Chapter 1

Duty Owed by Landowner, Possessor Or Controller

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1-1 INTRODUCTION

Premises liability is a form of negligence where liability attaches to an owner, possessor or controller[1] of land for injuries caused by the negligent management of its property.[2] The duty is primarily owed to persons entering the land, but is sometimes extended to those off the premises. Just as with "general" negligence, there must be a duty, breach, causation and damages. What often sets premises liability apart from general negligence is the issue of duty. The existence or scope of duty in premises liability actions generally follows traditional negligence principles, but may be limited by a number of factors not necessarily applicable to a garden variety negligence action.[3] The issue of duty has evolved over time to reflect the standards of our modern, often complex, society. It has been broadened beyond the historical rigid classifications of "invitee," "licensee" and "trespasser," but also limited in its reach by statute and policy.

[1.] For ease of reference, a controller, possessor and owner of land will at times be collectively referenced as a "landowner," "owner or possessor." If the status of the person or entity having an interest in the land is significant, it will be noted.

[2.] Cal. Civ. Code § 1714(a); *Brooks v. Eugene Burger Management Corp.*, 215 Cal. App. 3d 1611, 1619 (1989); *Rowland v. Christian*, 69 Cal. 2d 108, 119 (1968).

[3.] *Rowland v. Christian*, 69 Cal. 2d 108, 112-13 (1968).

1-2 DUTY, GENERALLY

1-2:1 Owner, Possessor Or Controller of Land

In premises liability actions, a defendant is only liable for the defective or dangerous condition of the property he owns, possesses or controls.[4] These limits arose from a practical understanding that a person who owns or possesses property is in the best position to discover and control its dangers, and is often the one who created the dangers in the first place. The current California CACI jury instruction given in premises liability cases asks the jury to first decide if the defendant actually "owned, leased or controlled" the premises at issue, before moving on to the negligence elements.[5] For a detailed discussion of Interest in Land, see Chapter 2.

1-2:2 Reasonable Person Test: Civil Code § 1714

Duty is the first element of any negligence claim. California's general negligence policy is found in Civil Code § 1714(a), which provides that every person is responsible, not only for the results of his or her willful acts, but also for any injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property, except so far as the other person has willfully, or by want of ordinary care, brought the injury on himself or herself.[6] While this fundamental principle holds true in a premises liability action, it does not, by itself, establish the existence of a legal duty. This is because the imposition of duty on the part of a landowner involves the judicial weighing of a number of factors and policy considerations, which may warrant a departure from Civil Code § 1714.[7] Thus, the duty analysis begins with the principles embodied in Civil Code § 1714(a)—that "[t]he owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm"[8]—but does not necessarily end there. For example, for policy reasons, a landowner generally

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4. *Isaacs v. Huntington Memorial Hospital*, 38 Cal. 3d 112, 134 (1985).

5. CACI 1001, et seq.

6. *Brooks v. Eugene Burger Management Corp.*, 215 Cal. App. 3d 1611, 1619 (1989); *Rowland v. Christian*, 69 Cal. 2d 108 (1968).

7. *Thai v. Stang*, 214 Cal. App. 3d 1264, 1271 (1989).

8. *Brooks v. Eugene Burger Management Corp.*, 215 Cal. App. 3d 1611, 1619 (1989).

owes no duty to injured employees of independent contractors; landowners are generally immune to suits involving persons on their land for recreational purposes; and landowners normally do not owe a duty to persons exposed to toxins carried home from workers on their premises.[9]

1-2:3 The Court, Not a Jury, Determines the Existence and Scope of Duty

The issue of duty is a question of law to be decided by the court.[10] Although the question of foreseeability is often viewed as a jury question when looking at what constitutes reasonable care;[11] when it is being evaluated for purposes of duty, foreseeability is still a question of law.[12]

1-2:4 Duty Extends to Injuries and Property

The duty of property owners and possessors extends to a person's "injured" or damaged property.[13] Accordingly, a landowner must exercise reasonable care to protect not only against personal injury, but injury to property of persons as well. Thus, a store owner, by inviting the public to enter and do business, undertakes to exercise reasonable care for the protection of property a customer brings on site while doing business pursuant to the invitation.[14] However, with respect to valuables such as money and jewelry, a customer may need to provide notice to the shopkeeper that she is carrying these valuables before such a claim is actionable.[15]

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9. *Campbell v. Ford Motor Co*., 206 Cal. App. 4th 15 (2012); *Seabright Insurance Co. v. U.S. Airways, Inc.*, 52 Cal. 4th 590 (2011); *Ornelas v. Randolph*, 4 Cal. 4th 1095 (1993); Cal. Civ. Code § 846; *Valladares v. Stone*, 218 Cal. App. 3d 362, 369 (1990).

10. *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465, 500 (2001); *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 674 (1993).

11. *Pamela W. v. Millsom*, 25 Cal. App. 4th 950, 956 (1994); *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 678 (1993); *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 46 (1975). But note that what is reasonable care in a particular situation may become established by judicial decision or statute. *Ludwig v. City of San Diego*, 65 Cal. App. 4th 1105 (1998).

12. *Ludwig v. City of San Diego*, 65 Cal. App. 4th 1105 (1998); *Pamela W. v. Millsom*, 25 Cal. App. 4th 950, 956 (1994); *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 678 (1993).

13. *Royal Ins. Co. v. Assei*, 50 Cal. App. 2d 549 (1942).

14. *Fuller v. I. Magnin & Co*., 104 Cal. App. 2d 517, 522 (1951).

15. *Fuller v. I. Magnin & Co*., 104 Cal. App. 2d 517, 525 (1951).

1-2:5 Duty (Sometimes) Owed to Persons Outside the Land

Normally, the duties of a landowner or possessor do not extend to persons outside the land.[16] However, there are some exceptions. For a full discussion of duty owed to persons outside of land, see Chapter 5.

1-2:6 Duty Generally Nondelegable

A landowner's duty is generally nondelagable.[17] Sometimes referred to as the "nondelegable duty doctrine," this rule has its roots in the Comment to the Restatement (Second) of Torts, § 420.[18] The doctrine is a form of vicarious liability.[19] A landowner charged with a nondelegable duty can be held liable for the negligence of his or her agent regardless of how carefully selected, or whether its agent was an employee.[20]

Historically, this rule also applied to independent contractors.[21] Until recently, there was a CACI instruction relating to a landowner's nondelegable duty to independent contractors, found in 1009C (Owner liability for injury to employee of independent contractor—nondelegable duty). In 2011, the Judicial Council Committee revoked this instruction pursuant to *Seabright Insurance Co. v. U.S. Airways, Inc.*, explaining:

> In *Seabright Ins. Co. v. US Airways, Inc.*, the California Supreme Court held that by hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract. Therefore, the owner cannot be liable for an injury to an employee of the contractor under a theory of nondelegable duty. This holding undermines the legal basis

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16. *Scott v. Chevron U.S.A.*, 5 Cal. App. 4th 510, 516 (1992).
17. *Davert v. Larson*, 163 Cal. App. 3d 407, 410 (1985).
18. *See also Brown v. George Pepperdine Foundation*, 23 Cal. 2d 256, 260 (1944).
19. *Maloney v. Rath*, 69 Cal. 2d 442 (1968).
20. *Maloney v. Rath*, 69 Cal. 2d 442, 446 (1968).
21. *Snyder v. Southern California Edison Co.*, 44 Cal. 2d 793, 797 (1955); *Golden v. Conway*, 55 Cal. App. 3d 948, 958 (1955).

for CACI 1009C. The committee recommends revoking CACI 1009C.[22]

For a discussion on duty owed to persons hired to work on land, see Chapter 4. For a discussion on a landlord's nondelegable duty, see Chapter 2, § 2-6.

1-2:7 Statutory Duty

The doctrine of negligence per se is applicable in premises liability cases. The doctrine has been codified in Evidence Code, § 669. Under Section 669, negligence is presumed if:

1. The person violated a statute, ordinance, or regulation of a public entity;
2. The violation proximately caused death or injury to person or property;
3. The death or injury resulted from an occurrence of the nature that the statute, ordinance, or regulation was designed to prevent; and
4. The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statue, ordinance, or regulation was adopted.[23]

The first two elements are generally decided by the trier of fact,[24] whereas the last two elements are questions of law for the court.[25] The negligence per se doctrine has been applied to suits involving multiple statutes, including, for example, the Uniform Building Codes, governed by California's Health and Safety Codes.[26]

1-3 PERSONS ENTERING THE LAND

Historically, the law classified persons entering the land in order to determine the duty the possessor or landowner owed to that person. A "licensee" was distinguished from a "social guest"

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22. Judicial Council of California Report, 2011 at 3.
23. Cal. Evid. Code § 669.
24. *Cade v. Mid-City Hospital Corp.*, 45 Cal. App. 3d 589, 597 (1975); CACI 418, 419.
25. *Nowlon v. Koram Ins. Center, Inc.*, 1 Cal. App. 4th 1437, 1442 (1991).
26. *See, e.g., Huang v. Garner*, 157 Cal. App. 3d 404, 414 (1984).

and "trespasser," and each triggered a different duty analysis. In 1968, the California Supreme Court eliminated the common law categorical distinctions for a possessor's duty of care based on a person's status, and replaced them with a general duty of care by a landowner based on a "foreseeable risk" approach. This approach directs courts to weigh foreseeability and other factors to resolve the question of duty. While no longer determinative, the historical categories still are relevant to the amount of care required by a premises defendant.[27]

1-3:1 Historical Distinctions

Invitees ↓	Duty to use reasonable care not to injure the invitee by any negligent activity; to make the premises reasonably safe by inspecting the premises to discover any dangerous condition and remedy it or warn of any unknown dangerous condition; and to control the conduct of third persons on the premises.
Licensees ↓	Duty to warn only of known risks and use reasonable care in active operations.
Trespassers	Generally, no duty—trespassers must take the premises as they find them.

1-3:1.1 Invitees

An invitee enters at the "express or implied invitation" of the occupant for a purpose "of common interest or mutual benefit," or in connection with the business of the occupant.[28] The distinguishing

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[27] *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 674 (1993); *Rowland v. Christian*, 69 Cal. 2d 108, 119 (1968).

[28] *Smith v. Kern County Land Co.*, 51 Cal. 2d 205, 208 (1958); *Oettinger v. Stewart*, 24 Cal. 2d 133, 137 (1944); *Buckingham v. San Joaquin Cotton Oil. Co.*, 128 Cal. App. 94, 98 (1932); *Madigan v. O.A. Hale & Co.*, 90 Cal. App. 151, 154 (1928); *Bush v. Weed Lumber Co.*, 63 Cal. App. 426, 432 (1923).

characteristic of the invitee from the other classifications is a mutual business interest with the occupant.[29]

There are two types of invitees: a business visitor and a public invitee. A "business visitor" enters or remains for a purpose directly or indirectly connected with the business dealings between him and the premises owner (the so-called "economic benefit" claim).[30] This includes customers (and their children or friends) in stores, theaters, restaurants, banks, and places of amusement; visitors at railway stations; hotel guests; airline passengers; and delivery persons. The classification also includes workers on the property.[31] A "public invitee" enters or remains on the premises for a purpose for which the land is held open to the public, *e.g.*, libraries, playgrounds, community centers, hospitals, parks.[32]

A person may be an invitee as to one portion of the property, but not have the same status as to other portions.[33] Where workers or business invitees were injured in other areas of the premises, the courts looked at such things as: (1) whether the person's presence in those areas was incidental to his work, and (2) whether the visitor was induced to enter those areas, through location or arrangement, to conduct business. This determined the person's status and, thus, the duty owed.[34]

The landowner owed invitees a duty of reasonable care not to injure the invitee by any negligent activity; to make the premises reasonably safe by inspecting the premises to discover any dangerous condition and remedy it or warn the invitee of any unknown dangerous condition; and to control the conduct of third

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29. *Hinds v. Wheadon*, 19 Cal. 2d 458, 460 (1942); *Crane v. Smith*, 23 Cal. 2d 288, 297 (1943).

30. *O'Keefe v. South End Rowing Club*, 64 Cal. 2d 729-37 (1966).

31. *Miller v. Desilu Productions, Inc.*, 204 Cal. App. 2d 160, 164 (1962); *Oettinger v. Stewart*, 24 Cal. 2d 133, 137 (1944).

32. Restatement (Second) of Torts § 332 (1965); *O'Keefe v. South End Rowing Club*, 64 Cal. 2d 729, 735 (1966).

33. *Powell v. Vracin*, 150 Cal. App. 2d 454, 460 (1957).

34. *Danisan v. Cardinal Grocery Stores, Inc.*, 155 Cal. App. 2d 833, 837 (1957); *Powell v. Jones*, 133 Cal. App. 2d 601, 606 (1955); *Sheridan v. Ravn*, 91 Cal. App. 2d 112, 116 (1949); *Brinkworth v. Sam Seelig Co.*, 51 Cal. App. 668, 670 (1921); *Jacobson v. Northwestern Pac. R. Co.*, 175 Cal. 468, 472 (1917); *Schmidt v. Bauer*, 80 Cal. 565, 567-68 (1889).

persons on the premises.[35] This was the highest level of duty owed in a premises action.

1-3:1.2 Licensees

A licensee comes on the land by consent or permission of the landowner, but usually for his or her own purpose, having no relation or benefit to the landowner.[36] A licensee is not invited; rather, his or her presence is merely tolerated.[37] For example, loiterers, persons taking shortcuts across property or making permissive use of crossings, persons entering the land to avoid bad weather, those in search of their children or other third parties, door-to-door sales people and those soliciting for charity have been found to be licensees.[38] Although "invited," a social guest is not an "invitee" in the legal sense of a business visitor, but is considered merely a licensee.[39]

Unlike an invitee, a landowner did not owe a licensee a duty to inspect the premises and keep it safe.[40] In this respect, the duty owed to a licensee was not much different than that owed to a trespasser.[41] However, if a landowner knew of a dangerous condition and had reason to believe that the licensee would not discover it, some courts held the landowner must either remedy the condition or warn the licensee of the condition.[42] Others applied the "concealed trap" exception, *i.e.*, liability found if the dangerous condition amounted to a concealed trap.[43] Licensees were further

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35. *Wingard v. Safeway Stores, Inc.*, 123 Cal. App. 3d 37, 41 (1981); *Chance v. Lawry's, Inc.*, 58 Cal. 2d 368 (1962).

36. *Allen v. Jim Ruby Const. Co.*, 138 Cal. App. 2d 428, 431 (1956); *Boucher v. American Bridge Co.*, 95 Cal. App. 2d 659, 667 (1950); *Fraters v. Keeling*, 20 Cal. App. 2d 490, 491 (1937); *Lindholm v. Northwest Pac. R. Co.*, 79 Cal. App. 34, 37 (1926).

37. *Laidlaw v. Perozzi*, 130 Cal. App. 2d 169, 173 (1955).

38. 6 Witkin, Summary of Cal. Law (10th), Torts § 1100.

39. *Hansen v. Richey*, 237 Cal. App. 2d 475, 478 (1965); *Huselton v. Underhill*, 213 Cal. App. 2d 370, 374 (1963); *Bylling v. Edwards*, 193 Cal. App. 2d 736, 739 (1961); *Nelsen v. Jensen*, 177 Cal. App. 2d 270, 271 (1960); *Simpson v. Richmond*, 154 Cal. App. 2d 27, 29 (1957); *Free v. Furr*, 140 Cal. App. 2d 378, 385 (1956); *Saba v. Jacobs*, 130 Cal. App. 2d 717, 718 (1955); *See Ashley v. Jones*, 126 Cal. App. 2d 328, 332 (1954).

40. 6 Witkin, Summary of Cal. Law (10th), Torts § 1101.

41. *Bylling v. Edwards*, 193 Cal. App. 2d 736, 742 (1961); 6 Witkin, Summary of Cal. Law (10th), Torts § 1101.

42. *See, e.g., Newman v. Fox West Coast Theatres*, 86 Cal. App. 2d 428, 432 (1948).

43. *Rowland v. Christian*, 69 Cal. 2d 108, 114-115 (1968).

protected by an obligation of the landowner to use reasonable care during active operations.[44]

In determining whether an injured person is an invitee or a licensee, an invitation need not be express; but, can be implied from the circumstances, including the conduct of the owner or possessor of the premises, the particular arrangement of the premises, the relationship of the parties, and custom.[45] An invitation extended by another, but unauthorized by the owner or possessor of the land, does not make the person an invitee.[46] Likewise, acquiescence by the owner or possessor of the premises does not give the person "invitee" status.[47]

For policy reasons, a special rule has been carved out for recreational licensees. A recreational licensee enters the land by consent or permission for a recreational purpose.[48] A recreational purpose is one that is intended to refresh the body or mind by diversion, amusement or play.[49] Under Civil Code § 846, an owner owes no duty to keep his or her premises safe or to warn persons entering for "any recreational purpose" of hazards on the property.[50] Although the statute provides a list of activities, they are merely illustrative; other recreational activities similar to those listed will be covered.[51] Activities such as fishing, hunting, camping, water sports, hiking, sport parachuting, riding (including animal riding), snowmobiling, vehicular riding, rock collecting, sightseeing, picnicking, nature study, recreational gardening, gleaning, hang gliding, winter sports, tree climbing, and viewing or enjoying historical, archaeological, scenic, natural or scientific sites have been found to fall under the "recreational purpose" exception. On the other hand, eating lunch in a restaurant is not subject to recreational purpose immunity.[52]

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44. *Rowland v. Christian*, 69 Cal. 2d 108, 114-115 (1968).

45. *Smyth v. Schacht*, 93 Cal. App. 2d 315, 316 (1949); *Edwards v. Hollywood Canteen*, 27 Cal. 2d 802, 809 (1946); *Oettinger v. Steward*, 24 Cal. 2d 133, 136 (1944).

46. *Giannini v. Campodonico*, 176 Cal. 548, 550-51 (1917).

47. *Popejoy v. Hannon*, 37 Cal. 2d 159, 169 (1951).

48. *Valladares v. Stone*, 218 Cal. App. 3d 362, 369 (1990).

49. *Valladares v. Stone*, 218 Cal. App. 3d 362, 369 (1990); Cal. Civ. Code § 846.

50. Cal. Civ. Code § 846.

51. *Valladares v. Stone*, 218 Cal. App. 3d 362, 369 (1990).

52. *Gordon v. Havasu Palms*, 93 Cal. App. 4th 244 (2001); *Valladares v. Stone*, 218 Cal. App. 3d 362, 369 (1990).

The limitation of liability set forth in Civil Code § 846 was not abrogated by *Rowland v. Christian*[53] and, instead, is a statutory exception to the reasonable care rule set forth in Civil Code § 1714.[54] The purpose of Section 846 is to encourage property owners to allow the general public to engage in recreational activities free of charge on privately owned property, without fear of incurring tort liability.[55] Civil Code § 846 does not limit liability where it would otherwise exist for: (a) willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; (b) injury suffered where permission was granted for consideration, or where consideration was received from others for the same purpose; or (c) injury to persons expressly invited rather than merely permitted.[56]

Section 846 does not apply to public entities because it would conflict with certain provisions of the California Tort Claims Act, which also deals with the liability to recreational users of public property.[57] See Chapter 3, §§ 3-4:2, 3-4:3 for more on public entities.

1-3:1.3 Trespassers

A trespasser comes on the land without privilege or consent.[58] As a general rule, a trespasser was bound to take the premises as he found it and any liability for injuries caused by a dangerous condition was based only on willful or wanton conduct.[59]

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53. *Rowland v. Christian*, 69 Cal. 2d 108 (1968).

54. *English v. Marin Municipal Water Dist*., 66 Cal. App. 3d 725, 731 (1977) (disapproved on other grounds by *Delta Farms Reclamation Dist. v. Superior Court*, 33 Cal. 3d 699).

55. Prior to the California Supreme Court's decision in *Ornelas v. Randolph*, several court of appeal decisions held that immunity under Civil Code § 846 only applied where the property was "suitable" for a recreational purpose. The *Ornelas* Court rejected the "suitability" requirement on the grounds that the concept was a "purely judicial construct, without any basis or support in the statutory language," was "elusive and unpredictable," and had resulted in the "perverse anomaly that landowners who make the most effort to safeguard their property are the least likely to benefit from the statute." *Ornelas v. Randolph*, 4 Cal. 4th 1095, 1105 (1993).

56. *See Johnson v. Unocal Corp.*, 21 Cal. App. 4th 310, 316 (1993).

57. *Delta Farms Reclamation Dist. v. Superior Court*, 33 Cal. 3d 699, 707 (1983).

58. *Kirkpatrick v. Damianakes*, 15 Cal. App. 2d 446, 449 (1936); *Hamakawa v. Crescent Wharf & Warehouse Co.*, 4 Cal. 2d 499, 501 (1935).

59. *Hume v. Hart*, 109 Cal. App. 2d 614, 615 (1952); *Boucher v. American Bridge Co.*, 95 Cal. App. 2d 659, 667 (1950); *Strother v. Pacific Gas & Elec. Co.*, 94 Cal. App. 2d 525, 529 (1949); *Wilson v. Long Beach*, 71 Cal. App. 2d 235, 238 (1945); *Flick v. Ducey & Attwood Rock Co.*, 70 Cal. App. 2d 70, 78 (1945); *Hamakawa v. Crescent Wharf & Warehouse Co.*, 4 Cal. 2d 499, 502 (1935); *Giannini v. Campodonico*, 176 Cal. 548, 550 (1917); *Toomey v.*

Therefore, so long as the trespasser was "unknown," no duty was owed to keep the premises in safe condition or to carry on activities carefully.[60] However, if the possessor knew or should have known that a trespasser had come on the land, he or she had the duty to warn of artificial conditions constituting concealed dangers, and to exercise reasonable care in carrying on activities.[61] This is why case law often put trespassers into subcategories of "known" and "unknown" trespassers. A further subcategory was also developed—sometimes called the "habitual trespasser"—to cover situations where people habitually and notoriously crossed railroad tracks with the acquiescence of the railroad companies. The railroad companies were held to a duty to both discover and avoid injury to these trespassers.[62]

Because the duty of a landowner is to persons, there is no duty to keep premises safe for trespassing animals.[63]

1-3:1.4 Attractive Nuisance Doctrine

The "attractive nuisance doctrine" was an exception to the general rule of no affirmative duty of care owed to trespassers.[64] Under this doctrine, a possessor of land was subject to liability for physical harm to trespassing children caused by an artificial condition upon the land if:

1. The place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass;

Southern Pac. R. Co., 86 Cal. 374, 379 (1890); *see also* Restatement (Second) of Torts § 333 (1965); 62 Am. Jur. 2d (2005 ed.), Premises Liability § 206.

60. *Hume v. Hart*, 109 Cal. App. 2d 614, 615 (1952); *Boucher v. American Bridge Co.*, 95 Cal. App. 2d 659, 667 (1950); *Strother v. Pacific Gas & Elec. Co.*, 94 Cal. App. 2d 525, 529 (1949); *Wilson v. Long Beach*, 71 Cal. App. 2d 235, 238 (1945); *Flick v. Ducey & Attwood Rock Co.*, 70 Cal. App. 2d 70, 78 (1945); *Hamakawa v. Crescent Wharf & Warehouse Co.*, 4 Cal. 2d 499, 502 (1935); *Giannini v. Campodonico*, 176 Cal. 548, 550 (1917); *Toomey v. Southern Pac. R. Co.*, 86 Cal. 374, 379 (1890); *see also* Restatement (Second) of Torts § 333 (1965); 62 Am. Jur. 2d (2005 ed.), Premises Liability § 206.

61. *Fernandez v. American Bridge Co*., 104 Cal. App. 2d 340, 343 (1951); *Fernandez v. Consolidated Fisheries*, 98 Cal. App. 2d 91, 97 (1950); *See Blaylock v. Coates*, 44 Cal. App. 2d 850, 852 (1941); *see also* Restatement (Second) of Torts §§ 336, 337 (1965); 70 A.L.R. 3d 1125.

62. *Staggs v. Atchison, Topeka & Santa Fe Ry. Co.*, 135 Cal. App. 2d 492, 500 (1955); *Smithwick v. Pacific Elec. Ry. Co.*, 206 Cal. 291, 303 (1929).

63. *Lenk v. Spezia*, 95 Cal. App. 2d 296, 213 (1950).

64. *Copfer v. Golden*, 135 Cal. App. 2d 623, 627 (1955); *Marino v. Valenti*, 118 Cal. App. 2d 830, 843 (1953); *Cahill v. E.B. & A.L. Stone & Co*., 153 Cal. 571, 574 (1908).

2. The condition is of such nature that he has reason to believe that the trespasser will not discover it or realize the risk involved;
3. The children, because of their youth, do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it;
4. The utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight, as compared with the risk to children involved; and
5. The possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.[65]

The attractive nuisance doctrine has been applied to the following situations: an unlocked and unguarded railroad push car on a public street;[66] a guy wire hanging from a pole;[67] an unguarded wagon attached to the rear of a house being moved;[68] a tunnel in an abandoned mine;[69] a trailer with hot tar left unguarded on a city street;[70] poles of an electric power transmission line with climbing spikes;[71] dynamite caps left on a railroad right-of-way where children play;[72] an uninhabited shack near a school bus stop;[73] open holes around sprinkler heads in an area with children around;[74] mattresses piled near an open window;[75] and a heavy gate moving on wheels on a track in a chain-link fence.[76] The attractive nuisance doctrine was held not to apply in the following situations: railroad trailer cars

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65. *See Reynolds v. Wilson*, 51 Cal. 2d 94, 99 (1958); Restatement (Second) Of Torts, § 339 (1965).
66. *Cahill v. E.B. & A.L. Stone & Co.*, 153 Cal. 571 (1908).
67. *Pierce v. United Gas & Electric Co.*, 161 Cal. 176 (1911).
68. *Skinner v. Knickrehm*, 10 Cal. App. 596 (1909).
69. *Faylor v. Great Eastern Quicksilver Mining Co.*, 45 Cal. App. 194 (1919).
70. *Morse v. Douglas*, 107 Cal. App. 196, 290 P. 465 (1930).
71. *Clark v. Pacific Gas & Electric Co.*, 118 Cal. App. 344 (1931).
72. *Lambert v. Western Pac. R. Co.*, 135 Cal. App. 81 (1933).
73. *Marino v. Valenti*, 118 Cal. App. 2d 830 (1953).
74. *Edler v. Sepulveda Park Apartments*, 141 Cal. App. 2d 675 (1956).
75. *Roberts v. Del Monte Properties Co.*, 111 Cal. App. 2d 69 (1952).
76. *Walker v. Fresno Distributing Co.*, 233 Cal. App. 2d 840 (1965).

when not in use and secured by ordinary brakes;[77] an open cellar;[78] a stable;[79] common moving vehicles on city streets;[80] a playground swing;[81] an apparatus for loading ice onto cars;[82] a dance hall;[83] a moving train;[84] an oil well pump;[85] a high ladder;[86] a scaffold on a sidewalk used in remodeling a building;[87] and a water ski jump.[88]

Early California cases carved out natural conditions, such as a body of water, from the attractive nuisance doctrine, finding these were "common" dangers and, therefore, did not subject the landowner to liability. Subsequently, this reasoning was found inconsistent with the Restatement, and the doctrine was applied to some "common" dangers, such as private swimming pools.[89] The courts also struggled with the application of the attractive nuisance doctrine in the construction context, ultimately concluding that no rule excluded the application of the doctrine to construction.[90]

With the abolition of the distinctions between invitees, licensees and trespassers, came the elimination of their exceptions, including the attractive nuisance doctrine. Likewise, the distinction between artificial and natural conditions was ultimately rejected.[91]

1-3:2 Historical Categories Abolished—Foreseeable Risk Approach

1-3:2.1 *Rowland v. Christian*

In its decision in *Rowland v. Christian*, 69 Cal. 2d 108, 113 (1968), California repudiated the common law categorical distinctions

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77. *George v. Los Angeles Ry. Co.*, 126 Cal. 357 (1899).
78. *Loftus v. Dehail*, 133 Cal. 214 (1901).
79. *Giannini v. Campodonico*, 176 Cal. 548 (1917).
80. *Allred v. Pioneer Truck Co.*, 179 Cal. 315 (1918).
81. *Solomon v. Red River Lumber Co.*, 56 Cal. App. 742 (1922).
82. *Hernandez v. Santiago Orange Growers' Ass'n*, 110 Cal. App. 229 (1931).
83. *Doyle v. Pacific Elec. R. Co.*, 6 Cal. 2d 550 (1936).
84. *Walker v. Pacific Elec. R. Co.*, 66 Cal. App. 2d 290 (1944).
85. *Giddings v. Superior Oil Co.*, 106 Cal. App. 2d 607 (1951).
86. *Saba v. Jacobs*, 130 Cal. App. 2d 717 (1955).
87. *Lopez v. Capitol Co.*, 141 Cal. App. 2d 60 (1956).
88. *Severance v. Rose*, 151 Cal. App. 2d 500 (1957).
89. *Hansen v. Richey*, 237 Cal. App. 2d 475, 481 (1965).
90. *See Garcia v. Soogian*, 52 Cal. 2d 107 (1959).
91. *Sprecher v. Adamson Companies*, 30 Cal. 3d 358, 371 (1981).

based on a person's status as an invitee, licensee or trespasser when reaching the issue of duty. Today, a landowner's duty of care extends to licensees, invitees and trespassers alike. A number of factors and policy considerations which the courts must weigh to determine whether a duty is owed by a premises defendant have replaced these categories.

In *Rowland*, the plaintiff was a guest in defendant's apartment and, thus, a licensee. The porcelain handle of the bathroom faucet broke while plaintiff was using it. He suffered severed tendons and nerves. Defendant had known about the damaged fixture and reported it to her landlord, but did not warn plaintiff. Plaintiff brought suit for recovery and the trial court granted defendant summary judgment. The Court reversed, holding that a social guest such as the plaintiff was entitled to a warning of a dangerous condition so that he, like the host, could take proper precautions:

> Where the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it and is aware that a person on the premises is about to come in contact with it, the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence. Whether or not a guest has a right to expect that his host will remedy dangerous conditions on his account, he should reasonably be entitled to rely upon a warning of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it.[92]

The Court explained that it is unreasonable to apply the historical or traditional terminology to modern society, because it fails to take into account certain factors and policy concerns that should be considered in evaluating whether a premises owner or possessor owes a duty to a plaintiff.[93]

"The proper test to be applied to the liability of the possessor of land in accordance with section 1714 of the Civil Code is whether

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92. *Rowland v. Christian*, 69 Cal. 2d 108, 119 (1968).
93. *Rowland v. Christian*, 69 Cal. 2d 108, 119 (1968).

in the management of his property he has acted as a reasonable man in view of the probability of injury to others. . . ."[94] There is no exception to this fundamental principle absent specific statutory authority or unless clearly supported by public policy considerations. In recognizing that certain policy considerations may justify a departure from Civil Code § 1714, the Court set forth the major factors and policy considerations that should be balanced in evaluating whether a premises owner owes a duty of care, giving rise to liability. The so-called "*Rowland* factors" include:

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

Courts now use the *Rowland* analysis to weigh traditional negligence factors (foreseeability, degree of certainty if injury, closeness of connection between conduct and harm) with a number of policy considerations to determine whether liability should be limited in negligence actions.[95] For examples of policies limiting a landowners duty, see Chapters 4 and 5.

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94. *Rowland v. Christian*, 69 Cal. 2d 108, 119 (1968).

95. *See e.g.*, *O'Neil v. Crane Co.*, 53 Cal. 4th 335, 362 (2012) (product manufacturer); *Campbell v. Ford Motor Co*., 206 Cal. App. 4th 15 (2012) (take-home exposure); *Oddone v. Superior Court*, 179 Cal. App. 4th 813 (2009) (take-home exposure); *Brennan v. Cockrell Inv.*, 35 Cal. App. 3d 796 (1973) (landlord); *Hamilton v. Gage Bowl*, 6 Cal. App. 4th 1706 (1992) (invitee); *Beauchamp v. Los Gatos Golf Course*, 273 Cal. App. 2d 20 (1969) (invitee); *Beard v. Atchison, Topeka & Santa Fe Ry. Co.*, 4 Cal. App. 3d 129 (1979) (trespasser); *Fitch v. LeBeau*, 1 Cal. App. 3d 320 (1969) (licensee); *Carlson v. Ross*, 271 Cal. App. 2d 29, 30 (1969) (licensee).

1-3:2.2 Foreseeability

Although California is sometimes referred to as a "foreseeability" jurisdiction based on the "foreseeable risk" approach set forth in *Rowland*, foreseeability alone is not synonymous with duty; nor is it a substitute.[96] A legal duty "depends on foreseeability of the risk and a weighing of policy considerations for and against imposition of liability."[97] As California's high court explained, "there are clear judicial days on which a court can foresee forever … but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for an injury."[98] Thus, the duty analysis does not end if foreseeability is present. If present, the other factors identified by the *Rowland* court (and sometimes additional factors), are evaluated. But, if foreseeability is absent, the analysis ends. As with any type of negligence case, if the injury was not foreseeable, there is no duty as a matter of law. And because it is also relevant to the amount of reasonable care required by a premises defendant, foreseeability may still set limits on liability, even once duty is established.

1-3:2.3 Status of Person Entering the Land Still Relevant

While *Rowland* eliminated rigid distinctions based on status, the status of persons entering the land still has bearing on a defendant's liability.[99] For example, when deciding whether a defendant used reasonable care, a trier of fact can consider, among other factors, "the likelihood that someone would come on to the property in the same manner as the plaintiff did."[100] Because the status of persons entering the land correlates to the likelihood they would come on the property in that manner, the distinctions remain relevant. Some jury instructions, such as CACI 1010 (Recreational Activities), still require the trier of fact to determine if the injured

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96. *Erlich v. Menezes*, 21 Cal. 4th 543, 552 (1999); *O'Neil v. Crane Co.*, 53 Cal. 4th 335, 362 (2012).

97. *Burgess v. Superior Court*, 2 Cal. 4th 1064, 1072 (1999).

98. *Thing v. La Chusa*, 48 Cal. 3d 644, 668 (1989).

99. *Rowland v. Christian*, 69 Cal. 2d 108, 119 (1968).

100. CACI 1001 (2012);*Williams v. Carl Karcher Enterprises, Inc.*, 182 Cal. App. 3d 479, 486 (1986) (overruled on other grounds in *Soutle v. GM Corp.* 8 Cal. 4th 548 (1994)); *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 674 (1993); *Rowland v. Christian*, 69 Cal. 2d 108, 117-18 (1968).

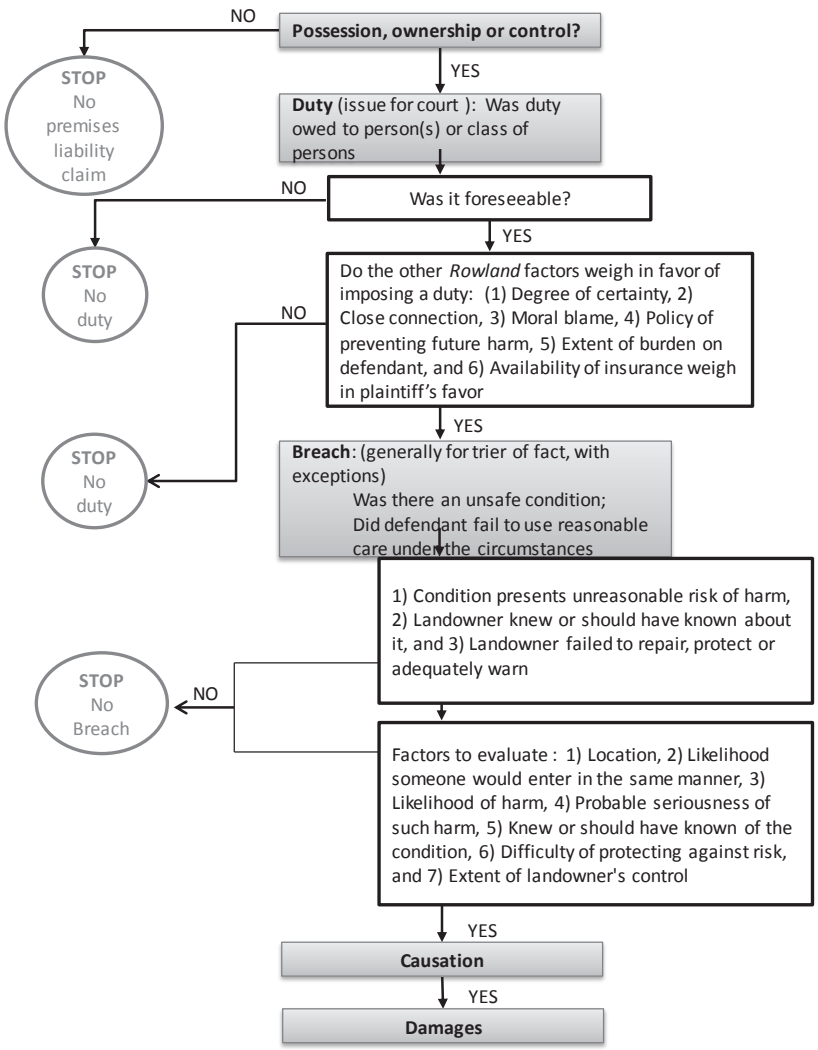
party was "expressly invited."[101] Also, the factors identified by the *Rowland* Court are not an exhaustive list; courts are permitted to apply other factors pertinent to the duty inquiry.[102] Therefore, the terms "invitee," "licensee" and "trespasser" live on, at least in some contexts.[103] For special circumstances, see Chapter 6.

101. CACI 1010 (2012).

102. *Rowland v. Christian*, 69 Cal. 2d 108, 112-13 (1968).

103. *See also Williams v. Carl Karcher Enterprises, Inc.*, 182 Cal. App. 3d 479, 486 (1986); *Beard v. Atchison, Topeka & Santa Fe Ry. Co.*, 4 Cal. App. 3d 129 (1970); *Beauchamp v. Los Gatos Golf Course*, 273 Cal. App. 2d 20, 26 (1969).

1-4 Anatomy of a Premises Case



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