "certain socially recognized relations" existed. Id. at 887. They were not thinking of Lord Esher's larger proposition or Lord Atkin's neighbor principle, which were also framed in terms of relationship; they had in mind situations involving what amounted to legal privity, as for example the relation of parent to child, carrier to passenger, and owner to invitee.

57. See notes 40 & 53 supra.
the Restatement of Torts.\textsuperscript{58} Section 314 of Topic 7 entitled "Duties of Affirmative Action," recognized that there was no general duty to exercise reasonable care with regard to another if that exercise involved the necessity of taking positive action.\textsuperscript{59} There were exceptions dealt with in Topic 7,\textsuperscript{60} and by 1965, when the Second Restatement appeared, a section was added enumerating them,\textsuperscript{61} such as the relationship of a carrier to its passengers,\textsuperscript{62}

\textsuperscript{58} Restatement of Torts (1934).
\textsuperscript{59} Id. § 314. The section states in pertinent part: "The actor's realization that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."
\textsuperscript{60} Id. § 315. The "Special Relationship" section provides:

There is no duty so to control the conduct of a third person as to prevent him from causing bodily harm to another unless,

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right of protection.

\textit{Id.} Thus was created an attractive symmetry: on the one hand a duty to control and on the other a duty to protect, with the special relation acting as the generative touchstone. Despite its nice appearance, when read in conjunction with §§ 316-320, it becomes questionable whether § 315 was or indeed was even meant to be anything more than a superficial abridgment of the latter sections, and itself devoid of intrinsic content. As far as the duty to control (§ 315(a)) is concerned, Comment c explicitly observes that "the relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316-319."

Those sections dealt with the duty of a parent to control a child (§ 316), of a master to control a servant (§ 317), of the owner of land to control a licensee (§ 318), and of one in charge of a dangerous person (§ 319). As far as § 315(b) (the duty to protect) is concerned, that section seems to be no more than a concise nutshell of § 320 (duty of person having custody of another to control conduct of third persons) (i.e., to protect the person in custody), and Comment a of § 320 describes it as applicable to sheriffs, jailers, wardens, officials, and teachers. In fact, Comment c to § 315 tells us that "another relationship which creates the same duty as stated in § 320." One is led to wonder whether § 315 served any singular function at all.

\textsuperscript{61} Restatement (Second) of Torts § 314A (1965). The section reads as follows:

\textbf{§ 314 A. Special Relations Giving Rise to Duty to Aid or Protect}

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against unreasonable risk of physical harm, and

(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

(2) An innkeeper is under a similar duty to his guests.

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Even though § 314A by the terms of its caveat left room for the addition of duties, it was apparent that any "new" duties could not come from beyond the ambit defined by the protection-control "special relationship," a rather limited field for expansion. Moreover, according to the Restatement, the only case found from 1934 to 1965 which recognized a tort duty arising from a relation not specifically stated in § 314A (or, by implication, in §§ 316-320), was Hutchinson v. Dickie, 162 F.2d 103 (6th Cir. 1947), where a guest on a private yacht fell overboard. Restatement (Second) of Torts (Appendix) § 314A, Caveat, at 17 (1965). This use of the term "special relationship" in § 315 is miles apart from Lord Thackerton's use of the same term in Donoghue v. Stevenson, [1932] A.C. 562, 603.

\textsuperscript{62} Restatement (Second) of Torts § 314A (1965).
an innkeeper to his guests, a possessor of land to members of the public coming in response to an invitation, and one having custody of another who is unable to care for himself or herself. While section 315 spoke of a "special relationship" as the requirement necessary for the imposition of a duty of care, it was clear that the section contemplated "socially recognized relationships." The introduction of new specific duties or a general evolution into the duty of care found in Heaven v. Pender would have to employ the Restatement somehow and fit into the protection-control reasoning of section 315.

Courts typically used section 315, the "special relationship" section, as a tool to deny liability in those novel situations that constitute the stuff from which tort law is continually developing. Thus, in Richards v. Stanley, where the defendant parked his automobile on a busy street and left it unlocked with the keys in the ignition, a thief stole the automobile, and injured the plaintiff, the California court held that "in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another." If the duty question in Richards v. Stanley had been analyzed in terms of Heaven v. Pender, the question would have been whether the owner of the vehicle was in such a position with regard to the plaintiff, a member of the

63. Id.
64. Id.
65. Id.
66. RESTATEMENT (SECOND) OF TORTS § 315 (1965). This section states the general principle of the Duty to Control Conduct of Third Persons:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

The Restatement clearly indicates that § 315 is a special application of § 314. Id. at Comment a.

67. See notes 65-68 and accompanying text infra.
68. See note 63 supra.
69. See, e.g., Nipper v. California Automobile Assigned Risk Plan, 19 Cal. 3d 35, 136 Cal. Rptr. 854, 560 P.2d 743 (1977) (even though the insurance company knew the insured was incapable of driving safely and that its insurance allowed insured to drive, it was not liable for injuries to the plaintiff caused by the insured's reckless driving); Totten v. More Oakland Residential Hous., Inc., 63 Cal. App. 3d 538, 134 Cal. Rptr. 29 (1976) (landlord is not liable when an intruder shoots tenant's guest in the laundry room); Martin v. Ushev, 55 Ill. App. 3d 409, 371 N.E.2d 69 (1st Dist. 1977) (landlord not liable for injuries to tenant caused by an intruder even though landlord failed to repair locks and lights in the building's common area).
70. 43 Cal. 2d 60, 271 P.2d 23 (1954).
71. Id. at 67, 271 P.2d at 27. The plaintiff was a member of the public who had the misfortune to be in the wrong place when the thief negligently collided with him. Obviously, plaintiff had no pre-existing "special relationship" with the owner of the vehicle. Nor was there any relationship, special or otherwise, between the owner and the thief. The owner did not even know of the thief's existence, much less have him in his custody or control. Therefore, the court held that § 315 did not operate to trigger liability. Id. at 65-66, 271 P.2d at 27.
public, that in the exercise of ordinary sense he should have realized the
danger of failing to use reasonable care to prevent access and use of the
automobile by other persons.\footnote{72} If a court goes so far as to answer this ques-
tion affirmatively, then a general relationship supporting a duty of care ex-
isted between the owner of the vehicle and the injured party. Liability,
even after a general relationship is found to exist, is still not certain to fol-
low. The question of whether leaving the ignition keys in an automobile falls
within the scope of protection of the rule formulated by the general rela-
tionship existing between the owner and the public can be answered dif-
ferently by different courts,\footnote{73} and differently by the same court at different
times.\footnote{74}

In \textit{Richards v. Stanley}, however, plaintiff was not asking the owner of the
vehicle to control the imprudent interloper; the plaintiff was asking the
owner to control himself. He was not asking for protection from another who
happened to be driving the owner's vehicle; he was asking the owner not to
create in the first place a situation fraught with danger. By basing its deci-
sion upon section 315 of the Restatement, the court not only avoided a con-
sideration of the general relationship but also avoided the more basic, diffi-
cult question of whether policy should reduce or limit the scope of the
rule.\footnote{75} Although Justice Traynor's use of section 315 of the Restatement in
\textit{Richards v. Stanley} attracted some favor,\footnote{76} the same California court avoided
\begin{footnotes}
\footnotetext{72}{Another problem that arises regarding § 315 is the question whether leaving the keys in
the ignition is action or inaction. In favor of inaction, it could be said that what occurred was a
failure to remove something that ought to have been removed. On the other side, it could be
argued that in leaving something in the automobile that ought not to be left, the owner committ-
ted, rather than abstained from committing, a positive act. When the dividing line between
action and inaction is this unclear, the relevancy of a § 315 analysis should be questioned.
Section 315, after all, is limited to putative duties involving positive or affirmative action. In
\textit{Richards}, the court rationalized that removing the keys was a positive action. \textit{Cf. Ney v. Yellow
Cab Co.}, 2 Ill. 2d 74, 117 N.E.2d 74 (1954) (the court did not consider whether, in general,
accidents are foreseeable if one leaves the car in a situation for another to take, but whether
under the facts of this case, a theft of the car and hence an accident were foreseeable. Because
the defendant left his car running and unattended, theft was foreseeable and he was liable for
injuries caused by the theft).}

\footnotetext{73}{Courts finding negligence include: \textit{Schaff v. R.W. Claxton, Inc.}, 144 F.2d 532 (D.C.
Cir. 1944); \textit{Boss v. Hartman}, 139 F.2d 14 (D.C. Cir. 1943); \textit{Mellish v. Cooney}, 23 Conn. Supp.

\footnotetext{74}{For example, one year after \textit{Richards}, the California Supreme Court found liability
when defendant left his bulldozer unlocked on a canyon plateau and he had had past experience
of meddling. \textit{Richardson v. Ham}, 44 Cal. 2d 772, 285 P.2d 269 (1955). Similarly, the Pennsylva-
nia Supreme Court found liability for injuries caused by a stolen car in \textit{Anderson v. Bushong

\footnotetext{75}{\textit{See notes 32 & 33 and accompanying text supra.}

\footnotetext{76}{\textit{Permenter v. Milner Chevrolet Co.}, 229 Miss. 385, 91 So. 2d 243 (1965). But \textit{compare}
\textit{Permenter v. Milner Chevrolet Co.}, 229 Miss. 385, 405, 91 So. 243, 252 (1965) (Holmes, J.,
dissenting) \textit{with Ney v. Yellow Cab Co.}, 2 Ill. 2d 74, 85-86, 117 N.E.2d 74, 81 (1954).}
the "special relationship" section when in two later cases with slightly different facts it held for the plaintiffs.\textsuperscript{77}

A contrast between two cases—\textit{Wright v. Arcade School District}\textsuperscript{78} and \textit{Raymond v. Paradise School District}\textsuperscript{79}—helps to illuminate the interplay of general duty and special relationship. In \textit{Wright}, a five year old boy was struck by a negligently driven automobile on his way home from school. The plaintiff alleged that the accident occurred because of the "negligence of the school district in failing to provide protection,"\textsuperscript{80} thereby asserting, presumably, that the school should have provided someone at the intersection to supervise the children as they crossed. Citing both \textit{Richards v. Stanley} and section 315, the court fell back on the same old chestnut that one has no duty to take affirmative steps to protect another unless there is "a duty to act emanating from some special relationship recognized by the law."\textsuperscript{81} Accordingly, the court held that the school had no duty to exercise reasonable care for the safety of five year old children crossing busy intersections near the school because such a duty would involve affirmative, positive acts.\textsuperscript{82}

The dissenter, however, thought that the facts of \textit{Wright} fell within the "special circumstances" exception contained in \textit{Raymond}, decided only a year earlier by the same court.\textsuperscript{83} There, a seven year old child was struck

\begin{itemize}
\item \textsuperscript{77} Hergenrether v. East, 61 Cal. 2d 440, 393 P.2d 164 (1964) (discussed in note 83 infra);
\item \textit{Richardson v. Ham}, 44 Cal. 2d 772, 285 P.2d 269 (1955) (discussed in note 83 infra).
\item \textsuperscript{78} 230 Cal. App. 2d 272, 40 Cal. Rptr. 812 (1964).
\item \textsuperscript{79} 218 Cal. App. 2d 1, 31 Cal. Rptr. 847 (1963).
\item \textsuperscript{80} 230 Cal. App. 2d at 276, 40 Cal. Rptr. at 814.
\item \textit{id.} at 277, 40 Cal. Rptr. at 814.
\item \textit{id.} at 277-78, 40 Cal. Rptr. at 814.
\item \textsuperscript{82} Hergenrether v. East, 61 Cal. 2d 440, 393 P.2d 164, 39 Cal. Rptr. 1 (1964), was based on an action for personal injuries resulting from the negligent operation by an unknown thief of a truck which defendant's employee had left parked overnight on a skid row street, unlocked and with the key in the ignition. The court noted several significant circumstances which were instrumental in its decision. \textit{id.} at 445, 393 P.2d at 167, 39 Cal. Rptr. at 7.
\end{itemize}
DUTY OF CARE

by a school bus while waiting for it in the designated waiting zone on school property. 84 The plaintiff’s allegation of negligence in Raymond was the failure to provide supervision in the bus loading zone. 85 Agreeing, the court formulated a duty to exercise care that was blind to differences between action and inaction. 86 Taken together, the two cases revealed a predilection to resort to section 315’s “special relationship” analysis when the court was determined to deny liability, and an equal predilection to venture in the direction of the general relationship when the court wished to find a duty.

INCURSIONS ON SPECIAL RELATIONSHIP AND RENEWAL OF THE LARGER PROPOSITION

Justice Friedman had based his own conception of duty, with its weighing and balancing of determinative factors, on the California Supreme Court’s opinion in Amaya v. Home, Ice, Fuel & Supply Co. 87 It was with Amaya that the evolution from a no-duty rule into a general duty of care based upon foreseeability was nearing its penultimate stage, at least in California.

The facts of Amaya involved neither a nonfeasance nor a “special relationship.” A mother had helplessly seen her infant negligently run down by a truck. The issue was whether she could recover from the nervous shock and illness she had suffered caused solely by her apprehension of danger for her son. 88 The rule in such cases had long been that recovery was not allowed unless the shock and consequent illness were induced by the fear for one’s own safety. 89 In practical terms, the question was whether the court would adhere to a firmly established precedent or regard the mother’s own injury as a wrong with a remedy.

85. Id.
86. These were the very factors prompting the Wright Court’s denial of relief. See notes 78-82 and accompanying text supra. In both Raymond and Wright the injuries to the children resulting from the failure to supervise were plainly foreseeable. According to the accepted view, however, there was no obligation to take affirmative action for their safety. In both cases the court purported to weigh the eight delicate policy judgments. As a result, liability was imposed in Raymond and not in Wright. Foreseeability, however, is distinct from the other factors. Foreseeability forms a consideration that should have been weighed in a balancing process against all the other liability limiting factors because foreseeability is congruent with the presumptive duty. In Wright, however, as is discussed more fully below (see note 126 infra), the court’s conclusion that no liability should follow was a pure value judgment because the court devalued the importance of foreseeability by placing that consideration together with the other various factors in the balance it purportedly employed in reaching its decision.
88. Id. at 298, 379 P.2d at 514, 29 Cal. Rptr. at 34.
89. See, e.g., Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935) (no liability for plaintiff’s death even though it was the result of seeing her daughter killed by defendant’s negligently driven auto). See generally W. Prosser, HANDBOOK OF THE LAW OF TORTS § 54, at 333-35 (4th ed. 1971).
In the lower appellate tribunal, Justice Tobriner, relying upon the neighbor principle of *Donoghue v. Stevenson*, reasoned that the mother was "so closely and directly affected" by the act of the driver of the truck that he should have contemplated her as he drove the truck. In its simplest statement, the rule Tobriner proposed was that the mother was a foreseeable victim because it was foreseeable that the mother witnessing her infant run down by a truck would suffer shock and emotional anguish. In an analysis containing substantial ethical content, Tobriner said that it was not consonant with the reactions or the mores of contemporary society to hold otherwise, and that, in a time of death and danger on the highway, it would be anachronistic to grant immunity to the negligent driver of the truck on the basis of "legal abstractions." Tobriner briefly traced the evolution of the concept of duty from feudal times, which fastened upon the actor a rule of strict liability, through the time of the industrial revolution, which entitled a man to do as he pleased "towards the whole world" unless a duty existed, up to the time of the formulation of the neighbor principle in *Donoghue v. Stevenson*. In feudal times, explained Tobriner, the nature of society "imposed an imperative for maximum procurable safety." If this was so, Tobriner implied, then in these times of "death and danger on the highway" a similar imperative should be imposed to protect us from the automobile. It would be imposed, not by a return to strict liability, but by an easing of the equally strict no-duty rules which had their genesis in the time of the industrial revolution.

Playing a central part in Tobriner's analysis of the issue were two identifiable features: the strong ethical current, evidenced by his reliance on *Donoghue v. Stevenson*, and a keen concern for human safety. Most people had come to accept the slaughter on the highways as a fact of life. Tobriner was asking, in effect, whether this was the proper attitude. On appeal, the Supreme Court of California reversed Tobriner's opinion in a 4 to 3 decision. Justice Schauer, writing for the majority, thought that foreseeability was not enough to trigger liability unless there was some foundation for it, namely, a duty. Although this case did not involve a nonfeasance, Schauer expressed approval of the duty framework of *Richards v. Stanley*, citing that case three times in his opinion. When Schauer came to weigh the factors, which he differentiated and designated as administra-
tive, socio-economic, and moral factors, his scales tipped heavily in favor of the defendant. In interesting contrast to Tobriner, who was bothered by the slaughter on the highways, Schauer thought that as our industrial society becomes even more complex, increased accidents on the highways become "statistically inevitable." We were a fast growing industrial society, still in its youth, a hard-driving people, both in our daily pursuits and in our automobiles. Abjuring Tobriner's path, which he felt led only into a "fantastic realm of infinite liability," Schauer and the majority reversed his decision.

Amaya is instructive on several counts. For the first time since MacPherson, an influential American court in a significant case had made pivotal use of the general relationship concept announced in Heaven v. Pender and reiterated in Donoghue v. Stevenson. Justice Tobriner had used the latter case as the starting point of his analysis; Justice Peters adopted in his dissent the Tobriner opinion, word for word. Second, it was apparent that the preservation and salvation of the no-duty concept would have to depend largely upon manipulation and application of the feasance dichotomy and the privity concept. Therefore, section 315 of the Restatement would begin to play a more prominent role in liability-denying rationales. Amaya is also instructive because it shows the divergent positions of the no-duty and pro-duty factions on the subject of human safety.

101. Id. at 308-15, 379 P.2d at 521-25, 29 Cal. Rptr. at 41-45. Factors to be weighed against the risk of harm include the availability of funds and personnel to correct the problem, the ease with which the duty can be undertaken and the ability of others to also exercise protection, the desirability of limiting the role of foreseeability so as to avert fraudulent claims, the practical problems of administering justice where feasible, the difference between negligent and intentional acts, the fact that every injury is not practically compensable, and the need to balance the social utility of the action against the probability of risk of ensuing harm. If these other factors are present, the relative weight of the foreseeability factor is diminished and a duty will not be present. Id. at 315, 379 P.2d at 525, 29 Cal. Rptr. at 45. See note 126 infra.
102. Id.
103. Id.
104. Id.
106. 23 Cal. Rptr. 131, 134 (1962).
107. 59 Cal. 2d at 320-23, 379 P.2d at 528-36, 29 Cal. Rptr. at 48-56.
108. See notes 47-52 and accompanying text supra.
109. Until the decade of the 1970's, § 315 was only rarely utilized by the courts; however, beginning about in the mid-1970's, the "special relationship" analysis of § 315 has attracted increasing favor, both from courts denying liability and also from those finding a duty. A frequency summary of appellate cases follows:
Five years later, Justice Tobriner, now a member of the California Supreme Court, authored the decision that overruled Amaya: Dillon v. Legg.109 A few months later, in Rowland v. Christian,110 the same California court took another step to put the no duty rule to rest when it abolished the classification of trespassers, licensees, and invitees, and the corresponding degrees of duty of care owed by the landowner to each. Like Tobriner's opinion in Amaya, Justice Peters' majority opinion in Rowland indicated a concern for human safety112 and displayed a rationale with moral perspective.113 Most significant, however, is the use to which Peters put Heaven v. Pender; it formed the starting point of the analysis, just as did Donoghue v. Stevenson in Tobriner's Amaya opinion.114 Identifying California's Civil Code section 1714115 with the larger proposition, Peters said that "a departure from this fundamental principle involves balancing a number of considerations."116

In Rowland a guest suffered an injury when he turned the handle of the cold water faucet in a friend's apartment. The defective handle, which the friend had known about for some time, shattered in the guest's hand, severing nerves and tendons.117 The facts showed a negligent omission, or nonfeasance. The injured guest alleged that the defendant did not undertake the positive, affirmative act to warn him about the handle's condition.118

1934 - 1939 1
1940 - 1949 5
1950 - 1959 3
1960 - 1969 5
1970 - 1979 40+

The "special relationship" analysis is thus a rapidly expanding concept in tort law. See Mann v. State, 70 Cal. App. 3d 773, 779, 139 Cal. Rptr. 82, 86 (1977).


111. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

112. Id. at 111-19, 443 P.2d at 563-68, 70 Cal. Rptr. at 99-104.

113. Id.

114. Id. at 112, 443 P.2d at 564, 70 Cal. Rptr. at 100.

115. CAL. CIVIL CODE § 1714(a) (West Supp. 1980). This section states in pertinent part:

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

Id.

116. 69 Cal. 2d at 112-13, 443 P.2d at 564, 70 Cal. Rptr. at 100. From the grammatical context it is clear that the court contemplated § 1714 of the Civil Code when it referred to the "fundamental principle." Nevertheless, the identification of that section with Heaven v. Pender, along with a confusing syntactical placement of its antecedents, tended to point to either as a source of the "fundamental principle." While the principle could be found in § 1714, it was also a common law principle traceable to Heaven v. Pender.

117. 69 Cal. 2d at 110, 443 P.2d at 563, 70 Cal. Rptr. at 99.

118. Id.
Under the traditional status approach, had the plaintiff been an invitee, instead of a licensee, the relationship between invitee and landowner would have supported an obligation to take positive action to provide for the safety of the invitee, either by repairing the defective handle or by warning the guest of the danger. In *Rowland*, the nonfeasance aspect of the situation was not examined for the very reason, paradoxically, that it was at the center of the problem. It was because *Rowland* involved a nonfeasance that the guest, standing in the shoes of a licensee, could not recover because a licensee could only have recovered for a misfeasance. Had he been an invitee, he could have recovered for the nonfeasance or failure to warn.

The intellectual purity of Justice Peters’ rationale deserves mention. Significantly, he did not treat the proposed exception to the rule of the categories as a departure from the common law; rather, he treated the categories themselves as the departure from the common law. Peters therefore applied the balancing process, not to a presumptive rule of no-duty, but to the negating force of the limitation which, as a system of grouping into categories, now pressed in upon the fundamental principle. When the product of the balancing process was measured against the exterior standard of foreseeability, no justification could be found for the continuation of the limitation exerted on the fundamental principle. The categories receded: the residual fundamental principle remained. Naturally, the weighing of

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119. See, e.g., Chance v. Lawry’s, Inc., 58 Cal. 2d 368, 374 P.2d 185, 24 Cal. Rptr. 209 (1962) (proprietor who knows of, or has reason to know of by exercise of reasonable care, an artificial condition that creates an unreasonable risk to business invitees is under a duty to exercise reasonable care to repair the condition or to give adequate warnings to allow said invitees to avoid the harm); Beauchamp v. Los Gatos Golf Course, 273 Cal. App. 2d 20, 77 Cal. Rptr. 914 (1969) (golf course owner is under duty to use reasonable care to keep premises in a reasonably safe condition and to give warnings to invitees of latent or concealed peril).

120. Id.


122. See note 119 supra.

123. 69 Cal. 2d at 117-19, 443 P.2d at 567-68, 70 Cal. Rptr. at 103-04. In this regard the court stated:

> Complexity can be borne and confusion remedied where the underlying principles governing liability are based upon proper considerations. Whatever may have been the historical justifications for the common law distinctions, it is clear that those distinctions are not justified in the light of our modern society and that the complexity and confusion which has arisen is not due to difficulty in applying the original common law rule—they are all too easy to apply in their original formulation—but is due to the attempts to apply just rules in our modern society within the ancient terminology.

124. Id. at 117, 443 P.2d at 567, 70 Cal. Rptr. at 103.

125. Id. at 117-19, 443 P.2d at 567-68, 70 Cal. Rptr. at 103-04.

126. Id. At this juncture it might be useful to comment generally on one aspect of this new approach to the duty concept taken by the California courts and culminating in *Rowland* v. *Christian*. In Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958), the court stated that the
the factors in the balance called for policy judgments, but it now took place as an inquiry into the justification of limitations on already existing duties.

determination of whether a defendant would be held liable involved "the balancing of various factors." They were: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered the injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm. \textit{Id.} at 650, 320 P.2d at 19. In \textit{Amaya}, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), see notes 87-110 and accompanying text supra, the court repeated the six factors. In doing so, however, it depreciated the importance of the "foreseeability factor," stating that it was only one of the relevant factors. \textit{Id.} at 307-10, 379 P.2d at 520-22, 29 Cal. Rptr. at 40-42. Furthermore, the \textit{Amaya} court coalesced the six factors into what it termed the administrative, socio-economic, and moral factors. \textit{Id.} at 310-15, 379 P.2d at 522-25, 29 Cal. Rptr. at 42-45. The number of factors to be considered seemed to decrease or increase to suit the court's convenience. For example, in both Raymond v. Paradise Unified School Dist., 218 Cal. App. 2d 1, 8, 31 Cal. Rptr. 847, 851 (1963), and Wright v. Arcade School Dist., 230 Cal. App. 2d 272, 278, 40 Cal. Rptr. 812, 815 (1964), Justice Friedman listed not six, but eight considerations which he termed "delicate policy judgments" to be weighed in the balance.

Each of these lists may be traced, by one route or another, to two influential articles in tort law: Green, \textit{The Duty Problem in Negligence Cases: II}, 29 Colum. L. Rev. 255 (1929); Green, \textit{The Duty Problem in Negligence Cases}, 28 Colum. L. Rev. 1015 (1928). Green originated the enumeration and consideration of policy factors which have come to be considered a legitimate step in the resolution of the duty question. See also 2 F. Harper & F. James, \textit{The Law of Torts \S 18.6, at 1052 (1956).}

In addition, it is of more than passing interest that Green's celebrated formulation of his "determinants of duty" occurred at least partially as a result of his dissatisfaction with \textit{Heaven v. Pender}. Recognizing that the "larger proposition" was indistinguishable from the foreseeability test, he found it unacceptable that the law "should provide the judge with the same formula for use in determining the existence of duty as it does to the jury for the determination of the violation of duty." Green, \textit{The Duty Problem in Negligence Cases}, 28 Colum. L. Rev., 1015, 1028-29 (1928).

A continuing enigma in tort law is the mechanics of the balancing process. How does the court, after making a series of "delicate policy judgments," relate the resultant product of the balancing process to an exterior standard against which that product can be measured in order for liability to attach? Without some method by which to compare the product of the balancing process with an exterior standard, it is impossible to impose liability. The consideration of each of the factors may be learned and knowledgeable; and the balancing process itself may be presumed, whatever its actual merits, to be a valid mechanism. Yet the balancing occurs, so to speak, "in the air." Its product, no matter how weighty, cannot explain the imposition of liability, unless something is weighed against that product. If the balancing process proceeds from a position of presumptive non-duty, there is no bridge between the process itself and the decisional result.

Assume, however, that we start from a position of presumptive duty. The basis of such a position is the positive principle developed in \textit{Heaven v. Pender} and in \textit{Donoghue v. Stevenson}. The change immediately causes a diatametical shift in the axis of the balancing process. The object of the balancing process now becomes one of limitation on the presumptive duty, and the negating force of each of the factors must be examined. Presumptive liability based on foreseeability provides the exterior standard against which to assay the product of the balancing process. For example, in both Raymond and Wright the injuries to the children resulting from the failure to supervise were plainly foreseeable, but according to the accepted view there was no obligation to take affirmative action for their safety. In his analysis, Justice Friedman purported to weigh in the balance the eight delicate policy judgments, so called, and thereupon
rather than as a judicial option to be exercised in an open-ended creation of new duties.127

The fundamental principle that Peters propounded was identical to the larger proposition of Lord Esher128 and to the neighbor principle of Lord Atkin. In determining liability, the question was, in the words of the English Court of Appeal in 1978, whether there was a "sufficient relationship of proximity or neighbourhood,"130 such that in reasonable contemplation carelessness on one's part would likely cause damage.131 If there was, there existed a "prima facie duty."132

imposed liability in Raymond and denied it in Wright. But foreseeability cannot be a factor to be weighed; or, if one chooses to call it such, it is of an order different and distinct from the other factors. Understood in this sense, it would not be inaccurate to state that foreseeability, being congruent with the presumptive duty, is a factor against which the aggregate weight of the other limiting factors is balanced. In Wright, then, the foreseeability factor is outweighed by the combined weight of the other various factors. The conclusion of no liability follows. The ostensibly approach in Wright, however, and the approach of dozens of later opinions purporting to use the so-called balancing process, was to lump foreseeability together with the other factors and to downgrade its importance, in a generalizing, delimiting deliberation whose conclusion must rest ultimately upon no more than a value judgment.

In Rowland v. Christian, the "fundamental principle" was formulated as a positive basis on which to premise liability. It was put forth as the source of the duty. The court stated that "a departure from the fundamental principle involves balancing a number of considerations." 69 Cal. 2d at 112-13, 443 P.2d at 564, 70 Cal. Rptr. at 100. The major considerations, with one exception, are the same six factors noted in Biakanja and in Amaya.

If the Rowland court had attacked the problem in the same way as the Raymond and Wright courts had, it would have, first, recognized the orthodox common law rule that the duty of landowners and occupiers is governed by the categories, that is, the status as either trespasser, licensee, or invitee that the injured party may have occupied. See Palmquist v. Mercer, 43 Cal. 2d 92, 272 P.2d 26 (1954). Second, it would have noted that, according to California law, the status of the plaintiff as a licensee imposed no duty on the part of the defendant to warn him of the dangerous faucet handle. Id. See also Oettinger v. Stewart, 24 Cal. 2d 133, 148 P.2d 19 (1944). Finally, uncomfortable with the result dictated by that rule, the court would have introduced the balancing process, indicating that the determination of whether a duty existed in a particular case depended on weighing in the balance a number of factors, the same factors which Justice Friedman in Raymond and Wright had characterized as "delicate policy judgments."

It is difficult to find any nexus calling for the implementation of this balancing process beyond a personal displeasure with the result dictated by the application of the rule shielding the defendant from liability. Thus, the only purpose of the balancing process appears to be to get around that unpopular rule. Moreover, the proposition that an affirmative declaration of duty amounts to a statement that two parties stand in such a relationship that the law will impose on one a duty of care toward the other becomes a rather circular truism. See Raymond v. Paradise Unified School Dist., 218 Cal. App. 2d 1, 8, 31 Cal. Rptr. at 847, 851 (1963). After purporting to weigh the factors in the balance, the Rowland court would have concluded that a duty should, does, or ought to exist, and accordingly have found for the plaintiff, without having first justified the use of the balancing process.

127. See note 126 supra.
128. See notes 1-8 and accompanying text supra.
129. See notes 25-30 and accompanying text supra.
131. Id.
132. Id.
This question being answered affirmatively, a second question arises: are there any considerations which ought to negate or reduce or otherwise limit the scope of the duty? The function this second question performs is precisely the same function that the so-called "balancing process" performed in Rowland, with the noticeable difference that it has the advantage of avoiding the verbal ambiguities suggested by the concepts of balancing and weighing. It was clear that Rowland v. Christian propounded the first definitive statement in the United States adopting the larger proposition found in Heaven v. Pender. In itself this was significant. Moreover, it was inferable that the "fundamental principle" would attach no import to the feasance dichotomy and its cousin, privity. There was every reason to believe that the fundamental principle, like the larger proposition and the neighbor principle, would be blind to any supposed distinction between misfeasance and nonfeasance.

The Tarasoff Intersection

The two lines of development—one, represented in Heaven v. Pender, Donoghue v. Stevenson, MacPherson, and culminating in Rowland, and the other traceable to Winterbottom v. Wright, represented in Moch and

133. Id.

134. The designation of the second question as one of balancing the factors is unfortunate because it tends to disperse the court's attention in many directions. Furthermore, with characteristic thoroughness, most American courts weigh all the factors. In all probability, however, only one or two of them have any relevance to the question. Properly understood, it is not a balancing process anyway. Despite the characterization, no balancing or weighing goes on, either literally or figuratively. What occurs is an inquiry into the question of whether or not there are considerations which ought to limit the presumptive duty. The inquiry is in no way advanced by attempting to "balance" or "weigh" half a dozen or more so-called "factors," most of which can have no dispositive bearing on the problem. The result of the enumeration and separate consideration of these numerous factors is the partial occlusion or depreciation of the one determinative consideration. The intrusion of foreseeability into these various factors waiting to be balanced and weighed results in even more confusion. This bogus factor in the balancing process has already done its work. It is admittedly of the utmost importance in answering the first question of whether there exists a relationship of proximity or neighborhood in determining whether or not a presumptive duty exists. Once foreseeability has served this purpose, it has exhausted its usefulness. To put foreseeability to work in this second question of whether to limit or negate the duty is logically redundant, as the second question would not be asked at all except for the fact that foreseeability has been found in sufficient quantity to give rise to a presumptive duty.

Foreseeability is not a factor in the scales but rather the sine qua non of the balancing process itself. In a case involving the imposition of a duty to take affirmative action, foreseeability may be seen as triggering the balancing process, but not as a part of it.

135. The re-orientation of the fulcrum of liability that occurred in Rowland as a result of the abandonment of the tripartite categories (trespasser, licensee, and invitee) and the adoption of the general standard of care poses interesting theoretical possibilities. Under the categories, the characterization of negligent conduct as a misfeasance or a nonfeasance was irrelevant. Relevance lay in the legal status of the injured party. When that was determined, the application of a defined set of rules was comparatively easy. However, with the categories swept away in Rowland and replaced with a general duty of care, the question arises as to what extent the
Richards v. Stanley, and epitomized in section 315 of the Restatement—intersected during the mid-1970’s in Tarasoff v. Regents of the University of California. Making use of both the fundamental principle enunciated in Rowland and the special relationship analysis of section 315, the court held that the defendant psychotherapists were liable for their failure to warn the intended victim of their patient.

Although the result is consistent with Heaven v. Pender, the decision must be criticized because the duty emanating from section 315, articulated and developed historically in terms of control and protection, has a wider scope of operation and demands in effect a higher standard of care than that imposed by the general rule that requires the exercise of due care. More importantly, section 315 requires what approaches, and very nearly amounts to, a fiduciary or confidential relationship.

All the relationships mentioned in topic 7 of the Restatement and abstracted in section 315 have in common a peculiarity, appearing on its face to be perhaps no more than redundancy. The peculiarity is that the relationships, irrespective of tort principles, have traditionally been defined in terms of the duty to protect or to control. Viewed from negligence principles, the attachment of a duty to exercise reasonable care with regard to one standing in a particular relation is quite sufficient, once the relation entailing the duty is established. But the Restatement particularizes the duty: it is to protect, in one class of relations, and to control in the other. The general requirement in the formulation of duty under negligence principles is to use due or reasonable care, that is, to be prudent; however, under the Restatement (Second) of Torts § 315 (1965), courts have sometimes seemed to require almost a fiduciary or confidential relationship between the defendant and the tortfeasor. See, e.g., Whitcombe v. County of Yolo, 73 Cal. App. 3d 698, 706, 141 Cal. Rptr. 189, 193 (1977) ("breach of special relationship" used to describe the county’s alleged failure to ascertain whether a probationer was dangerous to the public).

Passive character of a negligent omission might be a factor in the determination of liability. Foreseeability is now the key factor, and foreseeability of harm is ordinarily greater to an invitee than it is to a trespasser. Still, as the Rowland court noted, in a particular case the opposite might be true. 69 Cal. 2d at 117-18, 443 P.2d at 567, 70 Cal. Rptr. at 103. It is conceivable, therefore, that in a given situation there might be found a duty to a trespasser where none exists to an invitee. Moreover, for the duty to take affirmative action for the safety of the invitee, which formerly derived from his status, there must now be a new origin.

137. Id. at 557-59, 118 Cal. Rptr. at 133-35.
138. See notes 68-86 and accompanying text supra.
139. See notes 1-4 and accompanying text supra.
140. See notes 61-67 and accompanying text supra. When applying the special relationship analysis found in the Restatement (Second) of Torts § 315 (1965), courts have sometimes seemed to require almost a fiduciary or confidential relationship between the defendant and the tortfeasor. See, e.g., Whitcombe v. County of Yolo, 73 Cal. App. 3d 698, 706, 141 Cal. Rptr. 189, 193 (1977) ("breach of special relationship" used to describe the county’s alleged failure to ascertain whether a probationer was dangerous to the public).
141. See notes 59 & 60 and accompanying text supra.
142. Id.
143. Id.
144. One application of the duty to control is a hospital’s duty to control mental patients. See Underwood v. United States, 356 F.2d 92 (5th Cir. 1966) (a hospital may be liable for injuries a patient causes to another if it negligently permits a patient’s escape); Greenberg v. Barbour, 332
statement, protection or control in itself is the object of the duties particularized in sections 314 through 320 and abstracted in section 315.\textsuperscript{145}

The value and virtue of the phraseology to use reasonable care is that the requirement so stated is still wide and flexible enough to deal with the full range of human activities. It omits the specificity that would channel one's conceived and executory actions into routes previously designated to require the exercise of care. The exercise of reasonable care, in a given case, might well go beyond taking efforts to protect or to control. It is also possible that the exercise of reasonable care might require, in another case, less than one or more of a cluster of acts explicable in terms of protection or control. The denomination of the duty in words of to protect or to control thus tends to narrow the range of the kinds of acts required in fulfilling the obligation. If affirmative acts are under consideration, only those acts reasonably necessary to protect or control others are prescribed. Acts falling outside the purpose or the end of protection or control are not indispensable.

F. Supp. 745 (E.D. Pa. 1971) (a cause of action is present when a doctor fails to admit a mental patient into a hospital and he assaults plaintiff); Vistica v. Presbyterian Hosp., 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967) (when a hospital has notice that a patient might harm others if preventive measures are not taken, it is under a duty to use reasonable care to prevent any harm).


145. Restatement (Second) of Torts § 315 (1965). The Restatement's special relationship analysis is inferior to a generalized duty to exercise reasonable care because the duty to protect or control, at least as defined in § 315, is not an affirmative obligation to undertake new actions. Instead, it only demands an exercise of vigilance that has already been voluntarily undertaken. For example, in Tarasoff the psychotherapists voluntarily treated their patient. The duty to control him was merely an extension of their acceptance of him as their patient. Similarly, the Restatement (Second) of Torts § 317 (1965) imposes on a master the duty to control his servant in certain situations. Again, this duty stems from the master's voluntary decision to employ the servant. In contrast, the exercise of reasonable care was enlarged in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), to require the same vigilance one must exercise when he protects another. Yet, in MacPherson, the source of the duty was not the defendant's voluntary action. Instead, the duty to protect a third person was included as an enlargement of the reasonable care duty standard the law already imposed on the defendant. Thus, MacPherson required car manufacturers to protect potential car buyers from unsafe wheels even though the car manufacturers had not voluntarily entered into a special relationship with the ultimate car buyers. Indeed, the manufacturer would never enter into this voluntary relationship since he would sell the car to a car dealer. Nevertheless, based on MacPherson the manufacturer was under a duty to exercise reasonable care for the protection of the ultimate car buyer.

146. The Second Restatement provides, for example, that a parent is only under a duty to exercise such ability to control a child as he or she in fact has at the time when he or she knows of the necessity for doing so. Restatement (Second) of Torts § 316, Comment b (1965). The parent is not under a duty to discipline his child so that the child will be amenable to parental control when it is exercised: But see Harper & Kime, The Duty to Control the Conduct of Another 43 Yale L.J. 886 (1943) (discussed in note 148 infra).
The problem with the words *protect* and *control* is, however, two-sided because they come close to suggesting the duty to do acts reasonably connected with the end to be achieved at one’s peril. In semantic terms, one either controls a dangerous person or does not. One either protects or does not. Usually failure to protect or to control in and of itself indicates a lack of purposive reasonable care. When the special relationships mentioned in Restatement sections 314 through 320 are examined, it becomes clear that one group of them, those classed together under duty to protect, are fundamentally nothing more than undertakings. Take the innkeeper as an example. He or she undertakes to do more for a guest than merely to exercise reasonable care with regard to the latter’s safety. He or she undertakes to protect him. While this obligation stops short of absolute liability, it requires something more than reasonable care. It requires a kind of vigilance cognate at least with the vigilance that Cardozo spoke of in *MacPherson v. Buick Motor Co.*, with one difference. The vigilance required of the innkeeper springs directly from the nature of the undertaking. He or she assumed the obligation, not to be merely careful or passively non-negligent, but to exercise vigilance in behalf of the guest. The vigilance of *MacPherson* has a different source: it is imposed by the law as an enlargement or refinement in the standard of care. In the case of the relationships classed together under the duty to control, it is remarkable that all of them may be explained in terms of respondeat superior and the traditional position of the common law that one having the ability, right, and power to control another should make good the loss suffered by his or her remiss failure to control the dangerous party or thing.

147. See note 60 supra.
148. Harper & Kime, whose seminal article (The Duty to Control the Conduct of Another, 43 YALE L.J. 886 (1934)) provided the analytical cornerstone of § 315, admittedly took a contrary view. They thought that “[t]he duty involved in controlling the conduct of human beings is at most the duty to exercise reasonable care for the prevention of harm to others.” *Id.* at 888. Not surprisingly, therefore, they believed that all human relations fell into one or the other of the two general divisions they put forth. *Id.* at 905. In fact, their closing remarks on the concept of relationship, if read literally, come close to those of Lord Macmillan in *Donoghue v. Stevenson* (see notes 23-29 infra). The fact is, however, that Harper and Kime had in mind anything but the general relationship formulated in *Donoghue* and in *Heaven v. Pender*. What the article attempted was to provide a unified analytical structure that, one, is apparently capable of dealing with any and all factual situations, and two, has built-in limitations on liability. Justice Cardozo’s thoughts on the concept of relationship in *Moch* (see notes 45 & 46 supra), from which Harper and Kime took their lead, attempted much the same thing. The authors’ assumption was that the special relationships described in terms of duty to protect and duty to control were peculiar relationships to which there attached a consequent or derivative duty to protect or control. On the contrary, the essence itself of those relationships is the duty to control or protect. In other words, the special relationships discussed by Harper and Kime are one and the same with the duty to protect or control. The duty and the relationship are identical.

In the two groups of relationships, the duty is a consequence of an already existing control or an already existing protection. The duty to protect or to control is not an affirmative obligation in the sense that it requires one, as in MacPherson, to do new and positive acts; it only demands the exercise of a vigilance that has already been undertaken by choice or imposed, if not with the acquiescence then at least with the knowledge, of the burdened party.

The Tarasoff case itself provides the best example of the problems caused by these underlying incongruities in section 315. The Supreme Court of California initially held, in an opinion that has come to be known as Tarasoff I, that when a psychotherapist determines, or ought to determine, that a warning to another is necessary to avert danger from his patient, he incurs a legal obligation to give that warning. The relationship imposed a duty to warn. The court purported to derive this duty to warn from both the special relationship of section 315 and the fundamental principle of Rowland. The impact of the rule was that the psychotherapist was now obligated to warn almost at his peril. For the psychotherapist there was at least one consolation; the duty was purposive. It was simply to warn, not to carry out any other numerous, thoughtful actions. Actually, the court had

151. See notes 19 & 20 and accompanying text supra.
152. Tarasoff v. Regents of the University of Cal., 529 P.2d 553, 118 Cal. Rptr. 129 (1974). In Tarasoff, Posenjit Poddar, a patient of the defendant psychotherapists, killed Tatiana Tarasoff after warning his psychotherapists of his plans to kill her. Because of these threats, defendants detained Poddar, but after he promised to stay away from Tatiana, they released him and asked the police to return all information given them about Poddar. Shortly after his release, Poddar moved into Tatiana's apartment. When she returned home from a trip, Poddar killed her. After the murder, Tatiana's parents sued, alleging that the defendants failed to warn of a dangerous person and to detain Poddar. The superior court dismissed the plaintiff's complaint without leave to amend. 529 P.2d at 554-56, 118 Cal. Rptr. at 130-32. The appellate court affirmed. 83 Cal. App. 3d 275, 108 Cal. Rptr. 878 (1973).
153. 529 P.2d at 559, 118 Cal. Rptr. at 135.
154. Id.
155. Id. In support of its holding that the defendants were involved in a special relationship with Poddar and therefore under a duty to control his conduct, the court cited several cases concerning a hospital's duty to control mental patients. See Underwood v. United States, 356 F.2d 92 (5th Cir. 1966) (a hospital may be liable for injuries a patient does to another if it negligently permits a patient's release); Greenberg v. Barbour, 322 F. Supp. 745 (E.D. Pa. 1971) (a cause of action is present when a doctor fails to admit a mental patient into a hospital and he assaults plaintiff); Vistica v. Presbyterian Hosp., 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967) (when a hospital has notice that a patient might harm himself or others if preventive measures are not taken, it is under a duty to use reasonable care to prevent any harm). The court analogized that the defendants were similarly involved in a special relationship with Poddar. In addition, the court rejected the argument that the defendants also had to be related to Tatiana before a duty would arise under Restatement (Second) of Torts § 315 (1965). In support of this proposition, the court cited Merchants Nat'l Bank & Trust Co. of Fargo v. United States, 272 F. Supp. 409 (D.N.D. 1967). In this case, the Veterans Administration was held liable for the murder of a woman by a patient who was released to work on a local farm. The court found liability, notwithstanding the lack of any special relationship between the Veterans Administration and the woman.
followed section 315 to its logical conclusion, and in so doing it had implicit-ily demonstrated its inapplicability.

Two years later, in Tarasoff II,156 the court vacated its earlier opinion. Still purporting to use both the “special relationship” analysis and the “fundamental principle” analysis, the court now held that the discharge of the duty required the psychotherapist to take one or more various steps, depending on the nature of the situation.157 There was no mandatory duty to warn, but there was a mandatory duty to exercise reasonable care, to take whatever steps were reasonably necessary under the circumstances.158 This duty might or might not require a warning, might or might not require notification of the police, might or might not require any other numerous and unstated, thoughtful actions. The duty, to repeat, was to exercise reasonable care. While the court reiterated the words about duty to protect from section 315,159 that special language was now verbal appendage. Conceptually, the court had wrought a remarkable, though unexpressed, shift in the basis of its holding. The duty of the psychotherapist was now placed squarely where it belonged, in the fundamental principle and its antecedents.160

Ironically, in bringing section 315 of the Restatement to the forefront, and making it one of the more active areas in tort law, Tarasoff at the same time foreshadows the demise of the special relationship analysis, or at the very least portends for it a contraction into its former, narrow boundaries. Since Tarasoff II, other courts have begun to discover the incongruities of section 315.161

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157. Id. at 435-42, 551 P.2d at 343-47, 131 Cal. Rptr. at 23-27.
158. Id.
159. Id.
160. Also of interest in this regard is the recent decision in Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980), where the federal district court, following Justice Tobriner’s lead in Tarasoff, rejected the position that the therapist’s duty is limited to providing a warning. In the court’s words, it refused to rule as a matter of law that a reasonable therapist would never be required to take precautions other than warnings, or that there is never a duty to attempt to detain. . . . This duty requires that the therapist initiate whatever precautions are reasonably necessary to protect the potential victims of his patient.

Id. at 193 (emphasis added).
The result of the Tarasoff case is that, for the time being, courts relying upon section 315 may be reluctant, if not unable, to impose liability in newly emerging and socially sensitive fact situations. First, section 315 requires what amounts to a fiduciary relationship. Second, when courts do impose liability, they may find that it results in an erratic and vacillating standard of care, requiring a warning or other preconceived acts, which in a given case may either fall short of, or actually exceed, a standard of reasonableness. Moreover, courts wishing to deny liability will find the principles embodied in section 315 a convenient and plausible device.

162. See Thompson v. County of Alameda, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980), rev'd, 88 Cal. App. 3d 936, 152 Cal. Rptr. 226 (1979). In Thompson, the court held in a 7-2 decision that the county was not liable for releasing from custody a sexual psychopath with known violent propensities who had made a non-specific threat against a non-specific child living in his neighborhood. The case is the leading post-Tarasoff example of the contrasting results that follow from the conventional "special relationship" analysis and "fundamental principle" analysis. Purporting to apply Tarasoff, the majority conceived the issue in relation to the performance of a particularized, purposive act: whether to provide a warning. Id. at 745, 614 P.2d at 732, 167 Cal. Rptr. at 74. As a condition precedent for this exacting but narrow obligation, there had to be an already existing relationship of the § 315 variety. Since "nonspecific threats of harm directed at nonspecific victims," id. at 749, 614 P.2d at 735 167 Cal. Rptr. at 77, did not come close to establishing a § 315 special relationship, the conclusion of no duty was logically fore-ordained from the moment the court declared the issue to be whether or not there was a duty to warn. For the identifiable victim with a determinable name, a special relationship would spring up and impose a duty on the defendant; the victim who was nameless and faceless would be a statistical inevitability. Justice Tobriner, dissenting, pointed out that the duty, if there was one, was not to warn but to exercise reasonable care:

[A] special relationship, such as that between the state and a person in its custody, establishes a duty to use reasonable care to avert danger to foreseeable victims. If the victim can be identified in advance, a warning to him may discharge that duty; if he cannot be identified, reasonable care may require other action. But the absence of an identifiable victim does not postulate the absence of a duty of reasonable care.

Id. at 760, 614 P.2d at 739, 167 Cal. Rptr. at 80.

Just as § 315 of the Restatement served as a useful, plausible tool to justify the imposition of a duty in Tarasoff, it served equally well to justify a contrary result in Thompson. Moreover, an argument can be made that Thompson by implication has "vacated" Tarasoff II and "reinstated" Tarasoff I. Such contradictory decisions will continue until it is seen clearly that the duty is not to warn but to use reasonable care and that it originates not in the special relationship concept but in the fundamental principle of Rowland. Resourceful attorneys for plaintiffs might experience greater overall success in precedent-breaking cases such as Thompson if they simply allege a failure to exercise reasonable care, rather than a failure to warn (with its concomitant pitfalls), and let the evidence show what actions might or should have been taken.

163. See, e.g., McGeorge v. City of Phoenix, 117 Ariz. 272, 572 P.2d 100 (1977) (city not liable for the death of an illegally-parked truck owner even though a police officer had reported that the landowner would most likely resort to violence); Nipper v. California Automobile Assigned Risk Plan, 19 Cal. 3d 35, 560 P.2d 743, 136 Cal. Rptr. 854 (1977) (no duty on insurance agent to inform insurer that insured was senile and unable to drive) (over dissent by Justice Tobriner, who authored the Tarasoff opinions); Beauchene v. Synanon Foundation, 88
A preferable approach in Tarasoff would have been that of Justice Sims, who dissented in the lower appellate decision, and found a direct relationship between the victim and the defendants "which although then unknown to the victim . . . was obvious to and recognized by [the psychotherapists]." In other words, Sims would have employed the fundamental principle to find a duty to exercise reasonable care without advert- ing to section 315. The immediate significance of Tarasoff is that it seems to have engrafted the special relationship concept onto the fundamental principle. The result can only be to retard the final establishment of a concept of duty unimpeded by privity or the misfeasance-nonfeasance dichotomy. New duties will de- velop, as exemplified in Tarasoff, despite anything courts may say to the contrary, not from the "special relationship" of section 315, but from the larger proposition of 

Heaven v. Pender. Courts are trying now, and will continue to try for a time, to fit their decisions into the constraints of section 315. In the end, however, it will be held that if a "special relationship" is necessary before the law will require one person to take reasonable steps to avert foreseeable harm befalling another human being, then (as was similarly said years ago by a court confronted with the privity of contract obstacle) a

Cal. App. 3d 342, 151 Cal. Rptr. 796 (1979) (no duty on rehabilitation program with regard to escape of probationer with violent propensities); Coffman v. Kennedy, 74 Cal. App. 3d 28, 141 Cal. Rptr. 267 (1977) (passenger who served driver intoxicated beverages owes no duty to third person injured by the driver to control driver's conduct); Harland v. State, 73 Cal. App. 3d 894, 141 Cal. Rptr. 215 (1977), vacated, 75 Cal. App. 3d 475, 142 Cal. Rptr. 201 (1977) (no duty of care on veterans' home with regard to driving of resident patient known to have physical and mental disabilities, with long history of headaches and blackouts); DeSuza v. Andersack, 63 Cal. App. 3d 694, 133 Cal. Rptr. 920 (1976) (no duty on passenger with regard to conduct of intoxicated owner-driver). Mangeris v. Gordon, 94 Nev. 400, 580 P.2d 481 (1978) (operator of a massage parlor owed patron no duty even though patron was murdered by a taxi driver whom the parlor owner called and whom the owner knew to have violent tendencies; even if special relationship, no duty because risk unforeseeable); Cracraft v. City of St. Louis Park, 279 N.W. 2d 801 (Minn. 1979) (city owed no duty to high school student injured because of failure of fire inspector to discover obvious fire code violations); Felty v. City of Lawton, 578 P.2d 757 (Okla. 1978) (city owes no duty to plaintiff when police officer left the key in his car which was stolen by a thief who then collided with deceased's vehicle); Cecil v. Hardin, 575 S.W.2d 268 (Tenn. 1978) (passenger not liable for wrongful death of bicyclist even though passenger and driver both intoxicated and on joint drinking venture).

164. 108 Cal. Rptr. at 896. Justice Sims stated:

The lack of an express prior relationship between the victim and her parents, on the one hand, and the employees of the Regents on the other, is not determinative in this case, because the peculiar circumstances of the case in themselves supply a relationship, which although then unknown to the victim, was obvious to and recognized by those acting on behalf of the Regents.

Id.

165. Id. See also McIntosh v. Milano, 168 N.J. Super. 466, 491, 403 A.2d 500, 512 (1979) (on all fours with Tarasoff, where although the court followed Justice Tobriner's special relationship analysis, it noted that a duty can also be found "in the more broadly based obligation a practitioner may have to protect the welfare of the community").

166. See cases cited in note 163 supra.
special relationship exists in the consciousness and understanding of all right-thinking persons.\textsuperscript{167}

\textbf{Conclusion}

If the twentieth century with its machines and hurried, impersonal human relations has taught us anything, it is that a little neglect may breed a great mischief.\textsuperscript{168} Several acts of compounded carelessness in a nuclear power plant almost render unliveable half the state of Pennsylvania. An improper procedure in the maintenance of an engine mount results, in one case, in the death of 275 air passengers; in another case, a band-aid approach to a troublesome cargo door, in the death of 350. A state department official fails to act on the perceptions of his eyes and ears, and the consequent dangers inferable by a normal intelligence, and the result is that hundreds of Americans are slaughtered by a madman in the jungles of Guyana. The roof of a newly constructed civic center unaccountably collapses just a few hours after thousands had sat beneath it; later it is discovered that the inspection of the roof was carried out in an incredibly perfunctory manner. The management of a large automobile manufacturer decides, it seems, that it is in the best interests of corporate stockholders to risk dozens of people being incinerated in an unsafe vehicle rather than recalling that model and remediying the defect at the cost of approximately $10 per vehicle. These instances display various hues and shades of culpability; the common denominator in each is that otherwise ordinary men wink their eyes at a little neglect, and even in the moment of foreseeability content themselves with falling back on nineteenth century legal abstractions that obscure, even to themselves, their moral accountability.

\textsuperscript{167} Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 283, 90 S.W.2d 445, 450 (1936).

\textsuperscript{168} Benjamin Franklin's maxim, while perhaps a moralistic luxury in the eighteenth century, is in today's world of machines an iron law: "A little neglect may breed mischief: for want of a nail the shoe was lost; for want of a shoe the horse was lost; and for want of a horse the rider was lost." B. Franklin, Poor Richard's Almanac (1757).

A particularly horrible tragedy emphasizes the above. A man and his wife and their two-year old daughter were driving on the freeway at 60-65 m.p.h. The husband was driving and the daughter sat in front between her parents. At some point during the trip the mother placed the child on the rear seat. Shortly thereafter the child pulled the unlatching handle on the rear door and the door opened. The child fell from the car. The child's father stopped the car and attempted to rescue his daughter; both were killed by oncoming traffic. Two points were made in the ensuing action for wrongful death against the manufacturer. The surviving mother argued that the rear-hinging of the rear doors caused the fatal door to open wider and faster than would have been the case with front-hinging doors and hence was a design defect. Second, she argued that the position and configuration of the unlatching lever also constituted a design defect. The court opined, one, that the manufacturer was not required to design a fail-safe product, and two, that the "cause" of the accident was either that the driver failed to lock the door or that the two-year old child "deliberately" unlocked the door and unlatched it. Korli v. Ford Motor Co., 137 Cal. Rptr. 828 (1977). The response of the court exemplifies the corporate attitude, and an all too-often judicial attitude as well, that has punctuated modern life with one needless disaster or tragedy after another. One might as well argue that a manufacturer is not required
The world we live in today no longer provides room for a little neglect. The notion that, absent a duty, one may be as careless as he or she pleases toward the whole world, whatever its utility arguably may have been in the nineteenth century, is today a socially irresponsible notion. A rethinking of the standard of care is required, and Cardozo's duty of "vigilance" serves as a model. The word sounds moralistic, but the standard need not be. A positive example is defensive driving, which is a constructive application of the duty of vigilance in a social context. It is an actor-oriented vigilance based upon an appreciation of the value of human life, rather than a goal-oriented fastidiousness based upon a desire to evade liability, as, for example, the essentially anti-social "defensive medicine," to which more and more physicians are characteristically resorting.

Like it or not, we are all "inescapably hooked together," and hooked together for good. Lord Abinger's fear of "an infinity of actions," while premised on a narrow view of human nature, will ironically be vindicated for the simple reason that, as Lord MacMillan observed in Donoghue v. Stevenson, "human beings place themselves in an infinite variety of relations with their fellows." Despite the predictions of doom from the legal
to design a fail-safe DC-10. Incredible as it may sound, that was precisely the position taken by McDonnell-Douglas after the DC-10 Paris air disaster in 1974. Even though the manufacturer had full knowledge of the ineffective latching system on the rear cargo door of the DC-10, no substantial modifications were made. The position of McDonnell-Douglas was that the disaster was "caused" by the failure of baggage handler Mohammed Mahmoudi to close the cargo door properly. See P. Eddy, E. Potter, & B. Page, Destination Disaster 377-78 (1976).

169. See note 21 supra.
170. See note 20 supra.
172. Twentieth century life, whether we have consciously opted for it, or whether it was bound to come from the very beginning, has brought us to a pass where it is as if we were roped together on a steep mountain side. A careless act by one puts the rest in imminent danger. That is so whether we design DC-10's, manufacture home appliances, operate conveyor belts, or merely drive our automobiles. The concluding words of Edward Whymper in his book Rambles Amongst the Alps (1871) are appropriate to describe, by way of metaphor, the plight of man in a technological age: "Climb if you will, but remember that courage and strength are nought without prudence, and that a momentary negligence may destroy the happiness of a lifetime. Do nothing in haste; look well to each step; and from the beginning think what may be the end." Id. at 334. Whymper wrote from tragic experience. He accomplished a life-time goal when in 1865, along with six companions, he ascended the Matterhorn, a mountain that up to that time had been considered unclimbable. On the descent, in the joy and excitement of the victory, some member of the party (to this day no one knows who) hooked up with a badly frayed rope. The result was that four men fell to their death.
173. See note 24 supra.
174. What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may
Jeremias, it is hardly likely that the acceptance of the doctrine of *Heaven v. Pender* and the adoption of *Thomas v. Winchester* in its full import will lead into the “fantastic realm of infinite liability.” Although the relations that may give rise to a duty of care are infinite in number, the most that the foreseeability test requires is that one exercise reasonable care, a reasonable care founded not in the intricacies of privity or the metaphysics of the action-inaction variation, but in ethics—that people exercise the same reasonable care towards others that they expect others to exercise towards them.

The larger proposition of *Heaven v. Pender*, the neighbor principle of *Donoghue v. Stevenson*, the fundamental principle of *Rowland v. Christian*, Cardozo’s duty of vigilance: these are way stations in the path of the development of the duty concept. It is submitted that they all point the same way—to the social imperative of maximum procurable safety.

The duty principle of the twenty-first century will be the moral axiom from which develop in adaption to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed.


175. Justice Musmanno’s characterization of the “crushing burden” school of jurisprudence. See note 46 supra.

176. See note 103 and accompanying text supra.

177. See, e.g., Bartell v. Palos Verdes Peninsula School Dist., 83 Cal. App. 3d 492, 147 Cal. Rptr. 898 (1978) (plaintiff’s 12-year old son was killed when playing on a skateboard at an unsupervised school playground; the court, in denying liability, utilized the “special relationship” concept in much the same way that earlier courts had used the privity concept; there existed no special relationship because there was no allegation that plaintiff’s son was a student at the school). See also McDowell v. County of Alameda, 88 Cal. App. 3d 321, 151 Cal. Rptr. 779 (1979). In McDowell, defendant hospital and physicians determined that patient was a danger to himself and others yet sent him to a special care center by taxi, from which the patient escaped and while at large murdered the plaintiff’s decedent. The court, in assuming away the actual problem in a style reminiscent of *Richards v. Stanley* (see notes 70-77 and accompanying text supra), held that no special relationship existed between the defendant and the decedent or between the defendant and the patient. Such judicial approaches invite, ultimately, the same kind of comment that the privity defense inspired in food cases in the early 1900’s: “The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone upon privity of contract. It should rest, as was once said, upon the ‘demands of social justice.’” Ketterer v. Armour & Co., 200 F. 322, 323 (S.D.N.Y. 1912).

178. For example, the metaphysical morass of Justice Tongue’s concurring opinion treads close to in Christensen v. Epley, 601 P.2d 1216 (Ore. 1979), where to avoid the special relationship analysis based upon the failure of the matron to retain control over the detainee, Justice Tongue re-defined the matron’s negligence in terms of affirmative conduct as “permitting and assisting” the escape (see note 161 supra). See also notes 47-50 and accompanying text supra (Justice Cardozo’s attempt in *Moch* to deal with the action-inaction dichotomy).

179. This is, of course, stated in terms of the Golden Rule. Lord Atkin in formulating the neighbor principle drew on the same source. See *Salmond on the Law of Torts* 197 (17th ed. 1977). Lord Esher’s larger proposition (note 3 supra) amounts to a statement in legal terms of the same precept, and Justice Cardozo’s duty of vigilance (notes 49, 170, and accompanying text supra) seems to incorporate similarly an ethically based rationale of conduct.

180. See note 96 and accompanying text supra.
Thomas v. Winchester took its course: so highly does the law value human life, that it admits of no justification where life has been lost, or injury suffered, due to the carelessness of another.181 The end of the law is to protect human life.
