The Supreme Court of California
1968-1969

FOREWORD: "STATUS" CONCEPTS IN THE LAW OF TORTS

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The Supreme Court of California in its 1968-69 term rendered a number of extremely provocative, groundbreaking decisions on tort liability. In the Foreword to this year's review of the work of the court Professor Barbara B. Rintala develops a status approach to analysis of problems of tort liability. She first compares the nineteenth century concept of fault as the theoretical basis for tort liability to that of status, which it replaced, and then compares these to the new status concept of liability articulated by Professor Wolfgang Friedmann. Professor Rintala then uses four recent tort decisions of the California supreme court to demonstrate the analytical value as well as the limitations of this new "status" approach to tort liability.

Although we are accustomed to viewing contract law and tort law as creating two discrete bases of liability, the traditional formulation of negligence liability bears both analytical and normative analogies to the basic concepts of contractual obligation. The emergence of "fault" as the principal basis of tort liability during the nineteenth century may be seen as part of the broader legal development which Sir Henry Maine characterized as a "movement from Status to Contract." This Fore-

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1. "[W]e may say that the movement of the progressive societies has hitherto been a movement from Status to Contract." H. MAINE, ANCIENT LAW 182 (new ed. 1930) (emphasis in original). See generally Leflar, Negligence in Name Only, 27 N.Y.U.L. Rev. 564, 564-65 (1952):

Sir Henry Maine in the last century concluded that legal history showed a continuing progress, ancient times to modern, "from Status to Contract." Once much of the law governing enforceable legal rights, including those which we today call tort rights, was personal, growing out of the status of the persons involved . . . . The law that was modern to Maine was breaking away from that; most persons were legally free to make contracts that the law respected . . . .

Corollary to and philosophically a part of the movement "from Status to Contract" was the progress from liability for all harmful acts to liability for fault only, in the law of torts . . . . The shift from an old liability
word will suggest an approach to analysis of recent trends in tort law—and, in particular, four decisions of the California supreme court rendered during the 1968-1969 term—which focuses upon the displacement of "contractual" notions by what Professor Wolfgang Friedmann has called new-"status" concepts as the basis for delineating those re-

regardless of fault to the newer liability for fault only was like the shift that Maine noted, both basing results on the free will of the parties as discovered from voluntary agreements or voluntary conduct the legal consequences of which were presumably known to the actors when they acted. (Footnotes omitted.)


In legal terms, some of the major issues of our time can be formulated in terms of the antithesis of status and freedom. Maine's celebrated dictum that, in progressive societies, the move has been from status to freedom, has long been modified by events which have surrounded the freedom of modern man with new status conditions. This expresses itself not only in the field of contract—Maine's symbol of the emancipation of the individual—but in many other fields of law. The institutionalisation of contract, through compulsory terms, standardised conditions, collective bargaining, and other developments, has . . . [resulted in] a new kind of status, for the worker who must accept the conditions set for him by groups of employers and labour officials, while the consumer must eat, dwell or travel on terms prescribed for him by standardised contracts. Similar developments can be traced in the field of tort liability . . . . The theory corresponding to Maine's contract dictum would show a movement from liability and responsibility for acts as such, to liability for actions or omissions for which a morally fully responsible individual would answer because he has exercised freedom of choice. Yet, we have seen that tort liability is increasingly moving away from the fault principle—which, itself, has lost the moral connotation of former centuries—and that, to an ever-increasing extent, status-like insurance is substituted for the individual responsibility flowing from the tortious act . . . . The growth of the new status versus individual freedom means that legal liability again results more and more from a given position—as employer, land owner, consumer, worker—rather than from the exercise of the free will by an independent individual.

Yet, this is not the status of medieval law. For the new status, while limiting this often theoretical freedom of decision of the individual—a freedom that led to the degradations, the slums, the miseries of the many, compared with the wealth and power of a very few—has at the same time
relationships which give rise to tort obligations.

The first part will sketch the analogies between the nineteenth century formulations of tort and contract liability, and explain how they differ both from Maine's "Status" and from the new-"status" approach to determining non-consensual obligations. The second part discusses two decisions—Barrera v. State Farm Mutual Automobile Insurance Company\(^4\) and Elmore v. American Motors Corporation\(^5\)—which illustrate judicial recognition of the new-"status" approach. Barrera, which imposes a duty of care on automobile liability insurers in favor of victims of an insured, represents an explicit adoption of this approach. Elmore, which extends the doctrine of "strict liability in tort" to protect accident "bystanders" represents a case which is best explained as implicitly resting on this approach. The Elmore decision thus demonstrates how a new-"status" analysis clarifies the economic and policy considerations underlying a court's delineation of tort liability. The third part analyzes Dillon v. Legg,\(^6\) which replaces the "zone of danger" doctrine with the traditional negligence "foreseeability" standard. The Dillon decision is used to illustrate cases in which liability cannot be determined solely on the basis of a new-"status" approach. However, a new-"status" analysis serves to highlight the basic compensation issue involved in such a case. It thereby provides the means to determine the

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extent to which that issue should be resolved according to traditional tort law criteria. The final part analyzes *Connor v. Great Western Savings & Loan Association*,⁷ which extends the traditional negligence standard applied in *Dillon* into the area of residential construction financing. *Connor* represents a paradigmatic case for a new-"status" approach. The case is thus presented as a counter-example to *Dillon*, and its rationale is criticized insofar as it retains arbitrary and unnecessary elements of the contractual notion of "privity."

## I

"STATUS" AND "PRIVITY"

Maine's dictum concerning the movement of "progressive" societies from "Status" to "Contract" was a normative as well as an empirical generalization.⁸ "Status" in Maine's sense of the word referred to a societal position or role which was not voluntarily assumed. Such positions or roles—for example, one's place in the family or on the feudal tenurial hierarchy—carried with them certain legal rights and obligations over which an individual had no control. A legal system which imposed liability on the basis of "Status" in this sense of the word failed to assess responsibility on the basis of individual choice and im-

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⁷. 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968).


This compact blueprint [of Sir Henry Maine] for the development of society was thoroughly consistent with the temper of a time that was discovering the doctrine of evolution. It fitted well with the laissez-faire political and economic philosophy of Sir Henry's property-minded compatriots. Darwin and John Stuart Mill had given classical formulation to these doctrines only two years before Maine's epochal work [in 1861]. Maine's and Bastiat's thesis accorded fully with . . . an expanding faith in human self-perfectability and development and the potentialities of free will and a democratic way of life. Freedom and sacredness of contract were beginning to assume a place in the constitutional and social folkways of this country . . . .

. . . There are two fundamental implications of the concept of liberty that the original evangelists of liberty of contract ignored. First, they tended to regard liberty and freedom as the purely personal possession of the individual, and in consequence, assumed a laissez-faire rather than a vigilant attitude about it . . . .

There was a second consideration that the over-optimistic advocates of liberty of contract overlooked . . . . They did not realize that the completely untrammeled liberty of an individual or a class might well generate repression and tyranny for other individuals . . . .

. . . This spuriously equalitarian liberty of contract is analogous to what Anatole France had in mind: "The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." (Footnotes omitted.)

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peded social and economic progress, which could be realized only through maximization of "freedom." From the nineteenth century perspective of Maine and his contemporaries, who advocated social Darwinism and laissez-faire economics, such a legal system seemed "primitive." It was "primitive" in their view because it based liability on an individual's identity or station rather than on what he voluntarily did, thereby contradicting the nature both of man and of a "progressive" society. A "progressive" society, on the other hand, was characterized by a legal system which placed primary emphasis on individual "freedom"—i.e., a legal system which imposed liability only for voluntary acts which wrongfully interfered with the freedom of another, or on the basis of voluntarily incurred obligations. To use the shibboleths of the nineteenth century, a "progressive" society was one whose legal system imposed liability only for "fault" and protected "freedom of contract." 9

The normative analogies between traditional negligence and contractual liability may, therefore, be summarized as follows: Imposing liability only on the basis of "fault"—or only when one unreasonably created a foreseeable risk of harm to another—served the twin nineteenth century values of maximizing individual "freedom" and encouraging economic "progress." Similarly, these twin values were reflected in the basic nineteenth century principle of contract law that one should be liable for failing to perform only those obligations which were voluntarily undertaken. Imposing liability "without fault," on the other hand, or on the basis of a nonvoluntarily assumed position or role, would deter individual action by increasing one's potential scope of liability, thus minimizing individual "freedom" and impeding the industrial expansion essential to "progress." 10

The analytical analogies between traditional negligence and con-


tractual liability are somewhat more difficult to articulate. Briefly, however, the correspondence between the two forms of liability may be perceived by focusing on the critical importance of the identity of the plaintiff in both. Taking Justice Cardozo’s characterization of the relational nature of negligence in *Palsgraf v. Long Island Railroad* as the culminating exemplar of the traditional notion of liability for negligence, the analytical analogy between that notion and the traditional formulation of contractual liability may be expressed as follows: Just as one owes a duty of care only to that person, or class of persons, who constitutes the foreseeable victim or victims of one’s careless behavior, so one owes an obligation to perform a particular act only to the promisee of that performance. In other words, the traditional view of both negligence and contractual liability rests on an assessment of the particular plaintiff’s relationship to the defendant. Both forms of liability are thus not only relational in character, but involve a very individualistic conception of the type of relationship which can give rise to liability.

*The Individual and the Public Service Enterprise in the New Industrial State, 55 Calif. L. Rev. 1247, 1251 (1967); cf. Green, The *Palsgraf* Case, 30 Colum. L. Rev. 789, 791 (1930) (“Put as baldly as possible, the question [in *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928)] was simply whether the railroad company should bear the risk or whether it should stay where it fell.”). See also R. Pound, *The Spirit of the Common Law* 143 (1921).

11. 248 N.Y. 339, 162 N.E. 99 (1928). See id. at 341-45, 162 N.E. at 99-101: Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. “Proof of negligence in the air, so to speak, will not do.”

... The ideas of negligence and duty are strictly correlative.” Bowen, L. J., in Thomas v. Quartermaine, 18 Q.B.D. 685, 694 [(1897)]. The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.

... Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all... One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended.

A defendant is liable under the traditional, or Palsgraf, formulation of negligence liability, in other words, only if he has acted toward the particular plaintiff in such a way as to give rise to a relationship which is analytically analogous to that relationship between a defendant and plaintiff traditionally characterized as being one of contractual "privity." 12

The focus upon the identity of the particular plaintiff—the "plaintiff orientation"—of the traditional formulation of negligence and contractual liability marks the primary analytical difference between the traditional or "privity" approach, and the "status" approach to delineation of relationships giving rise to obligations. The "status" approach focuses upon the defendant, not the particular plaintiff. Unlike Maine's "Status," however, which focused upon one's societal position to determine rights and liabilities, the new "status" approach focuses upon the role voluntarily assumed by the defendant and the defendant's relationship, arising out of the role assumed, to the general class of persons who may be affected by one who plays such a role.

At this point a practical example of the difference between a new "status" approach and the traditional or "privity" approach to a liability issue may be helpful. Assume this simple set of facts, similar to those involved in the 1968 California supreme court case of Rowland v. Christian: 13 A small puddle of water on the defendant's premises causes

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12. See generally L. Green, Rationale of Proximate Cause 44 (1927). On the relational nature of tort liability and its highly individualistic character, see generally J. Fleming, supra note 1, at 44, 48:

A duty is an incident to the relation between two individuals . . . .

. . .

Nowhere is the common law's individualistic bias more clearly revealed than in the axiom that the plaintiff must bottom his claim to redress on breach of a personal duty to himself as a particular individual. See also W. Prosser, Selected Topics on the Law of Torts 209-10 (1953).

In discussing the divergence, out of the old common law forms of action such as assumpsit, of what became "tort" principles from those denominated "contract" principles (id. at 380-91), Dean Prosser similarly indicates the "privity" notion inherent in the Palsgraf-type formulation of liability for negligence (see note 11 supra and accompanying text):

The middle of the nineteenth century saw negligence emerge as a separate tort, and with it the concept of duty, regarded as a matter of some relation between the plaintiff and the defendant. Given such a relation, the duty might require the defendant to take affirmative precautions for the plaintiff's safety. The development took place quite apart from contract, and the relation which gave rise to the duty need not be one of contract at all; but it might be incidentally so . . . .

Id. at 391-92. (Footnote omitted.)

13. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). Rowland abolished the "trespasser"-"licensee"-"invitee" trichotomy and adopted the general negligence "foreseeability" standard as the basis for determining the liability of an owner or occupier of land to one injured on his property. See also Fitch v. LaBeau, 1 Cal. App. 3d 320, 81 Cal. Rptr. 722 (4th Dist. 1969). In Rowland, the defendant
the plaintiff to slip and fall. If a "privity" approach is adopted to determine the defendant's liability to the plaintiff, the first basic question was an apartment tenant and the plaintiff was a "social guest." See Restatement (Second) of Torts, Explanatory Notes § 330, comment h at 175 (1965). See generally F. Harper & F. James, supra note 1, at 1476-78; W. Prosser, supra note 11, at 387-88. The plaintiff's injury was caused by a crack in a faucet handle on the defendant's bathroom basin. Prior to the plaintiff's injury, the defendant had informed her lessors that the faucet was cracked and should be replaced. The evidence was unclear on whether the faucet handle crack was obvious or concealed. See 69 Cal. 2d at 110-11, 443 P.2d at 562-63, 70 Cal. Rptr. at 98-99.

Although Rowland is at least as significant as the other four cases selected for extensive analysis, it is not separately discussed here for two main reasons. First, Rowland is analytically similar both to Dillon's rejection of an equally arbitrary plaintiff-oriented limitation on liability and to Dillon's and Connor's reliance on the Palsgraf "foreseeability" standard. Second, the critical inadequacy in the Rowland decision is similar to the basic failure of the Dillon and Connor rationales: The defendants in Rowland, Dillon and Connor—respectively, an individual tenant, an automobile driver, and an institutional residential tract financier—are as different from each other as they are from the defendant railroad in Palsgraf, and yet all three cases purport to apply the Palsgraf liability standard. As the subsequent discussion of a new-"status" approach to the liability issue posed by our puddle hypothetical indicates, Rowland, like Connor, represents a paradigmatic case for that approach.

Rowland is also similar to Connor in that both cases expressly recognize factors which would be relevant to adjudicating liability on the basis of a new-"status" approach and appear to partially rely upon such factors in moving away from a "privity" limitation which the court in each case rejects in favor of a more flexible "foreseeability" standard. For a discussion of the court's recognition of the empirical factors and policy considerations which render Connor a paradigmatic case for the new-"status" approach, see text accompanying notes 166-79 infra. In Rowland, Justice Peters explains the artificial and anachronistic nature of the "trespasser"-"licensee"-"invitee" trichotomy in the following terms, 69 Cal. 2d at 117-18, 443 P.2d at 567-68, 70 Cal. Rptr. at 103-04:

[T]he classifications of trespasser, licensee, and invitee, the immunities from liability predicated upon those classifications, and the exceptions to those immunities, often do not reflect the major factors which should determine whether immunity should be conferred upon the possessor of land. Some of those factors, including the closeness of the connection between the injury and the defendant's conduct, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the prevalence and availability of insurance, bear little, if any, relationship to the classifications...and the existing rules conferring immunity.

Although in general there may be a relationship between the remaining factors and the classifications of trespasser, licensee, and invitee, there are many cases in which no such relationship may exist...The burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach may often be greater with respect to trespassers than with respect to invitees, but it by no means follows that this is true in every case...The last of the major factors, the cost of insurance will, of course, vary depending upon the rules of liability adopted, but there is no persuasive evidence that applying ordinary principles of negligence law to the land occupier's liability will materially reduce the prevalence of insurance due to increased cost or even substantially increase the cost.

[T]o focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian
would be whether the defendant owed this plaintiff a duty of care, and if so, the nature of that duty. The resolution of this question would then involve consideration of the following kinds of factors: The identity of the plaintiff, the reason the plaintiff was on the defendant’s property, whether the plaintiff’s presence on the property was expected by the defendant, and whether the defendant should reasonably have foreseen the plaintiff’s slipping because of the puddle.

The traditional criteria governing the defendant’s liability in the puddle hypothetical are analytically similar to the more generalized considerations enumerated as illustrative of a “privity” approach to the hypothetical: Both are plaintiff oriented and focus mainly upon the nature of the plaintiff’s presence on the defendant’s property. The criteria differ from the generalized considerations, however, to the extent that the criteria result in a rigid trichotomization of plaintiffs injured on the defendant’s premises into the property-based categories of “trespassers,” “licensees,” and “invitees.”

A new “status” approach to the defendant’s liability in our puddle hypothetical would focus primarily upon the identity of the defendant and the nature of his premises. Thus, a court would first consider whether the defendant was an individual occupying the premises for private purposes, or whether the defendant was a commercial entity using the premises for business purposes, and if the defendant fell into

values.

On the basis of these considerations, including the court’s recognition that “A man’s life or limb does not become less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose,” id. at 118, 443 P.2d at 568, 70 Cal. Rptr. at 104, the court concludes that “The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others . . . .” Id. at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

14. See generally F. Harper & F. James, supra note 1, at 1430-32; C. Morris, Torts 145-51 (1953); W. Prosser, supra note 11, at 364-65; Restatement (Second) of Torts §§ 333, 341-44 (1965); Comment, 44 N.Y.U.L. Rev. 426, 426-27 (1969). The arbitrariness of the “trespasser”-“licensee”-“invitee” trichotomy, and the increasing machinations of courts attempting to reach just results by developing exceptions to the categories and their correlative duties, has led jurists as well as commentators to deprecate as feudalistic the traditional approach to the tort responsibility of land owners and occupiers. See Kermarec v. Compagnie Generale, 358 U.S. 625, 630-31 (1959); Rowland v. Christian, 69 Cal. 2d 108, 113-18, 443 P.2d 561, 564-68, 70 Cal. Rptr. 97, 100-04 (1968); J. Fleming, supra note 1, at 77-82; W. Friedmann, supra note 3, at 148-49; F. Harper & F. James, supra note 1, at 1430-32, 1434, 1438-40, 1467-70. See also Green, Landowners’ Responsibility to Children, 27 Tex. L. Rev. 1, 4-6 (1948), reprinted in L. Green, supra note 3, at 330-32.

The traditional approach to determining the liability of a land owner or occupier has been partially rejected by statute in England. The distinction between “licensees” and “invitees” is abolished by The Occupiers’ Liability Act, 5 & 6 Eliz. 2, ch. 31 (1957). See generally J. Fleming, supra note 1, at 81-82, 84; H. Street, The Law of Torts 179-92 (3d ed. 1963).
the latter general category, the degree to which the premises were open
to and/or encouraged the presence of the public. Further considera-
tions relevant to a delineation of the basis and extent of the liability of
the defendant to those injured on his premises would then include:
Should the cost of bearing liability for the injury suffered be considered
an incident of the activity for which the defendant uses the premises?
Does this activity render the defendant more economically able to bear
and spread the risk of such losses than those persons likely to be injured
on the premises? How large is the class of those who typically come
onto the defendant's premises? What are their expectations concerning
the quality of maintenance of the premises? What is the public interest
in protecting those expectations? What tort obligations are justified in
light of this public interest? Is the plaintiff a member of that general
class of persons whose protection is required by the public interest justi-
fying imposition of the obligation?

The questions exemplifying a new-"status" approach to the liability
issue posed by our puddle hypothetical illustrate the primary analyti-
cal difference between that approach and the traditional or "privity"
approach: the new-"status" approach focuses primarily upon the de-
fendant rather than the plaintiff. Thus, if new-"status" concepts were
used to delineate the basis and extent of the liability of an owner or
occupier of land, that liability would vary, not so much on the basis
of the identity of the plaintiff or the reason for the plaintiff's presence
on the defendant's premises, but primarily according to whether the
premises were, for example, an apartment, a home, a warehouse, a man-
ufacturing plant, a hotel, a recreational club, or a department store.15

The new-"status" approach to the delineation of the basis and ex-
tent of non-consensual obligations has an important historical analog.
It is the traditional common law concept of a "common calling"16 or

15. See generally L. Green, Judge and Jury 132-33 (1930):
There is no rational basis to be found for continuing to handle the problems
created by the industrialist landowner in the same manner as those created
by the farmer and the small tradesman. The assumption (stated in the
decisions as a principle) which runs through hundreds of these cases that
all landowners are to be subjected to the same responsibility is not necessary,
nor is it well founded. There is no legal theory so flexible that its results
will not be used against itself if it is made to care for such widely variant
cases.
See also Green, The Duty Problem in Negligence Cases, 29 Colum. L. Rev. 255,
274 (1929), reprinted in L. Green, supra note 3, at 204; cf. Green, Landowners'
Responsibility to Children, 27 Tex. L. Rev. 1, 12-13 (1948), reprinted in L. Green,
supra note 3, at 338-39.
Professor John Fleming takes a similar position. See generally J. Fleming, supra
note 1, at 82.
16. See generally C. Fifoot, History and Sources of the Common Law (Tort
and Contract) 157-64 (1949); F. Harper & F. James, supra note 1, at 749-50,
1016-17; T. Plucknett, A Concise History of the Common Law 424-26 (2d ed.
business "affected with a public interest." The defendant who pursued a "common" or "public" calling was treated as "holding himself out" as providing a service to the public which the law deemed to include both extra-contractual obligations and duties of care to others than just those with whom the defendant was in contractual "privity." Thus, for example, in the first case relaxing the "privity" limitation on the scope of liability for economic loss, Glanzer v. Shepard, Justice Cardozo, writing for the majority, repeatedly emphasized the "public" nature of the defendant's calling—weight certification—and the expectations of those foreseeably affected by, but not in "privity" with, the defendant. Similarly, Professor Magruder has explained the early case law recognizing a cause of action against a defendant exercising a "common calling" for "emotional" as opposed to "physical" injury in terms of the "public" nature of the service offered. That the law


19. See id. at 238-42, 135 N.E. at 275-77 (emphasis added):

We think the law imposes a duty toward buyer as well as seller in the situation here disclosed. The plaintiffs' use of the certificates was not an indirect or collateral consequence of the action of the [defendants-] weighers. It was a consequence which, to the weighers' knowledge, was the end and aim of the transaction. . . . The defendants held themselves out to the public as skilled and careful in their calling. . . . In such circumstances, assumption of the task of weighing was the assumption of a duty to weigh carefully for the benefit of all whose conduct was to be governed. We do not need to state the duty in terms of contract or of privity. Growing out of a contract, it has none the less an origin not exclusively contractual. Given the contract and the relation, the duty is imposed by law. (Cf. MacPherson v. Buick Motor Co., 217 N.Y. 382, 390, [111 N.E. 1050, 1053 (1916)].)

There is nothing new here in principle. . . . One who follows a common calling may come under a duty to another whom he serves, though a third may give the order or make the payment. . . . "It is the duty of every artificer to exercise his art rightly and truly as he ought." . . .

We must view the act in its setting, which will include the implications and the promptings of usage and fair dealing. . . . We state the defendants' obligation, therefore, in terms, not of contract merely, but of duty. . . . The defendants, acting . . . in the pursuit of an independent calling weighed and certified at the order of one with the very end and aim of shaping the conduct of another.

imposed an extra-contractual obligation on a defendant exercising a "common calling" to use care with respect to the "emotional" as well as the "physical" well-being of those who sought his services reflects the important socio-economic function performed by such defendants as well as the expectations of the public as to how such defendants did and should perform their function. That these expectations were protected "for reasons of policy and because of the relationship of the parties," is, in Holmesian "legal realist" terminology, a conclusionary statement that the law treated as a "right" the public's interest in the protection of these expectations. The statement, then, that the obligations of the defendant exercising a "common calling" were imposed because of the "public" nature of the defendant's business, is more a conclusion than an explanation: The defendant's business was deemed "public" because the public's expectations concerning the way in which such a business was conducted were considered sufficiently important to elevate them to "rights" by providing legal redress for their impairment.

The "common calling" theory which justified the imposition of extra-contractual obligations and later relaxations of "privity" limitations on the scope of liability has modern analogs which can and do function in some cases as the basis for a conceptual return—but not regression—to similar "status" notions in the law of torts. Like the "common callings" of yesteryear, there are in today's society activities in which individuals participate as a matter of daily routine and institutions with which individuals must deal as a matter of social and eco-


24. Thus the basic question for the common law jurist as well as scholar must be, not which activities and enterprises are "affected with a public interest" which imposes on those conducting such activities or enterprises special obligations inuring to the benefit of the public, but which activities and enterprises should be considered as so "affected with a public interest" that the interest of the individual in protecting his expectations as to how those activities and enterprises function is accorded the protection of a legal "right." Or, to borrow an analogy from Professor Reich, the question to which the law of torts must respond is similar to the question of which forms of government largesse should be treated as "property," and not which forms are in fact protected under the shibboleth of a "property right." *See generally Reich, The New Property, 73 Yale L.J. 733, 771-74, 777-79, 782-87 (1964).
nomic necessity. Such routine dependence gives rise to various expectations as to how those participating in these activities and operating these institutions should respond to the individual's interest in his physical, emotional and financial security. Whether these expectations will be protected is thus a question of whether the law will elevate the interest in their protection to a "right" by imposing certain obligations on these participants and institutions by reason of the socio-economic role which they have assumed—that is, by reason of their "status."

The twentieth century economic institution which most closely assimilates the modern counterpart of the traditional common law's "common calling" is the insurer that engages in "standardized" transactions—i.e., utilizes "adhesion contracts"—on a mass basis. Because of the growing prevalence of and economic dependence on insurance, the obvious inferior bargaining position and knowledge of the insured, and the length, ambiguity, and fine print characteristic of the typical "standardized" policy, courts, since the turn of this century, have increasingly departed from the nineteenth century's "freedom of contract" principle.


[T]he individual consumer in the highly organized and integrated society of today must necessarily rely upon institutions devoted to the public service to perform the basic functions which they undertake. At the same time the consumer does not occupy a sufficiently strong economic position to bargain with such institutions . . . . Hence the courts in the field of insurance contracts have tended to require that the insurer render the basic insurance protection which it has held out to the insured.

Cf. W. Friedmann, supra note 3, at 124:

Contract is becoming increasingly institutionalised. . . . It has to a large extent become the way in which social and economic policies are expressed in legal form. This is another way of saying that public law now vitally affects and modifies the law of contract.

In so far as the basic industries and economic commodities are now subject to standardised regulation by private insurance, transport, or public utility undertakings, these exercise functions of public law. Because of the inability of the other party to bargain effectively on terms, such private enterprises exercise, by permission of the State, a quasi-legislative power.

See also id. at 104-06.

in insurance cases. Thus, there is a clear judicial trend toward treating insurance policies more like “commodities” than “contracts,” and toward imposing extra-contractual obligations on insurers on the basis of the expectations of those with whom they deal and the “public service” nature of the function they perform. The trend toward a “status” approach in insurance cases has centered mainly around the extra-contractual obligations owed by the insurer to, first, the insured (the person with whom the insurer is in contractual “privity”), second, the insurance applicant (a person seeking a “privity” relationship with the insurer), and third, a limited class of third persons, such as the intended beneficiary in a life insurance application on which the insurer fails to take reasonably prompt action (a third person whose protection is the known primary purpose of the attempted “privity” relationship).


The idea implicit in the cases which allow recovery [against the insurer for unreasonable delay in acting upon an application for insurance (see notes 30-31 infra)] seems very fruitful indeed. In dealing with standardized contracts courts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterprises “calling”, and to what extent the stronger party disappointed reasonable expectations based on the typical life situation. It can hardly be objected that the resulting task of rewriting, if necessary, the contents of a contract of adhesion is foreign to the function of common law courts . . . . (Footnote omitted.)

Cf. id. at 631: “The insurance business probably deserves credit also for having first realized the full importance of the so-called ‘juridical risk’, the danger that a court or jury may be swayed by ‘irrational factors’ to decide against a powerful defendant. Ingenious clauses have been the result.” (Footnote omitted.)


The California supreme court's two leading third-party duty decisions, *Biakanja v. Irving*[^32] and *Lucas v. Hamm*,[^33] both of which involve defendants who render a public service, are conceptually similar to the third category of cases in which the duty imposed upon the insurer inures to the benefit of a third person not in "privity" with the insurer. *Biakanja* and *Lucas* held, respectively, that a notary public who negligently fails to direct proper attestation of a will, and a testator's attorney who negligently drafts a will, are liable in tort for the resulting economic injury to the intended beneficiary of the will. While the opinions in *Biakanja* and *Lucas*, like Cardozo's opinion in *Glanzer v. Shephard*,[^34] relied primarily upon tort rather than a third-party beneficiary contract theory,[^35] the duty imposed upon the negligent contracting party in favor of the third person intended to be the beneficiary of the services was essentially the same as that duty owed by the contracting party to the party with whom he was in contractual "privity." Although the scope of the duty recognized in *Biakanja* and *Lucas* is determined in light of the primary "privity" relationship, the duty itself is imposed as a matter of public policy directly in favor of the intended beneficiary, on the basis of the latter's relationship with the notary public or attorney.[^36] Nonetheless, the *Biakanja*-*Lucas* type of third-party tort duty is still a "privity"-based duty because it not only derives from but depends upon the (theoretical) enforceability of the same duty by the party in "privity" with the tortfeasor. The question, then, is whether a court, on the basis of the kinds of public policy considerations underlying the cases imposing extra-contractual obligations on insurers and the common law's concept of a "common calling," will recognize a duty, which arises upon the (attempted) creation of a "privity" relationship, but which is owed directly to a class of third persons totally independently of the duties owed *inter sese* by the parties in contractual "privity." This question was answered affirmatively by the California supreme court in *Barrera v. State Farm Mutual Automobile Insurance Company*.[^37] We begin our discussion of the four landmark 1968-1969 tort law decisions of the California supreme court, then, with *Barrera* as a prototype "status" case.

[^34]: 233 N.Y. 236, 135 N.E. 275 (1922). See note 19 supra.
Barrera AND Elmore: LIABILITY BASED ON "STATUS"

Barrera v. State Farm Mutual Automobile Insurance Company imposed on automobile liability insurers a duty, owed directly to members of the public who may be injured by the insured, to investigate an applicant's insurability within a reasonable period of time after issuance of the policy. Elmore v. American Motors Corporation extended to injured "bystanders" the "strict liability in tort" borne by manufacturers and retailers of defective products. Both decisions, in rejecting any "privity" limitation on the class of potential plaintiffs and in focusing upon the socio-economic role of the defendant to determine the nature and scope of the defendant's liability, represent important examples of the new "status" approach in tort law. The two decisions differ to the extent that Barrera constitutes an explicit adoption of this approach, while Elmore can only be explained as an implicit recognition of this approach.

A. The Barrera Decision

In Barrera, the plaintiff, while a pedestrian, was injured by a negligent driver to whom the defendant had issued an automobile liability insurance policy approximately one and one-half years prior to the accident. On being informed by the plaintiff's attorney of the claim against the insured, the defendant commenced an investigation of the insured's insurability. After discovering from a Department of Motor Vehicles report, sought only after learning of plaintiff's claim,40 that the insured

38. Id.
40. An underwriting superintendent for State Farm testified that State Farm generally ordered Department of Motor Vehicle (DMV) reports "on a judgment basis." Moreover, in response to a question whether State Farm checked the driving record of an insured whenever a claim was presented against the insured, the underwriter answered that it depended upon the nature of the claim, and that whether the claim was sufficiently "significant" to warrant such an investigation was determined by the claims, rather than the underwriting, department of State Farm. See 71 Adv. Cal. at 690-91, 456 P.2d at 680, 79 Cal. Rptr. at 112. At the time State Farm accepted the initial application and issued the policy to the insured in 1958, the cost of an entire investigation was $3.35, and the cost of a DMV check was only 25 cents. Id. at 691, 456 P.2d at 680, 79 Cal. Rptr. at 112.

"The evidence suggests that State Farm, in failing to investigate [the insured's] insurability and to obtain a DMV report, pursued a policy of saving minor costs on its part at the expense and sacrifice of the interests of its insured and those of the general public who were the potential victims of the insured's negligence. . . . Not until plaintiff's attorneys notified State Farm of a $10,000 claim under the personal liability provision of the policy did State Farm attempt to check [the insured's] driving record." Id. at 691-92, 456 P.2d at 680, 79 Cal. Rptr. at 112. See also id. at
had falsely answered a question concerning prior license suspensions on his original insurance application, the insurer rescinded the policy. After the plaintiff obtained a judgment in her personal injury action against the insured, she sued the insurer to recover on the policy, contending that the latter was "estopped" from rescinding the policy. The court, in a six to one majority decision written by Justice Tobriner, concluded:

[A]n automobile liability insurer must undertake a reasonable investigation of the insured's insurability within a reasonable period of time from the acceptance of the application and the issuance of a policy. This duty directly inures to the benefit of third persons injured by the insured. Such an injured party, who has obtained an unsatisfied judgment against the insured, may properly proceed against the insurer; the insurer cannot then successfully defend upon the ground of its own failure reasonably to investigate the application.

Justice Tobriner explains that the court's holding is based, first, on the "quasi-public" nature of the insurance business and, second, on the public policy underlying California's Financial Responsibility Law. The character of the insurer and the public policy involved together require recognition of a duty to "conduct a reasonable investigation of insurability within a reasonable time after issuance of an automobile liability policy." While this duty could be characterized "as one sounding either in tort or quasi-contract," Justice Tobriner points out that "[t]he label is not important."
In discussing the "quasi-public" nature of the insurance business, Justice Tobriner adopts the "common calling" approach to delineation of those duties which such businesses owe both to those with whom they are in contractual "privity" and to third persons who may be affected by their contractual undertakings. Such duties must be determined, not only on the basis of the rules applicable to "private" contracts, but also in light of the "reasonable expectation of the public and the type of service which the entity holds itself out as ready to offer." The reasonable expectation of both the insured and the general public is that the insurer will perform its basic function of providing insurance—that is, accepting, in return for compensation, the risk of an obligation to indemnify the insured or his victim for possible future injury. But, if an automobile liability insurer can perpetually postpone the investigation of insurability and concurrently retain its right to rescind until the injured person secures a judgment against the insured and sues the carrier, then the insurer can accept compensation without running any risk whatsoever. Such a rule would permit an automobile liability insurer to continue to pocket premiums and take no steps at all to probe the verity of the application for the issued policy unless and until the financial interest of the insurer so dictated.

This "status" approach to the institution of insurance, which partially underlies the imposition on an automobile liability insurer of a duty to conduct a reasonable and timely investigation of insurability, is basically the same as that underlying the case law imposing an analogous extra-contractual duty on insurers to act promptly on applications—the quasi-public nature of the insurance business and the rea...
sonable expectation of the general public." The duty imposed on automobile liability insurers in Barrera, however, differs in one critical respect from the more general duty of insurers to act promptly on applications. Even though the latter duty has been extended to third persons who are neither insureds nor applicants, for reasons similar to those underlying the Biakanja-Lucas rule, it remains essentially a "privity"-based duty. The automobile liability insurer's duty recognized in Barrera, on the other hand, inures primarily to the general public—or, more precisely, to that class of third persons who will be injured through accidents involving the insured's automobile; and it is independent from a similar duty enforceable by the insured.

It is the court's second basic reason for imposing a duty on the automobile liability insurer to investigate insurability within a reasonable period of time—the public policy underlying California's Financial Responsibility Law—that justifies a non-"privity" based duty. As Justice Tobriner points out, the purpose of that law is
to make owners of motor vehicles financially responsible to those injured by them in the operation of such vehicles. ... [I.e., to give]
"monetary protection to that ever changing and tragically large group.

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51. Id. at 697, 456 P.2d at 684, 79 Cal. Rptr. at 116. See also id. at 698, 456 P.2d at 685, 79 Cal. Rptr. at 117.

52. See cases cited in note 31 supra. See generally text accompanying notes 28-31 supra.

53. See notes 32 & 33 supra and accompanying text.

54. See generally text accompanying notes 35 & 36 supra.


56. See generally 71 Adv. Cal. at 699, 701, 456 P.2d at 685-86, 79 Cal. Rptr. at 117-18:
The duty [to timely investigate insurability after issuance of an automobile liability policy] arises from the public policy that protects the innocent victim of the careless use of automobiles from an inability to sue a financially responsible defendant. This duty, which the insurer incurs with the issuance of an automobile liability policy, therefore runs directly to the class of potential victims of the insured. ... .

... The automobile liability insurer incurs a direct duty to those members of the public ... who stand to benefit from the validity of a contract of insurance which protects them against the risk of their own injury or death. Public policy requires the recognition of this duty; without its imposition a basic purpose of the Financial Responsibility Law would be significantly thwarted and persons such as the plaintiff would remain without an effective remedy for a loss incurred through no fault of their own.

See also note 44 supra and accompanying text.
Moreover, the public policy underlying the Financial Responsibility Law and the related statutory Assigned Risk Plan—\(^{(58)}\) to protect "that ever changing and tragically large group of persons\(^{(59)}\) who are the victims of automobile accidents by the assurance of financially responsible automobile owners—\(^{(60)}\) indicates the particularly strong public interest in the functioning of the automobile liability insurance enterprise. Thus, for example, "Automobile liability insurance differs from ordinary indemnity insurance, which primarily protects the insured and which may not be available to an applicant if the carrier decides he is not an insurable risk.\(^{(61)}\"

The court in \textit{Barrera} concludes that statutes applicable to automobile liability insurers must therefore be treated similarly to the "standardized" policies drafted by such insurers.\(^{(62)}\) Neither can be construed in a manner "which would serve only the financial interest of the insurer and directly thwart [the] public policy [underlying the Financial Responsibility and related laws].\(^{(63)}\"

Permitting an automobile liability insurer to postpone investigations of insurability until appraisal of a "significant" claim would surely thwart that public policy.\(^{(64)}\) Thus, the California Insurance Code provision governing "recission"—\(^{(65)}\)—must be construed, at least insofar as it applies to automobile liability insurers, in light of that public policy which requires "recognition of the duty of the automobile liability insurer to undertake within a reasonable time

\begin{footnotes}
\item 57. \textit{Id.} at 695, 456 P.2d at 682-83, 79 Cal. Rptr. at 114-15.
\item 60. \textit{See 71 Adv. Cal.} at 696, 456 P.2d at 683, 79 Cal. Rptr. at 115. \textit{See generally Grad, Recent Developments in Automobile Accident Compensation, 50 Colum. L. Rev. 300, 305-08 (1950); Murphy & Netherton, Public Responsibility and the Uninsured Motorist, 47 Geo. L.J. 700, 700-02 (1959).}
\item 63. \textit{Id.} at 696, 456 P.2d at 684, 79 Cal. Rptr. at 116.
\item 64. \textit{See id.} at 696-97, 456 P.2d at 684, 79 Cal. Rptr. at 116. \textit{See generally note 40 supra.}
\item 65. \textit{CAL. INS. CODE} § 650 (West 1955) provides: "Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this part such right may be exercised at any time previous to the commencement of an action on the contract."
from issuance of the policy a reasonable investigation and by penalizing
the breach of that duty by loss of the right of rescission."

The automobile liability insurer is deprived of its right to rescind,
as a "penalty" for breach of its investigation duty, to prevent the insurer
from relying on an untimely discovered basis for rescission thereby es-
caping liability for the judgment which the injured party has recovered
against the insured. However, the "penalty" does not in any way oper-
ate to the benefit of the insured who was responsible for both the acci-
dent and the voidability of the policy. First, the insurer's loss of its right
to " rescind" does not include loss of its right to "cancel" the policy. In
other words, the severity of the "penalty" imposed on the insurer is
limited to that necessary to protect the insured's judgment creditor.
The policy is therefore rendered effective at least through, but not neces-
sarily beyond, the time of the accident—the relevant time for determin-
ing the injured party's right to obtain satisfaction of his judgment against
the insured from the insurer. And, second, limitation of the insurer's
recission rights does not affect any other remedies against the insured
for the application misstatement. Thus, the insurer may rely on the
insured's misrepresentation as a basis for an action against him after it
satisfies the injured party's judgment claim, or as a defense in an action
by an insured person who personally pays the judgment. The ultimate risk of loss, as between the insurer and insured, therefore falls
upon the latter in the same way it would if the insurer had not lost its
rescission rights as the "penalty" for breaching the duty owed to the
insured's victim. The effect of the Barrera decision, then, is that if an
automobile accident victim can show that his tortfeasor's automobile
liability insurer breached its duty to investigate insurability within a
reasonable period of time, the victim, upon obtaining a judgment
against the insured, is treated as if the insurer had no basis upon which
to rescind the policy before or at the time of the accident; the insured-
tortfeasor, on the other hand, is treated as if the insurer always had a
right to rescind.  

67. Id. at 705, 456 P.2d at 689, 79 Cal. Rptr. at 121. On the difference be-
tween "recission" and "cancellation," see id. at 687-88 n.3, 456 P.2d at 678 n.3,
79 Cal. Rptr. at 110 n.3. In general, "recission" refers to a retroactive termination
of the policy (or, i.e., a complete return to the status quo based on the "voidness"
ab initio of the contract), while "cancellation" includes only prospective termination.
See generally BLACK'S LAW DICTIONARY 259, 1471 (4th cd. 1951). Compare CAL.
68. See 8 J. APPLEMAN, supra note 28, § 4813, at 179.
69. See 71 Adv. Cal. at 705, 456 P.2d at 689, 79 Cal. Rptr. at 121.
70. See id. at 706, 456 P.2d at 689-70, 79 Cal. Rptr. at 121-22.
71. Cf. id. at 704-05, 456 P.2d at 688-89, 79 Cal. Rptr. at 120-21: "[T]his
court has rejected a mechanical application of the over-generalization that the rights
of the injured person cannot rise above those of the insured. . . . [R]ights of innocent
This ultimate imposition of loss on the insured rather than the insurer, and the deprivation of the insurer's rescission rights only to the extent necessary to ensure compensation to the victim, make clear that although the automobile liability insurer's duty to conduct a reasonable and timely investigation of insurability arises upon the acceptance of a particular insurance application, the duty itself inures directly to the third-person class of the insured's future victims and exists totally independently of any duties owed *inter sese* by the insurer and the applicant-insured.\(^2\) Thus, despite some of Justice Tobriner's language suggesting that the automobile liability insurer's investigation duty is owed to the insured as well as to the class of his potential victims,\(^3\) and notwithstanding the analytically unsound reliance on the *Biakanja-Lucas* line of third-party duty cases,\(^4\) the duty recognized in *Barrera* is neither dependent upon nor limited by any "privity" factors. Particularly in its emphasis on the socio-economic function of the automobile liability insurer, and in its refusal to "label" the duty imposed in traditional "tort" or "contract" terms, *Barrera* therefore is a landmark of the new-"status" approach to the delineation of nonconsensual obligations.

### B. The Elmore Decision

*Elmore* involved consolidated personal injury and wrongful death actions arising out of a collision between plaintiff Waters' car and plaintiff Elmores' Rambler. The Rambler was manufactured by defendant American Motors and sold to the Elmores by defendant Mission Rambler Company. Plaintiffs' evidence was sufficiently strong to support an inference that their injuries were proximately caused by a "defect"\(^5\)
in the Rambler existing at the time of defendant Mission's sale to the Elmores. The trial court's granting of defendants' motion for nonsuit had to be reversed with respect to plaintiff Waters as well as plaintiff Elmores only if the "strict liability in tort" doctrines established in Greenman v. Yuba Power Products, Incorporated and Vandermark from decay or deterioration before sale, or from the way in which the product is prepared or packed." Id. at 352.

Moreover, as comment i points out, the "strict liability" rule of that section applies only if the "defective" nature of the product renders it "unreasonably dangerous." Id., comment i, at 352. This limitation of the "strict liability in tort" doctrine, adopted in section 402a of the Second Restatement of Torts and first explicitly judicially enunciated by (now Chief) Justice Traynor in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 62-64, 377 P.2d 897, 900-01, 27 Cal. Rptr. 697, 700-01 (1963), to "defective" products which are "unreasonably dangerous" represents a failure to completely abandon the "fault" principle underlying nineteenth century negligence liability. Although a defendant who bears "strict liability" cannot defend on the ground of the exercise of utmost (or any degree of) care, a condition precedent for the imposition of such liability is that there be something "wrong" with the product for which the defendant is responsible. Such a condition of liability implies at least a general presumption that someone, somewhere in the manufacturing and/or distribution process, must have done something at least bordering on "negligence," which resulted in the product having a "defect" which creates an "unreasonably dangerous" condition. See generally Morris, Enterprise Liability and the Actuarial Process—The Insignificance of Foresight, 70 YALE L.J. 554, 596-97 (1961). See also Freedman, "Defect" in the Product: The Necessary Basis for Products Liability in Tort and in Warranty, 33 TENN. L. REV. 323, 327-31 (1966); Kessler, Products Liability, 76 YALE L.J. 887, 898 n.57, 900-02, 928-30 (1967).

76. As Justice Peters points out in Elmore, 70 Adv. Cal. at 621, 451 P.2d at 87, 75 Cal. Rptr. at 655:

In [Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 260, 391 P.2d 168, 170, 37 Cal. Rptr. 396, 398 (1964)] it was recognized that a plaintiff is entitled to establish the existence of the defect and the defendants' responsibility for it by circumstantial evidence. . . . No reason appears why the same rule should not apply where the plaintiff is seeking to prove that the defect caused his injuries.

When the evidence is viewed . . . most strongly in favor of plaintiffs, it furnishes an inference that their injuries were proximately caused by a defect in the Rambler which existed at the time of sale. . . . [On the basis of the testimony of an eye witness and an expert witness] it could properly be inferred that the disconnected drive shaft gouged the roadway and caused the rear of the car to lift and to swerve or be thrown around which in turn caused the Rambler to go to the wrong side of the road. Thus, it could properly be found that the disconnected drive shaft was a proximate cause of the accident.

77. 59 Cal. 2d 57, 62-64, 377 P.2d 897, 900-01, 27 Cal. Rptr. 697, 700-01 (1963), held:

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. . . .

Although . . . strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law [citations omitted], and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products [Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 368-75, 161 A.2d 69, 84-96 (1960)]
v. Ford Motor Corporation extended to "bystanders" as well as to purchasers and users of "defective" products. The California supreme court, in an unanimous opinion authored by Justice Peters, held that "the doctrine of strict liability in tort is available in an action for personal injuries by a bystander against the manufacturer and the re-

make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. . . .

The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers . . . rather than the injured persons who are powerless to protect themselves. . . . To establish the manufacturer's liability it was sufficient that plaintiff [the purchaser's husband] proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.

See generally Kalven, Torts: The Quest for Appropriate Standards, 53 CALIF. L. REV. 189, 204-06 (1965); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791, 803-04 (1966).

78. 61 Cal. 2d 256, 261-63, 391 P.2d 168, 170-72, 37 Cal. Rptr. 896, 898-900 (1964), held that the manufacturer deemed responsible for the completed product cannot escape the "strict liability in tort" recognized in Greenman (see note 77 supra) by "delegating" duties (e.g., of inspection) to other parties in the distribution chain (e.g., a franchised retailer), and, a retailer engaged in the business of distributing goods to the public is also "strictly liable in tort" under the Greenman doctrine to a consumer injured by a "defective" product. See generally Lascher, Strict Liability in Tort for Defective Products: The Road To and Past Vandermark, 38 S. CAL. L. REV. 30, 43-45 (1965); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791, 814-16 (1966).

79. "Bystanders," at least as that term is used in Elmore, is a generic label for that very large residual class of potential victims of "defective" products which includes all such victims except those who purchase, or are injured while using, a "defective" product. The most typical example of a "bystander" is a pedestrian who is injured by a "defective" automobile driven by the "purchaser" and/or a "user" or "consumer." The "bystander"-plaintiff in Elmore was the driver of another car. Cf. RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402a, comment l at 354 (1965). Typical examples of "users" or "consumers" include the plaintiff in Greenman (the "purchaser"'s husband injured while using the "defective" Shopsmith), and one of the plaintiffs in Vandermark ("purchaser"'s sister injured while a passenger in the "defective" Ford). See 70 Adv. Cal. at 622, 451 P.2d at 88, 75 Cal. Rptr. at 656.

80. See RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402a, Caveat (1) at 348 (1965), in which the Reporters express no opinion as to whether the "strict liability in tort" doctrine restated in section 402a applies to injured persons other than "users or consumers." The class of "users or consumers" is defined in comment l to section 402a. In commenting on Caveat (1) the Reporters explain: "Thus far the courts, in applying the rule stated [in section 402a], have not gone beyond allowing recovery to users and consumers, as those terms are defined in Comment l. Casual bystanders, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery." Id. comment o at 356.

The primary rationale of Justice Peters' decision indicates that its unarticulated major premise is that the status of the defendant, rather than the particular relationship between the defendant and the individual who happens to be the plaintiff, determines whether the defendant shall bear strict liability for the plaintiff's injury caused by a "defect" in a product for which the defendant is deemed responsible. First, Justice Peters expressly points out that Greenman and Vandermark make it clear that the doctrine of strict liability may not be restricted on a theory of privity of contract. Since the doctrine applies even where the manufacturer has attempted to limit liability, they further make it clear that the doctrine may not be limited on the theory that no representation of safety is made to the bystander. In other words, an injured individual's lack of "privity" either with the manufacturer or with the retailer of the product has no relevance to the question whether the defendant manufacturer or retailer will be "strictly liable in tort" to this particular injured individual. Thus, the plaintiff's degree of "privity" with the defendant, whether as purchaser, user, or bystander, is rejected as the criterion for determining whether the defendant bears "strict liability in tort" to the plaintiff. Instead, the court relies on the socio-economic policies underlying the imposition of "strict liability in tort" in Greenman and Vandermark as the basis for delineating the scope of that liability.

Justice Peters' reliance on the Greenman-Vandermark rationale constitutes the second important indicia of the "status" approach inherent in the Elmore decision. Both Greenman and Vandermark focused upon the role of the defendant manufacturer and/or retailer in the process culminating in injury to the plaintiff from the defective product, and the defendant's ability to absorb and spread the costs of such injuries. In neither case did the court base its decision on the relationship of the particular plaintiff to the defendant. Nor did the court...
in either case rely on the "foreseeability" of a product "defect" causing injury to one category of potential victim as compared to another.\footnote{See notes 84 & 85 supra. Moreover, as Justice Peters explains in Elmore, regardless of whether injury to a "bystander" is more or less foreseeable than is injury to a purchaser or user from a "defective" product, the "bystander" is less able to protect himself from injury from "defective" products. Therefore, if one category of potential victim is more entitled to the protection of "strict liability in tort" than another, the "bystander" is in greatest need of such protection. See 70 Adv. Cal. at 623-24, 451 P.2d at 89, 75 Cal. Rptr. at 657.}

Thus, both Greenman and Vandermark exemplify a "status," rather than a "privity" or plaintiff-oriented approach to the issue of a manufacturer's and/or retailer's responsibility for "defective" products.

Elmore's direct reliance on and extension of the Greenman-Vandermark doctrine to encompass all persons whose injuries are proximately caused by a "defect" in a product for which the defendant is deemed responsible represents a culmination of the "status" approach inherent in the Greenman and Vandermark decisions. The Elmore decision is best characterized as holding that the obligation of the manufacturer and retailer to provide products free of "defects" which result in personal injury is owed directly to all members of the public. The manufacturer and retailer who bear "strict liability in tort" to any person injured by a "defective" product thus constitute modern analogs to those engaged in traditional "common callings."\footnote{See text accompanying notes 16-25 supra.} As with the automobile liability insurer involved in Barrera, the nature and scope of their obligations are determined by their socio-economic roles and the public's consequent expectations as to how they do and should perform their functions—that is, on the basis of "status" considerations. Elmore therefore represents the paradigm of the implicit "status" approach that was explicitly articulated in Barrera.

\section{III

\textit{Dillon: "PRIVITY" LIMITATIONS ON LIABILITY}}

\textit{Dillon v. Legg}\footnote{68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).} rejected the "zone of danger" doctrine as a limitation upon the class of persons to whom a negligent defendant owes a
duty of care. It thus represents a movement away from "privity" categorizations of the plaintiffs to whom a negligent defendant may be liable. However, insofar as Dillon adopts the traditional "foreseeability" standard to determine the scope of a defendant's duty of care, it is not a "status" decision like Barrera or Elmore. Moreover, the guidelines which Dillon formulates to implement the "foreseeability" standard themselves constitute another set of "privity" limitations on liability. As a decision which both extends the scope of a negligent defendant's liability to third persons and imposes new "privity" limitations on that liability, Dillon is a useful case to test the degree to which a "status" analysis can meaningfully resolve the typical "line-drawing" problems confronted by courts in negligence cases.

A. Dillon's Rejection of the "Zone of Danger" Doctrine

In Dillon, the plaintiff sustained physical injuries from emotional shock at witnessing her young child run over and killed by the defendant, a negligent driver. The plaintiff witnessed the fatal accident from a vantage point at which the defendant's negligence exposed her to no risk of physical injury. The California supreme court, in a four to three opinion by Justice Tobriner, rejected the "zone of danger" doctrine, adopted five years earlier in Amaya v. Home Ice, Fuel & Supply Company, which would have precluded plaintiff's recovery.

The "zone of danger" doctrine abolished in Dillon essentially provided that to recover compensation for physical injury suffered from shock or other emotionally traumatic response caused by witnessing the negligent injuring of another, one must have been within the area of exposure to direct physical injury created by the defendant's conduct. This doctrine and its progenitor, the "impact" rule, derive partially from the traditional reluctance of tort law to respond to claims of "emotional" as opposed to "physical" injury. The "impact" rule and the

93. This reluctance may be partially explained by the paucity of scientific knowledge on the subject and the genuine fear of fraudulent claims and/or overly sympathetic or gullible juries. See generally J. FLEMING, supra note 1, at 50-51; W. PROSSER, supra note 11, at 346-48; Comment, Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases, 35 U. CHI. L. REV. 512, 516-21, 527-28 (1968). See also Bohlen, Right to Recover for Injury Resulting from Negligence
arbitrary limitation imposed upon its abrogation by the "zone of danger" doctrine are also rooted in the fear traditionally engendered by the specter of a nonconfinable scope of liability imposed out of proportion to the defendant's individual "fault." Such fear is exemplified by Justice Schauer's analysis of the "administrative" and "moral" factors in his four to three majority opinion in Amaya:

[I]n circumstances such as those here shown, to impose liability would "open the way to fraudulent claims, and enter a field that has no sensible or just stopping point." . . .

... [T]he problem of setting some limits to such liability for fright or shock allegedly caused by the apprehension of danger or injury not to the plaintiff but to a third person . . . is a real one. . . .

... As long as our system of compensation is based on the concept of fault, we must also weigh "the moral blame attached to the defendant's conduct" . . .

There is good sense in the conclusion . . . that "the liability imposed by such a doctrine [extending the duty of a negligent driver beyond that class of persons within the 'zone of danger'] is wholly out of proportion to the culpability of the negligent tort-feasor." . . . It begs the question to argue that "If the loss is out of all proportion to the defendant's fault, it can be no less out of proportion to the plaintiff's innocence." . . . That obvious truism could be urged by every person who might adversely feel some lingering .

Without Impact, 50 U. Pa. L. Rev. 141, 144-46 (1902). An arguably more persuasive explanation for this reluctance, however, can be found in the nineteenth century's attitude toward the worth of an individual which is displayed, for example, in what Professor John Fleming has described as the common law's "unholy trinity" of defenses—contributory negligence, assumption of the risk, and the "fellow servant" rule. J. FLEMMING, supra note 1, at 5-6; cf. Green, The Individual's Protection Under Negligence Law: Risk Sharing, 47 Nw. U.L. Rev. 751, 758-61 (1953). In other words, given the apparent sacrificial attitude toward individuals' physical well-being as the price of "progress" during the rise of industrialism, it is not surprising that little if any concern was directed toward the mental security of an individual. See generally Bohlen, Right to Recover for Injury Resulting from Negligence Without Impact, 50 U. Pa. L. Rev. 141, 142-43 (1902). But see Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 HARV. L. REV. 1033, 1051-52 (1936). See also Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 325 & n.5, 379 P.2d 513, 532 & n.5, 29 Cal. Rptr. 33, 52 & n.5 (1963) (Peters, J., dissenting); cf. Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890).

94. See Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 319, 379 P.2d 513, 528, 29 Cal. Rptr. 33, 48 (1963) (Peters, J., dissenting); Hambrook v. Stokes Bros., [1925] 1 K. B. 141, 157; Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 HARV. L. REV. 1033, 1039 (1936): "Once accepting the view that a plaintiff threatened with an injurious impact may recover for bodily harm resulting from shock without impact, it is easy to agree with Atkin, L.J. [in his opinion in Hambrook v. Stokes, supra], that to hinge recovery on the speculative issue whether the parent was shocked through fear for herself or for her children 'would be discreditable to any system of jurisprudence.'" (Footnote omitted.)
effect of the defendant's conduct, and we would then be thrown back into the fantastic realm of infinite liability.\textsuperscript{95}

Justice Schauer's argument in \textit{Amaya}, that the court can find no rational or moral basis to limit the defendant's liability once it concedes that a driver has a duty to exercise care to protect some accident witnesses, as well as primary victims, from emotional and physical trauma, recalls similar fears expressed by Lord Abinger some 120 years earlier in \textit{Winterbottom v. Wright}:

There is no privity of contract between these parties [the plaintiff driver of the coach and the defendant who provided and serviced the coach pursuant to a contract with the Postmaster]; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts [to provide, \textit{inter alia}, a safe coach] . . . to the parties who entered into them, \textit{the most absurd and outrageous consequences, to which I can see no limit, would ensue.}

In \textit{Dillon}, Justice Tobriner expressly rejects the \textit{Amaya} majority's preference for a precise but arbitrary limitation on liability rather than a general principle of liability which poses difficult "stopping point" problems.\textsuperscript{97} First, Justice Tobriner explains the inherent arbitrariness of the "zone of danger" doctrine. That doctrine divides into two subclasses the class of plaintiffs who suffer physical injury from shock proximately caused by a negligent defendant's direct physical injury of another. Only that subclass of plaintiffs who were also in danger of direct physical injury—an "impact"—are entitled to recover for their physical injury. This subclassification created by the "zone of danger" doctrine is artificial and wholly indefensible in light of California's rejection of the "impact" rule.\textsuperscript{98} Thus, Justice Tobriner concludes, the liability of a defendant for the physical injury to a third person from shock at the defendant's direct physical injury of another must be determined by the general "foreseeability" standard of negligence law.\textsuperscript{99}

Second, Justice Tobriner argues that although adoption of the

\begin{itemize}
\item \textsuperscript{95} 59 Cal. 2d at 310-12, 315, 379 P.2d at 522-23, 29 Cal. Rptr. at 42-43 (emphasis added).
\item \textsuperscript{96} 152 Eng. Rep. 402, 405 (Ex. 1842) (emphasis added).
\item \textsuperscript{97} 68 Cal. 2d at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75: "The zone-of-danger concept must, then, inevitably collapse because the only reason for the requirement of presence in that zone lines in the fact that one within it will fear the danger of impact." \textit{See also} \textit{Amaya v. Home Ice, Fuel \\& Supply Co.}, 59 Cal. 2d 295, 319, 379 P.2d 513, 528, 29 Cal. Rptr. 33, 48 (1963) (Peters, J., dissenting). \textit{See note \textsuperscript{94} supra.}
\item \textsuperscript{98} 68 Cal. 2d at 739-40, 441 P.2d at 919, 920, 69 Cal. Rptr. at 79, 80:
\begin{itemize}
\item In the absence of "overriding policy considerations . . . foreseeability of risk [is] of . . . primary importance in establishing the element of duty."
\item . . .
\end{itemize}
\item \textsuperscript{99} Id. at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.
"foreseeability" standard may pose difficulties in adjudicating limits on liability in future cases, such difficulties cannot justify a court's continued adherence to an arbitrary limitation on the class of persons to whom a defendant owes a duty of care. A court's inherent inability to predetermine the scope of a defendant's liability in all possible future cases involving similar issues—and the folly of even attempting to find such "immutable" rules governing tort obligations—does not mean that a court is incapable of formulating reasonable and workable guidelines for future cases. Moreover, Justice Tobriner concludes, if a court refuses to apply the "foreseeability" standard unencumbered by an arbitrary limitation in "the most egregious case," then "the viability of the judicial process for ascertaining liability for tortious conduct itself" is 

This foreseeable risk may be of two types. The first class involves actual physical impact. A second type of risk applies to the instant situation. In other cases, however, plaintiff is outside the zone of physical risk (or there is no risk of physical impact at all), but bodily injury or sickness is brought on by emotional disturbance which in turn is caused by defendant's conduct. Under general principles recovery should be had in such a case if defendant should foresee fright or shock severe enough to cause substantial injury in a person normally constituted. Plaintiff would then be within the zone of risk in very much the same way as are plaintiffs to whom danger is extended by acts of third persons. . . . [2 F. Harper & F. James, supra note 1, at 1035-36].

100. See id. at 739-40, 441 P.2d at 919-20, 69 Cal. Rptr. at 79-80:
As a classic opinion states: "The risk reasonably to be perceived defines the duty to be obeyed." [Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99 (1928).] Defendant owes a duty, in the sense of potential liability for damages, only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous, and hence negligent, in the first instance. . . .

Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case. Because it is inherently intertwined with foreseeability such duty or obligation must necessarily be adjudicated only upon a case-by-case basis. We cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future. We can, however, define guidelines which will aid in the resolution of such an issue as the instant one.

Also see note 102 infra.


102. See 68 Cal. 2d at 743-44, 746, 441 P.2d at 922, 924, 69 Cal. Rptr. at 82, 84:
We do not believe that the fear that we cannot successfully adjudicate future cases of this sort, pursuant to the suggested guidelines, should bar recovery in an otherwise meritorious cause.

Thus we see no good reason why the general rules of tort law, including the concepts of negligence, proximate cause, and foreseeability, long applied to all other types of injury, should not govern the case now before us.

Also see note 100 supra.
thrown into doubt.\textsuperscript{103}

Having rejected the "stopping point" argument of the \textit{Amaya} majority as a sufficient justification for retaining the "zone of danger" doctrine, Justice Tobriner then articulates the following factors which a court should consider in determining whether a defendant should reasonably have foreseen physical injury to the plaintiff from shock or emotional trauma caused by the defendant's negligent direct physical injury of another:

(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.\textsuperscript{104}

The enumeration of these factors was presumably intended to serve two functions in \textit{Dillon}. First, these factors indicate that in "the most egregious case"—the mother's emotional trauma at the witnessed death of her child\textsuperscript{105}—the harm suffered by the plaintiff is undoubtedly "foreseeable." Second, that such factors may be formulated seems to show that "foreseeability" will be as workable a standard in post-\textit{Dillon} cases as in \textit{Dillon} itself—that is, that rejection of the "zone of danger" doctrine will not result in a limitless scope of liability.

\textbf{B. The "Privity" Nature of the \textit{Dillon} Decision}

The \textit{Dillon} replacement of the "zone of danger" doctrine with the general negligence "foreseeability" standard and the factors chosen as guidelines for the application of that standard raise several questions. The first involves the degree to which \textit{Dillon} can be considered as a significant departure from a "privity" approach and/or a movement towards a "status" approach. The "zone of danger" doctrine constitutes a "privity" limitation because it is totally plaintiff oriented and focuses upon the spatial relationship between the particular plaintiff and the defendant's allegedly negligent conduct.\textsuperscript{106} Insofar as \textit{Dillon} rejects that doctrine, the case represents an eradication of a "privity" limitation on the scope of a defendant's liability. Moreover, the adoption of the "foreseeability" standard imposes a duty to use care toward a class of persons related to the defendant in a much less "privity"-like manner than is the primary victim of the accident. Thus, \textit{Dillon} could

\textsuperscript{103} Id. at 747-48, 441 P.2d at 925, 69 Cal. Rptr. at 85.
\textsuperscript{104} Id. at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.
\textsuperscript{105} Id. at 747, 441 P.2d at 925, 69 Cal. Rptr. at 85.
\textsuperscript{106} See generally text accompanying notes 11-12 supra.
be viewed as moving away from “privity” towards a “status” approach.

The adoption of the “foreseeability” standard in itself, however, indicates that Dillon is not a “status” decision like Barrera and Elmore. Justice Tobriner expressly relies on Palsgraf\(^{107}\) in discussing the delineation of the defendant's duty to use care toward a third person who may be injured through shock at witnessing injury to the defendant's primary victim.\(^{108}\) And, in dicta, he states that the defendant's duty to this third person is merely a derivative of his duty to the primary victim.\(^{109}\) Thus, the duty owed to the plaintiff in Dillon is neither based on the nature of the defendant's activity that results in the plaintiff's injury—here automobile driving—nor independent of the duty owed to the defendant's primary victim.\(^{110}\) Dillon, therefore, does not represent a major departure from the traditional “privity” approach towards the new—“status” approach exemplified by Barrera and Elmore.

The second question posed by Dillon's adoption of the general “foreseeability” standard and especially the factors chosen to implement that standard is whether Dillon makes even a small step toward the new—“status” approach, or whether Dillon merely represents the rejection of one “privity” limitation in favor of other limitations prima facie less arbitrary but equally plaintiff oriented. The first factor to be considered in assessing “foreseeability”\(^{111}\) involves the physical location of

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108. 68 Cal. 2d at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79. See note 100 supra.
109. See 68 Cal. 2d at 733, 441 P.2d at 916, 69 Cal. Rptr. at 76:

We further note, at the outset, that defendant has interposed the defense that the contributory negligence of the mother [the plaintiff not within the "zone of danger"], sister [the other plaintiff who was probably within the "zone of danger" and who is not treated as raising the Amaya issue], and child contributed to the accident. If any such defense is sustained and defendant found not liable for the death of the child because of the contributory negligence of the mother, sister or child, we do not believe that the mother or sister should recover for the emotional trauma which they allegedly suffered. In the absence of the primary liability of the tortfeasor for the death of the child, we see no ground for an independent and secondary liability for claims for injuries by third parties. The basis for such claims must be the adjudicated liability and fault of defendant; that liability and fault must be the foundation for the tortfeasor's duty of due care to third parties who, as a consequence of such negligence, sustain emotional trauma. (emphasis added.)

111. See text accompanying note 104 supra.
the plaintiff. It differs from the "zone of danger" doctrine only in that it does not draw any rigid boundary lines. The second factor involves the temporal relationship between the plaintiff's shock and the accident which caused it. And the third factor, in a manner analytically analogous to the Biakanja-Lucas rationale, involves the plaintiff's relationship to the person directly injured by the defendant's negligence. Thus, all three factors essentially involve the identity of the plaintiff and his particular relationship to the defendant. Like the "zone of danger" doctrine, therefore, the Dillon guidelines represent "privity" limitations on the scope of the duty owed to a third person by a defendant who is primarily liable to another.

The hard question posed by Dillon is whether the "foreseeability" guidelines meet the Amaya majority's objections to abolition of the "zone of danger" doctrine. This question must be considered for at least two reasons. First, the Dillon majority accepts, at least implicitly, the major premise of the Amaya majority's objections: that rejection of the "zone of danger" doctrine is justified only if there is an otherwise applicable general principle of liability which would provide workable rules to delineate the scope of a defendant's liability in a manner not out of proportion with his "fault" in future similar cases. Second, the Amaya majority's argument against rejection of the doctrine is valid if, and to the extent that, it argues against decisions which do not offer a workable standard for adjudication of future cases. Thus, in arguing against extending "strict liability in tort" to drivers of automobiles with defective brakes, Chief Justice Traynor in his 1968 decision in Maloney v. Rath explained:

112. See text accompanying notes 30-34 supra.

113. See 59 Cal. 2d at 310-12, 315, 379 P.2d at 522-23, 29 Cal. Rptr. at 42-43 (1963). See text accompanying note 95 supra. The Dillon majority's implicit acceptance of the Amaya majority's major premise is evident throughout the second part of Justice Tobriner's opinion, entitled "The alleged inability to fix definitions for recovery on the different facts of future cases does not justify the denial of recovery on the specific facts of the instant case . . . ." 68 Cal. 2d at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79. See notes 100 & 102 supra and accompanying text.

114. See notes 77 & 78 supra.

115. 69 Cal. 2d 442, 446, 445 P.2d 513, 515, 71 Cal. Rptr. 897, 899 (1968). Chief Justice Traynor's view on the necessity of new precedents containing within themselves criteria which indicate with "reasonable certainty" the manner in which liability will be delineated in future similar cases may be characterized as a "balancing" approach compared to the extreme approach apparently adopted by Justice Schauer in Amaya. Justice Schauer's position in Amaya—at least on the basis of a literal reading of his opinion—is that any uncertainty injected into the common law by a precedent-breaking decision is to be avoided. Justice Schauer's extremest anti-"uncertainty" position probably derives from his fear of a nonconfinable degree of liability imposed out of proportion with the individual "fault" of the defendant (see text accompanying note 95 supra), and possibly may be limited to cases in which the rejection of a precedent would involve potential unlimited liability.

Chief Justice Traynor's position as expressed in Maloney, on the other hand,
Unless the ratio decidendi of a decision making an abrupt change in the law can point with reasonable certainty to the solution of similar cases, it cannot help but create uncertainty in the area of its concern. In many situations the problems caused by such uncertainty will not outweigh the considerations that dictate change as the appropriate common law development.

While abolition of the "zone of danger" doctrine may not constitute an "abrupt" change in the law comparable to that which would be created by adopting "strict liability in tort" in place of negligence, the similar concerns expressed in both Amaya and Maloney about adopting new rules of liability which do not contain within themselves the means for delimiting their applicability in future cases pose a serious problem which goes to the heart of the common law process.

appears to require the weighing of the problems which uncertainty will cause against the need for a change in the law. In some cases, the considerations dictating change may outweigh the problems created by uncertainty. In others, however, and especially those involving an "abrupt" change in the law, the reasons for the change may not justify the problems which would be caused if that change could not indicate with reasonable certainty the manner of resolving future similar cases.

Assuming, then, a difference between Justice Schauer's and Chief Justice Traynor's position on whether and when "uncertainty" should be tolerated as part of the common law process—which difference may be characterized as an "absolutist" (or "extreme" judicial restraint) as compared with a "balancing" approach—the textual acceptance of the validity of the objections posed by the Amaya majority (which included Traynor) is limited to the Traynor formulation of similar objections in Maloney. With the Maloney gloss on the Amaya majority's position, one can speculate as to whether Chief Justice Traynor's dissent in Dillon, on the ground that Amaya was "correctly decided" (68 Cal. 2d at 748, 441 P.2d at 925, 69 Cal. Rptr. at 85), was based on his belief that the Dillon majority's guidelines did not provide sufficient "reasonable certainty" vis-à-vis the solution of future similar cases, or that the considerations dictating change, which Justice Tobriner considered "compelling" (Id. at 730, 441 P.2d at 914, 69 Cal. Rptr. at 74), did not outweigh the problems caused by the uncertainty which Dillon's overruling of Amaya would generate.

Abolition of the "zone of danger" doctrine, unlike replacing negligence liability with "strict liability in tort," involves a broadening of the class of persons to whom a defendant may be liable as opposed to a change in the underlying basis of his liability. Moreover, California had already rejected the "impact" rule (see note 98 supra and accompanying text) and made the "abrupt" precedential break of recognizing an independent tort for intentional infliction of mental distress. See State Rubbish Collectors Ass'n v. Silizhoff, 38 Cal. 2d 330, 240 P.2d 282 (1952), discussed in Kalven, Torts: The Quest for Appropriate Standards, 53 CALIF. L. REV. 189, 194-96 (1965). See generally Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 319, 379 P.2d 513, 528, 29 Cal. Rptr. 33, 48 (1963) (Peters, J., dissenting).

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Compare Justice Tobriner's discussion in Dillon and Chief Justice Traynor's discussion in Maloney on the relationship between a viable common law and the necessity of courts formulating "workable" rules (see note 115 supra and accompanying text; notes 118-20 infra and accompanying text) with L. Green, Judge and Jury 77-96 (1930); Green, The Duty Problem in Negligence Cases, 28 COLUM. L. REV.
Justice Tobriner's attempt in Dillon to meet the Amaya majority's objections to abolition of the "zone of danger" doctrine—and, inferentially, the similar query posed in Maloney—takes two basic forms. First, as discussed above, Justice Tobriner takes the position, somewhat more activist than Chief Justice Traynor's stance in Maloney, that the viability of the common law process depends upon the judiciary's willingness to respond to "compelling" reasons for granting recovery even if "stopping point" problems are thereby created. Second, Justice Tobriner rejects only the conclusion, and not the major premise, of the Amaya majority's argument. That is, Dillon neither discards the notion that criteria to limit the potential scope of a negligent defendant's liability in future similar cases must be articulable in the instant case abolishing the "zone of danger" doctrine, nor the traditional tort law view that such criteria should relate to the defendant's degree of "fault." Rather, Dillon discards as incorrect the Amaya majority's conclusion that the doctrine is necessary to preclude a nonconfinable scope of liability imposed out of proportion to the defendant's "fault." Thus, the Dillon "answer" to Amaya is essentially that the general "foreseeability" standard provides criteria for delineating the scope of the defendant's liability in future cases which are as fair and manageable in the Amaya-Dillon context as they are in other types of negligence cases. The question left open, of course, and which must await resolution in less egregious post-Dillon fact situations, is whether the Dillon "foreseeability" guidelines are both workable and fairer than the rejected doctrine, or whether they will culminate in just another set of "privity" limitations no less arbitrary than that of the "zone of dan-

1014, 1035-45 (1928), reprinted in L. Green, supra note 3, at 174-84.
118. See text accompanying notes 100-03 supra.
120. See note 103 supra and accompanying text. Also see notes 100 & 102 supra.
121. While there is disagreement between the Dillon and Amaya majorities both as to the degree of change in the law which rejection of the "zone of danger" doctrine would create and the requisite preciseness of the criteria to implement in future cases the general standard of liability adopted in the case rejecting the doctrine, the primary disagreement between Justice Schauer and Justice Tobriner goes to whether the doctrine is necessary to preclude the possibility of a negligent defendant who "directly" injures one person bearing a nonconfinable degree of liability in favor of third persons who suffer injury arising out of emotional trauma caused by the injury to the primary victim. Thus, Justice Tobriner devotes the major part of his opinion in Dillon to a refutation of Justice Schauer's position that the possibility of such unlimited liability is the inevitable consequence of rejecting the "zone of danger" doctrine. See 68 Cal. 2d at 739-43, 746-47, 441 P.2d at 919-22, 924-25, 69 Cal. Rptr. at 79-82, 84-85.
ger" doctrine.

C. A "Status" Perspective of Dillon

The final, and for present purposes, most important question raised by the Dillon "privity"-"foreseeability" approach is whether a straightforward "status" analysis in Dillon would have yielded a rationale which more satisfactorily answered the judicial process problems posed by Chief Justice Traynor in Maloney. A "status" approach to Dillon would focus on what the defendant was doing, rather than on the identity of the plaintiff or the primary victim of the defendant's negligence. The defendant in Dillon was driving an automobile, presumably in a non-business capacity. From a "status" perspective, then, the issue in Dillon or a similar case would be whether an individual driving his car in a private capacity should, as an incident of engaging in that type of commonplace yet hazardous activity, assume an obligation to exercise care to avoid creating a risk of injury not only to primary victims of automobile accidents but also to third persons who witness or learn of physical injury to another and consequently suffer injury from emotional trauma. This question would then have to be resolved in terms of the individual motorist's capacity to bear the cost of injuries arising out of accidents, the public's expectations with respect to how an individual motorist should drive, the class of accidents for which an individual motorist should be considered responsible, and the scope of persons with whom he should be deemed to have a relationship which would give rise to a duty of care. Examining Dillon from this perspective—that is, asking whether an individual motorist should owe a duty of care to protect "bystanders" from injury arising out of shock—makes it clear that the recovery issue in Dillon is

122. See note 115 supra and accompanying text.
123. In light of America's traditionally high tolerance level for physical violence, increased judicial recognition of a right to be compensated for injuries resulting from witnessing the infliction of suffering or death on another may be viewed as bringing the law closer to, and arguably encouraging actualization of, our professed moral code's commandment to respect the integrity of others. On the prevalence of violence and its acceptance in our society, see H. GRAHAM & T. GURR, VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES, A REPORT SUBMITTED TO THE NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE (N.Y. Times ed. 1969). As John Herbers points out in his Special Introduction to the New York Times edition of Violence in America: "All across the land violence is being used for one purpose or another without qualms of conscience, just as it always has been in America. It is more noticeable now because we are in a period of great turbulence and change." Id. at xviii. See also the Introduction by H. Graham & T. Gurr, id. at xxv-xxxii.
125. See note 79 supra; text accompanying notes 82-83 supra.
126. Examination of Dillon from the perspective of the scope of liability of an individual motorist and as part of the general automobile compensation problem is
really an aspect of the much larger automobile accident compensation crisis with which tort law alone cannot adequately deal, without the aid of a complimentary compulsory insurance or comprehensive compensation scheme.\textsuperscript{127}

One reason why tort law alone cannot adequately resolve the liability issues arising out of automobile accidents—and a principal reason for the refusal to extend “strict liability in tort” to drivers in Maloney\textsuperscript{128}—can be strikingly illustrated by comparing the activity of individual motoring to the enterprise of mass production and distribution of standardized commodities. In this latter area, there are socially and economically relevant “status” considerations upon which to determine that one or more participants, irrespective of “fault,” should bear at least the initial risk of loss occasioned by or incident to the carrying on of the enterprise. Such considerations include: The superior ability of identifiable participants in mass production and distribution processes to bear and spread the risk of losses arising out of injuries attributable to the standardized commodities from which they profit; the consumer's relatively inferior economic position, bargaining power, and ability to detect defects likely to cause injury; the nonuser's total inability to protect himself from injuries caused by standardized commodities, except by the socially unacceptable method of insulating himself from almost every commonplace activity of modern daily life; the necessary and increasing routine dependence upon standardized commodities; and the great cost to society, as well as to the individuals directly affected, of uncompensated injuries. That these considerations justify the imposition of strict liability on the mass-scale producer and distributor of standardized commodities explains the steady evolution of tort law in the “products liability” field, from the initial “assault upon the citadel of analogous to Professor Leon Green’s analysis of Palsgraf as a railroad case. See generally L. Green, Judge and Jury 263-64 (1930).


privity"\textsuperscript{129} in \textit{MacPherson v. Buick Motor Company}\textsuperscript{130} to the abrogation of all "privity" limitations on "strict liability in tort" by the California supreme court's 1969 decision in \textit{Elmore}.

On the other hand, with an activity like individual motoring, when the only persons involved or adversely affected are individuals acting in a private capacity, analogous "status" considerations do not so readily justify loss allocation decisions similar to those protecting individuals from "defective" products.\textsuperscript{132} The increasing prevalence of the automobile, the helplessness and often economically ruinous position of the automobile's victims, and the soaring social cost of accidents can hardly be questioned. However, despite the increasing availability and utilization of insurance, the individual motorist is neither economically nor socially comparable to the mass-scale producer or distributor of standardized commodities. Factors explaining this disparity include: The social and economic necessity of driving; the difficulty of determining whether an individual motorist should be deemed responsible for an accident when other persons appear equally responsible; the fact that victims of automobile accidents are often other motorists, as in \textit{Elmore}, as contrasted with a case like \textit{Barrera} or \textit{Dillon}; the severe fi-

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  \item \textsuperscript{129} Ultramares Corp. v. Touche, Niven & Co., 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931). See Prosser, \textit{The Assault Upon the Citadel (Strict Liability to the Consumer)}, 69 Yale L.J. 1099 (1960).
  \item \textsuperscript{131} Elmore v. American Motors Corp., 70 Adv. Cal. 615, 451 P.2d 84, 75 Cal. Rptr. 652 (1969), discussed in Part II Section B supra, represents, in terms of California's development of products liability case law, the culmination of the trend which began with (now Chief) Justice Traynor's concurring opinion in \textit{Escola v. Coca Cola Bottling Co.}, 24 Cal. 2d 453, 461-68, 150 P.2d 436, 440-44 (1944). Traynor, in his concurring opinion in \textit{Escola}, argued that considerations like those enumerated in the text preceding note 129 supra, are the real basis for the decisions extending \textit{MacPherson}. He also argued against judicial reliance on fictions to reach results more clearly justifiable on the basis of an express articulation of such considerations. See also Traynor's discussion of the purpose of the "strict liability in tort" doctrine in his decision in \textit{Greenman} (see note 77 supra), which adopted the rationale of his concurring opinion in \textit{Escola}. See generally Kessler, \textit{Products Liability}, 76 Yale L.J. 887, 896-901, 909-28, 934-37 (1967).
\end{itemize}
nancial hardship which extended tort liability, along with the rising cost of insurance, would impose on the average motorist; the relative inadequacy of levels of insurance; and the possibility of the "responsible" motorist being totally uninsured in a noncompulsory-insurance state. Additionally, the most important factor is, perhaps, that the relative economic position of accident victims and individual motorists is not commensurate with that of an injured individual vis-à-vis a mass-scale producer or distributor of standardized commodities. That such factors render tort law, in the absence of complimentary nonjudicial legal changes, incapable of solving the increasing compensation problems inherent in today's expansive reliance on the automobile does not mean that tort law should retreat by standing still. It means only that in such an area, tort law may have to continue evolving on the basis of more traditional principles. That is, fair principles of tort liability for injuries arising out of individual motoring may have to continue taking into account the identity of the plaintiff, the nature of his injury, and his particular relationship to the defendant, rather than focusing primarily on the activity of the defendant. Thus, in cases like Dillon, as contrasted with those like Barrera and Elmore, "privity" factors will continue to be interjected into the line-drawing process.

That a "status" analysis of a case like Dillon may indicate that the defendant's liability should be based on or limited by "privity" concepts does not mean that a "status" analysis in such a case is irrelevant or futile. It serves to put the case in perspective and provides the basis upon which to determine whether some "privity" rules are necessary, and if so, which are desirable. From a "status" perspective, therefore, we may conclude that with an activity such as that involved in Dillon, some limits on the scope of the defendant's duty to exercise care must be imposed. Since neither the identity of the defendant nor the activity in which he is engaged contains within itself a sufficient basis upon which to fairly delineate the scope of his liability, that delineation will necessarily be plaintiff oriented to some degree. That is, the limitations on his liability will be, at least partially, "privity" limitations.

The characterization of the "foreseeability" standard and guidelines adopted in Dillon as "privity" rules does not, therefore, necessarily imply a criticism of the decision. From a "status" perspective, however, the Dillon opinion is subject to the serious criticism that it failed to consider the scope of liability issue from the viewpoint of the nature of the defendant's activity—individual motoring. By its overemphasis on the plaintiff and the nature of her injury, therefore, Dillon may have created "privity" limitations which are either unnecessary or undesirable in future cases in which a different kind of activity—for example, use of a defective power tool like that in Greenman—results in the emotional trauma precipitating the plaintiff's injury. That is, in a future case
to which the Dillon "foreseeability" guidelines appear applicable, it should not be overlooked, as it was in the Dillon decision itself, that the defendant was engaged in individual motoring. But, accepting the necessity for some plaintiff-oriented limitations on liability for injury resulting from emotional trauma caused by the defendant's direct physical injury to another—at least in cases involving automobile accidents caused by negligent private drivers—Dillon can be criticized for retaining a "privity" approach only if the "privity" rules adopted are no fairer or more workable than the doctrine rejected. Given the obvious arbitrariness of the "zone of danger" doctrine, that kind of criticism would be difficult to sustain.

IV

Connor: A "STATUS" CRITIQUE

Connor v. Great Western Savings & Loan Association\textsuperscript{133} rejected "privity" limitations on the tort liability of residential tract financiers and imposed a duty of care on them which inures to the benefit of the tract home purchaser. The supreme court's reliance on the Biakanja-Lucas rationale\textsuperscript{134} to extend the financier's duty of care to protect the tract home purchaser, however, essentially renders the liability recognized in Connor a "privity"-based liability. This final part of the Foreword will suggest that a straightforward "status" analysis would have yielded a more significant and analytically sounder decision than the "privity" approach adopted in Connor. That is, Connor, unlike Dillon, represents a case which should have been decided similarly to Barrera and Elmore.

A. The Legal and Empirical Context of Connor

A basic understanding of recent developments in the residential construction industry and the extent to which tort law has responded to those changes is a necessary prerequisite to grasping the significance of the issue posed in Connor, the inadequacy of its "privity" rationale, and the reason Connor represents a paradigmatic case for a "status" approach. During the last two decades the structure of the residential construction industry has been radically altered by the development of financing and building techniques making possible the mass production and merchandising of homes.\textsuperscript{135} The phenomena of "speculative" hous-

\textsuperscript{133} 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968). The California Legislature may have rendered this decision practically a nullity, depending on the interpretation of a post-Connor statute. See note 166 infra.

\textsuperscript{134} See text accompanying notes 32-35 supra; note 160 infra and accompanying text.

\textsuperscript{135} See generally Lefcoe & Dobson, Savings Associations as Land Developers, 75 Yale L.J. 1271 (1966); Comment, Liability of the Institutional Lender for Structural Defects in New Housing, 35 U. Chi. L. Rev. 739 (1968). See also D. Herzog, The
ing tract developments has become increasingly prevalent.\textsuperscript{136} The typical tract developer is a small, undercapitalized firm which can easily enter and depart from the residential construction industry depending on fluctuating housing demand.\textsuperscript{137} Such developers must obtain almost all of their capital from institutional lenders, which in practice are usually savings and loan associations.\textsuperscript{138}

This recent development of the speculative residential tract developer has led several courts to abandon "privity" concepts in actions against the builder-seller of tract homes by subsequent purchasers and other third persons for damage suffered as a result of negligent design and/or construction.\textsuperscript{139} And, in 1965, the New Jersey supreme court, in Schipper v. Levitt & Sons, Incorporated,\textsuperscript{140} held that the same considerations underlying "strict liability in tort" cases involving mass producers and distributors of standardized commodities, like *Henningsen v. Bloomfield Motors, Incorporated*\textsuperscript{141} and Santor v. A. & M. Karagheusian, Incorporated,\textsuperscript{142} apply equally to the residential tract developer:

We consider that there are no meaningful distinctions between [the defendant developer's] mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same. That being so, the warranty or strict liability principles of *Henningsen* and *Santor* should be carried over into the realty field, at least in the aspect dealt with here. . . .

. . .

When a vendee buys a development house from an advertised model . . . he clearly relies on the skill of the developer . . . .


\textsuperscript{137} See id. at 740-42.


\textsuperscript{140} 44 N.J. 70, 207 A.2d 314 (1965).


He has no architect or other professional adviser of his own, he has no real competency to inspect on his own . . . and his opportunity for obtaining meaningful protective changes in the conveyancing documents prepared by the builder vendor is negligible. If there is improper construction . . . the well-being of the vendee and others is seriously endangered and serious injury is foreseeable. The public interest dictates that if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party who justifiably relied on the developer's skill . . . .

The enterprise liability theory\(^{144}\) of the *Schipper* decision and the two post-*Connor* California court of appeal cases following *Schipper*\(^{145}\) cannot provide the contemplated protection when applied to the typical tract developer. Contrary to the court's apparent assumption in *Schipper*, the tract developer does not play the same economic role or occupy the same financial position as the manufacturer and mass distributor of standardized non-real property commodities. Although the individual purchaser, user or "bystander" who suffers loss as the result of faulty residential construction stands in no better position economically than his counterpart in the products liability cases, the tract developer, unlike the defendants in a case such as *Elmore*, is probably in no better position to absorb and spread the risk of such losses than is the injured individual. In fact, the reason for the "defective" nature of a tract home is often that very condition of the tract developer which will render him a financially insolvent defendant. The typical speculative tract developer is undercapitalized and obtains most of his financing, at high interest rates and fees, from a savings and loan association. His precarious financial situation predictably compels the tract developer to "cut corners" to be able to complete and sell the homes as quickly as possible.\(^{146}\) Thus, there is an inherent risk of faulty construction—"corner-cutting"—in the very nature of the residential tract enterprise.

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\(^{143}\) 44 N.J. at 90-91, 207 A.2d at 325-26 (1965).


\(^{146}\) See generally Lefcoe & Dobson, *Savings Associations as Land Developers*, 75 YALE L.J. 1271, 1293 (1966); Comment, *Liability of the Institutional Lender for Structural Defects in New Housing*, 35 U. CHI. L. REV. 739, 742 (1968): "Tract developments often require multi-million dollar investments, but the average home builder's assets are approximately $35,000-$40,000. When demand for housing is great, the undercapitalized developer often purchases large tracts with funds acquired at high rates of interest, is compelled to 'cut corners' in construction, and sells the completed houses as quickly as possible." See also id. at 742-43 n.28.
created by the financing techniques and undercapitalization of the tract developer, that will also render him unable to recompense the individual injured by his faulty construction.

The *Connor* case presents a typical example of the residential tract developer and the role played by savings and loan associations in the residential tract construction industry. In *Connor*, a savings and loan association, Great Western, loaned approximately three million dollars in construction funds to an inexperienced developer, Conejo, whose assets were only about 5,000 dollars at the time the loan was negotiated. Great Western also made the purchase money loan147 which enabled Conejo to acquire the 100-acre tract upon which the homes were constructed. Additionally, Great Western ensured itself of a return on Conejo's sale of the completed homes by obtaining a right of first refusal on the long-term purchase-money loans to be made to the individual home buyers, and also by obtaining Conejo's commitment to pay Great Western whatever interest and fees were earned by another purchase-money lender from a qualified buyer who refused to take permanent financing from Great Western.148 The insertion of such

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147. Great Western made what was in effect a purchase-money loan to Conejo by utilizing a technique known as "land warehousing." Great Western advanced 150,000 dollars of the 340,000 dollar purchase price, acquired title to the 100-acre tract in its name, and resold it in parcels to Conejo, pursuant to a one-year, "option-to-repurchase"-for-180,000-dollars agreement, as Conejo received downpayments from individuals who agreed to purchase homes before they were constructed on the basis of the plans and model homes. See 69 Cal. 2d at 858-60, 447 P.2d at 612-14, 73 Cal. Rptr. at 372-74. Chief Justice Traynor recognizes that the "land warehousing" device was in effect a disguised purchase-money loan which was used solely to avoid what were at the time very restrictive statutory maximums on the loan-value ratios governing loans by savings and loan associations on unimproved property. See id. at 859 & nn.2 & 3, 447 P.2d at 613 nn. 2 & 3, 73 Cal. Rptr. at 373 & nn.2 & 3.

148. Part of the consideration for Great Western making the construction loan was Conejo's agreement to inform prospective home buyers of Great Western's willingness to make long-term purchase-money loans secured by first deeds of trust to approved borrowers. Additionally, if a home buyer wished to obtain financing elsewhere, Great Western had ten days in which to meet the terms of the other lender. If Great Western did meet the terms but the home buyer still obtained financing from another lender, Conejo was to pay Great Western the fees and interest earned by the other lender. However, most of the home buyers from Conejo obtained their financing (approximately 80 percent of the purchase price in the form of 24-year loans) from Great Western. As part of the original financing agreement, Conejo paid Great Western a one percent fee for the loans to qualified buyers, and a one and one-half percent fee for loans made to Conejo on behalf of home buyers considered by Great Western to constitute poor risks. See id. at 861, 447 P.2d at 614, 73 Cal. Rptr. at 374.

Although savings and loan associations which finance construction by a tract developer such as Conejo typically also act as the long-term financier for the individual tract home buyers, or otherwise impose some form of "penalty" on the borrower-developer when the home buyer obtains long-term financing elsewhere (see note 149 infra and accompanying text), Chief Justice Traynor considered Conejo's agreement vis-à-vis the purchase-money loans to the home buyers to be one of the important indicators that Great Western was acting in the capacity of more than a "mere lender." See id. at
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“penalty” provisions in construction loan agreements is a common practice among savings and loan associations. Their primary reason for financing the construction of a residential tract is usually to acquire an advantageous position in the senior residential mortgage market and thereby become—or derive the same return as—the long-term secured financer of the individual tract home buyers.\(^\text{149}\)

Given the serious inexperience and undercapitalization of Conejo and its onerous financial commitments to Great Western,\(^\text{150}\) the risk of “corner-cutting” by Conejo was substantial. Chief Justice Traynor, in his four to three majority opinion in Connor, recognized the risk of improper construction created by financing a developer such as Conejo, and consequently imposed a duty upon tract financiers such as Great Western to exercise reasonable care in inspecting the construction plans and process. The rationale underlying the imposition of this duty and its extension to protect the individual home buyers as well as the financer’s shareholders, however, is unfortunately confused. Connor falls far short of being the analog to MacPherson\(^\text{151}\) for the residential consumer which it might have been.

864, 447 P.2d at 616, 73 Cal. Rptr. at 376. This misunderstanding of the role of the savings and loan association in the financing of residential tract construction can be characterized as a failure to appreciate the difference between the “usual money lender” and the “usual construction lender.” See Comment, New Liability in Construction Lending: Implications of Connor v. Great Western Savings & Loan, 42 S. Cal. L. Rev. 353, 354 (1969).


Another reason why savings and loan associations provide the major source of construction loan funds is to obtain a favorable position in the market for mortgages on the newly constructed homes. The savings association is generally more interested in obtaining a mortgage of long duration than a short-term construction loan, since its business return is derived from interest income. In order to obtain “end loans,” or mortgages, savings associations often insert a penalty clause in construction loan contracts . . . . Arguably, the builder who solicits “end loans” for his construction lender is in fact the lender’s agent in the home financing transaction.

Savings and loan representatives have frequently asserted that loan associations are far more concerned with the quality of workmanship than are the builders themselves. The builder’s relationship with the purchaser, and with the home, terminates upon the sale; the loan association continues to deal with the purchaser for many years as his mortgagee. (Footnotes omitted.)

150. Conejo was obligated, as part of the original financing agreement, to exercise the repurchase “option” which would provide Great Western with a 20 percent capital gain for “warehousing” the land (see note 147 supra), and to pay a five percent loan fee and more than six percent interest on the construction loan. See Connor v. Great Western Sav. & Loan Assn., 69 Cal. 2d at 861, 447 P.2d at 614, 73 Cal. Rptr. at 374. Additionally, Conejo had agreed to pay fees for the long-term loans made by Great Western to the home buyers, or alternatively to pay Great Western the interest and fees earned by the home buyer’s purchase-money lender if the buyer refused to accept financing from Great Western. See note 148 supra.

151. See note 130 supra and accompanying text.
B. The “Privily” Rationale of Connor

The rationale of Chief Justice Traynor’s opinion in Connor appears to be the following: The value of the security for the construction loan to Conejo, as well as for the long-term purchase-money loans to the individual buyers,\(^\text{152}\) directly depended upon the construction of sound homes. Since faulty construction would impair the security for both types of loans, “Great Western was clearly under a duty of care to its shareholders to exercise powers of control over the enterprise to prevent the construction of defective homes.”\(^\text{153}\) Since Great Western “knew or should have known that the developers were inexperienced, under-capitalized, and operating on a dangerously thin capitalization,” Great Western “therefore knew or should have known that damage from attempts to cut corners in construction was a risk reasonably to be foreseen.”\(^\text{154}\) Thus, Great Western owed a duty to its shareholders to exercise care to prevent “cornercutting” and other reasonably foreseeable construction errors which an inexperienced and undercapitalized developer like Conejo would be likely to make. The construction project in Connor involved expansive-soil problems of which Great Western had either actual or constructive knowledge.\(^\text{155}\) Conejo negligently failed to take sufficient precautions in designing and constructing the foundations, which thereafter cracked, causing serious damage to plaintiffs’ homes and substantial impairment of the value of Great Western’s security for both its construction loan to Conejo and its purchase-money loans to plaintiffs.\(^\text{156}\) Great Western therefore breached its duty of care to its shareholders by failing to follow its usual procedure of requiring soil tests, examining foundation plans, recommending necessary changes in the plans or in the construction as it progressed, engaging in sufficient inspection to discover gross structural defects, and relying for protection solely upon unknown building inspectors to enforce building code provi-

\(^{152}\) Great Western took back first deeds of trust on the residential property purchased as security for the “purchase money” loans to the home buyers. The value of Great Western’s security for the long-term loans to the home buyers (which are the primary incentive to finance such a tract project, as discussed in note 149\(^\text{supra}\) ), therefore, depended directly upon the quality of the completed homes. Moreover, California’s anti-deficiency legislation precludes a lender such as Great Western from holding the “purchase money” mortgagor personally liable for any deficiency which may remain after foreclosure on the security when the mortgagor is a “residential” borrower such as the plaintiffs in Connor. Cal. Code Civ. Pro. § 580b (West 1964). See generally Rintala, California’s Anti-Deficiency Legislation and Suretyship Law: The Transversion of Protective Statutory Schemes, 17 U.C.L.A.L. Rev. 245, 248-50 n.17 (1969)

\(^{153}\) 69 Cal. 2d at 864, 447 P.2d at 616, 73 Cal. Rptr. at 376 (emphasis added).

\(^{154}\) Id.

\(^{155}\) Id. at 864-65 & n.8, 447 P.2d 616 & n.8, 73 Cal. Rptr. at 376 & n.8.

\(^{156}\) See id. at 856-57, 447 P.2d at 611, 73 Cal. Rptr. at 371. See note 152\(^\text{supra}\) and accompanying text.
sions of which Great Western was totally ignorant. 157

Having concluded that Great Western breached the duty of care owed to its shareholders—a most peculiar notion in light of traditional conceptions of the nature of a corporate entity—158—the remaining "crucial" question for Chief Justice Traynor was, therefore, "whether Great Western also owed a duty to the home buyers . . . ." 159 This question was resolved in favor of a duty of care owed by Great Western to the home buyers on the basis of Biakanja's criteria for determining when a duty owed by a defendant to the party with whom he is in "privity" inures to the benefit of a third person who is injured by the defendant's negligence. 160

157. See 69 Cal. 2d at 865, 447 P.2d at 616-17, 73 Cal. Rptr. at 376-77.
158. See id. at 880, 447 P.2d at 626, 73 Cal. Rptr. at 386 (Burke, J., dissenting).
159. 69 Cal. 2d at 865, 447 P.2d at 617, 73 Cal. Rptr. at 377.
160. See id. at 865-67, 447 P.2d at 617-18, 73 Cal. Rptr. at 377-78:
The basic tests for determining the existence of . . . a duty [to exercise care in the performance of an obligation to one with whom the obligor is not in "privity"] are clearly set forth in Biakanja v. Irving . . . . [See note 32 supra and accompanying text.]

. . . . [1] Great Western's transactions were intended to affect the plaintiffs significantly.
The success of Great Western's transactions with [the developer] depended entirely upon the ability of the parties to induce plaintiffs to buy homes in the [developer's] tract and to finance the purchases with funds supplied by Great Western. . . . [See note 148 supra.]

[2] Great Western could reasonably have foreseen the risk of harm to plaintiffs.
Great Western knew or should have known that . . . Conejo was operating on a dangerously thin capitalization, creating a readily foreseeable risk that it would be driven to cutting corners in construction. That risk was enlarged still further by the additional pressures on Conejo ensuing from its onerous burdens as a borrower from Great Western.

[3] It is certain that plaintiffs suffered injury.

. . . . [4] The injury suffered by plaintiffs was closely connected with Great Western's conduct.
Great Western not only financed the development of the . . . tract but controlled the course it would take. . . .

[5] Substantial moral blame attaches to Great Western's conduct.
. . . . Great Western failed of its obligation to its own shareholders . . . .
It also failed of its obligation to the buyers, the more so because it was well aware that the usual buyer of a home, is ill-equipped with experience or financial means to discern such structural defects. [Cf. Schipper v. Levitt & Sons, Inc. 44 N.J. 70, 207 A.2d 314 (1965).] Moreover a home is not only a major investment for the usual buyer but also the only shelter he has. . . .

[6] The admonitory policy of the law of torts calls for the imposition of liability on Great Western . . . . Rules that tend to discourage misconduct are particularly appropriate when applied to an established industry.
As the student author points out, id. at 358, the reliance by the California supreme
Chief Justice Traynor's preliminary formulation of a duty of care owed by Great Western to its shareholders and his direct reliance on Biakanja to find that Great Western also owed a duty of care to adequately inspect and supervise construction plans and procedures in favor of the home buyers, make it clear that the liability imposed upon the residential tract financier in Connor is essentially a "privity"-based liability unlike the direct and independent liability imposed in favor of third persons in Barrera and Elmore. Thus, as in Dillon, the duty of care owed to the reasonably foreseeable victim of the defendant's negligence is a derivative of a duty owed by the defendant to the directly injured party with whom the defendant has a more "privity"-like relationship. Analytically, then, there is only one difference between Connor and Dillon: In Dillon the defendant's breach of duty which inures to the third party relates to the latter's relationship to the defendant's primary victim, while in Connor the breach of duty relates to the defendant's failure to exercise care to prevent the negligence of another.

The remaining question, then, is why Chief Justice Traynor relied on a "privity" rationale to impose liability on Great Western in favor of the home buyers instead of the "status" approach of Barrera and Elmore to which the facts of Connor, unlike those of Dillon, are so readily amenable.

C. A "Status" Approach to Connor

Since Chief Justice Traynor relies on a "privity" rationale to impose a duty of care upon Great Western in favor of the individual home
buyers as well as Great Western's shareholders, it is not at all clear why he emphasizes that a residential tract financier such as Great Western is not merely "a lender content to lend money at interest on the security of real property," but is "an active participant in a home construction enterprise."\textsuperscript{166} The degree of Great Western's "participation" in the

\textsuperscript{166} Id. at 864, 447 P.2d at 616, 73 Cal. Rptr. at 376. This characterization of Great Western apparently assumes that a distinction can be made between residential tract financiers on the basis of whether they are merely "money lenders" or are "active participants" in a manner similar to Great Western's involvement in Conejo's construction project. This assumed distinction is contrary to the role typically played by savings and loan associations in financing residential tract construction, i.e., such residential tract financiers are always more than "money-lenders." See generally note 148 supra; note 167 infra. Moreover, unless the inappositeness of this distinction to the institutional residential tract financier is recognized in post-Connor decisions, Connor has now been rendered practically a nullity.

In 1969, section 3434, which provides as follows, was added to the Civil Code:

A lender who makes a loan of money, the proceeds of which are used or may be used by the borrower to finance the design, manufacture, construction, repair, modification or improvement of real or personal property for sale or lease to others, shall not be held liable to third persons for any loss or damage occasioned by any defect in the real or personal property so designed, manufactured, constructed, repaired, modified or improved or for any loss or damage resulting from the failure of the borrower to use due care in the design, manufacture, construction, repair, modification or improvement of such real or personal property, unless such loss or damage is a result of an act of the lender outside the scope of the activities of a lender of money or unless the lender has been a party to misrepresentations with respect to such real or personal property.

Ch. 1584, § 1 [1969] Cal. Stats. (7 CAL. LEG. SERV. 3027 (Sept. 6, 1969)) (emphasis added).

The most significant statement which can be made about this statutory modification of Connor—other than pointing to its obvious ambiguities—is that it represents overwhelming evidence of the power and legislative influence wielded by the savings and loan industry. How the courts will interpret the new statute is another question. One post-Connor appellate court decision, which was rendered prior to the September 1969 enactment of Civil Code section 3434, may provide a reasonable basis for prediction. In Bradler v. Craig, 274 Adv. Cal. App. 507, 79 Cal. Rptr. 401 (2d Dist. 1969), the plaintiffs were successors in interest of the purchasers of a home damaged by cracks due to structural defects similar to those in Connor. They sued the savings and loan association which financed the purchase and development of the property by the allegedly negligent contractor. Bradler held the lender owed no duty of care to the purchasers or the plaintiffs because, unlike Great Western's involvement in Connor, the lender's participation here "was that of the usual and ordinary construction and purchase money lender, content to lend money at interest on the security of real property." \textit{Id.} at 516, 79 Cal. Rptr. at 407.

In distinguishing the construction and purchase money lender's participation as a "mere lender" from the "active participation" of Great Western in Connor, the Bradler court focused upon three purportedly significant factors present in Connor which were absent in Bradler: "Unlike Connor, [1] it [the lender] was not financing the development of a large tract wherein it sought to receive substantial fees for making construction loans. Unlike Connor, [2] it did not receive a fee for 'warehousing' the land. Unlike Connor, [3] it received no guarantee from loss of profits in the event a home buyer sought permanent financing elsewhere." \textit{Id.}

If Connor had rested on an enterprise theory of liability (see note 144 supra; \textit{cf.} Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965)), then factor (1)—.
tract construction enterprise would obviously be relevant to determining the size of the residential construction project—would be a relevant basis to distinguish Bradler from Connor. However, that factor is relevant in Connor because of the undercapitalized nature of the developers involved in large tract construction and the consequent reasonably foreseeable risk of "corner-cutting" in construction. See note 154 supra and accompanying text. In Bradler there is no discussion of the financial situation or experience of the developer, and thus no basis upon which to determine whether the lender had reason to know it was creating a risk of financing a construction project in which "corner-cutting" was likely. However, the facts of Bradler make clear that the case did not involve the type of large housing tract which is typically developed by the type of undercapitalized firm involved in Connor. The savings and loan association in Bradler apparently lent money to a contractor (the nature of whom is unknown), to purchase and residentially develop for sale to the public only five lots. Thus, the construction project in Bradler could hardly be characterized as the type of enterprise involved in Connor. Moreover, given the small nature of the project in Bradler, the contractor was probably not one of the thousands of small, undercapitalized developers who enter and leave the residential construction industry depending upon the tract housing demand and the availability of large amounts of capital. See note 137 supra. Thus, the Bradler court probably could have distinguished Connor simply by holding that there was not a foreseeable risk of faulty construction comparable to that in Connor which could serve as the basis for imposing a duty of care upon the lender in favor of anyone.

The second factor focused upon in Bradler—the fee for "warehousing" the land—is totally irrelevant to a determination of the degree of a financier's participation in a residential construction project. As Chief Justice Traynor recognizes in Connor, the "warehousing" device utilized there was really only a means to avoid what were at the time very restrictive statutory maximums on the loan-value ratios governing loans by savings and loan associations on unimproved property. See note 147 supra. In other words, the "warehousing" device used in Connor was in effect a "purchase money" loan to the developer similar to that made by the savings and loan association in Bradler.

The third factor focused upon in Bradler—Great Western's right of "first refusal" on the purchase money loans to the home buyers (see note 148 supra)—is relevant only to an inquiry whether the financier participated in the construction project to a degree which would render it a "joint venturer" with the developer, and not to a determination of whether the financier owes a duty to the home purchasers to exercise reasonable control over the developer, his plans, etc., to prevent defective construction. See Comment, Liability of the Institutional Lender for Structural Defects in New Housing, 35 U. Chi. L. Rev. 739, 751, 757-60 (1968). However, Chief Justice Traynor rejected a "joint venture" approach in Connor. See note 168 infra and accompanying text. Moreover, Great Western's negligence consisted principally in creating an unreasonable risk of "corner-cutting," and thus the risk of an impairment of the security for the construction and long-term loans contrary to Great Western's primary duty of care owed to its shareholders. See text accompanying notes 152-57 supra.

Given the wording of new Civil Code section 3434 and the Bradler decision, it may well be the third type of factor relied upon in Bradler which will be seized upon as a way of interpreting the legislative emasculation of Connor. Such an interpretation, assuming that section 3434 rests on an apparent distinction in Connor between "active" and "money" lenders, would be contrary to the Connor rationale. Since Connor rejected a "joint venture" approach (see note 168 infra) and relied expressly on the Biakanja third-party tort duty theory (see note 160 supra), only the first type of factor focused upon in Bradler constitutes a rational basis for distinguishing that or future cases from Connor. Moreover, focusing on the size of the development and the financier's role to interpret new section 3434 of the Civil Code will promote the socioeconomic policies underlying Connor. See note 170 infra.
whether Great Western and Conejo were "joint venturers."\textsuperscript{167} However, Chief Justice Traynor expressly refuses to hold Great Western vicariously liable for Conejo's negligence on a "joint venture" theory.\textsuperscript{168} The degree of Great Western's "participation" in the tract construction enterprise would also obviously be relevant if \textit{Connor} had rested on a "status" analysis similar to that of \textit{Barrera} or \textit{Elmore}. Chief Justice Traynor, however, by his express reliance on \textit{Biakanja},\textsuperscript{169} appears to have intentionally rejected imposition of an \textit{independent} duty of care on Great Western owed \textit{directly} to the home buyers on the basis of the role played by savings and loan associations in the residential tract construction industry.\textsuperscript{170} The only relevance which Great Western's "par-

\begin{itemize}
\item \textsuperscript{167} The factors cited by Chief Justice Traynor as evidencing Great Western's participation as more than that of "the usual money lender," (see note 166 \textit{supra} and accompanying text) appear clearly sufficient to support a finding that Great Western was a "joint venturer" with Conejo, despite the majority's holding to the contrary (see note 168 \textit{infra}), and Justice Mosk's economically unsound dissent, 69 Cal. 2d at 872-79, 447 P.2d at 621-25, 73 Cal. Rptr. at 381-85, notwithstanding. \textit{See generally Comment, Liability of the Institutional Lender for Structural Defects in New Housing, 35 U. Chic. L. Rev. 739, 759-60 (1968).}
\item Note that if Chief Justice Traynor had relied on a "joint venture" approach (and disregarding the newly enacted Civil Code section 3434, discussed in note 166 \textit{supra}), and the California supreme court directly adopts the products liability approach of Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965), discussed at text accompanying notes 140-43 \textit{supra}, as have two post-Connor appellate court decisions (see note 145 \textit{supra} and accompanying text), a savings and loan association in the position of Great Western—one which "actively participates" in a mass-production residential construction project—would be "strictly liable in tort" (see note 77 \textit{supra} and accompanying text) to those who suffer loss arising out of the construction of defective homes.
\item \textsuperscript{168} 69 Cal. 2d at 863, 447 P.2d at 615, 73 Cal. Rptr. at 375:
Although the evidence establishes that Great Western and Conejo combined their property, skill, and knowledge to carry out the tract development, that each shared in the control of the development, that each anticipated receiving substantial profits therefrom, and that they cooperated with each other in the development, there is no evidence of a community or joint interest in the undertaking. Great Western participated as a buyer and seller of land and lender of funds, and Conejo participated as a builder and seller of homes. Although the profits of each were dependent on the overall success of the development, neither was to share in the profits or the losses that the other might realize or suffer. Although each received substantial payments as seller, lender or borrower, neither had an interest in the payments received by the other. Under these circumstances, no joint venture existed.
\item \textsuperscript{169} See note 160 \textit{supra} and accompanying text.
\item \textsuperscript{170} \textit{Compare} 69 Cal. 2d at 865-67, 447 P.2d at 617-18, 73 Cal. Rptr. at 377-78 with \textit{Barrera} v. State Farm Mut. Auto. Ins. Co., 71 Adv. Cal. 683, 687, 696, 701, 456 P.2d 674, 677, 683-84, 686, 79 Cal. Rptr. 106, 115, 116, 118 (1969). See text accompanying notes 32-37, 43-44, 54-55, 72-74 \textit{supra}. \textit{See also Comment, New Liability in Construction Lending: Implications of Connor v. Great Western Savings & Loan, 42 S. Cal. L. Rev. 353, 363 (1969): "In \textit{Connor} . . . there seems to be an assumption that Great Western was more than a mere lender. It participated in the project to a far greater extent than the term 'financier' implies. . . . [See text accompanying note 166 \textit{supra}]." [S]avings and loan associations as construction lenders are typically more than 'mere' lenders. . . . [A]pparently [the court in Con-
ticipation” can have, therefore, given the narrow “privity” basis of the Connor decision, is that it demonstrates the enormous amount of control which Great Western had over Conejo from the inception of the construction project. The magnitude of this control renders Great Western’s negligence patent, and perhaps was emphasized to make the Connor decision more palatable. But such control was not a prerequisite to the recognition of the primary duty owed by Great Western to its shareholders, to extension of that duty to protect the home buyers on the basis of the Biakanja criteria, or to a finding that the evidence supported an inference that Great Western had breached its duty to exercise care to prevent the construction of defective homes. Thus, the question remains why Chief Justice Traynor emphatically characterized Great Western as more than a “mere lender.”

The internal tension of the Connor decision and the confusion generated by its awkward “privity” rationale, on the one hand, and its incipient “status” approach to Great Western’s liability, on the other, may partially be explained by hypothesizing a reason for Chief Justice Traynor’s choice of Biakanja over MacPherson (which he cites almost by way of dicta) as the vehicle for imposing a duty on tract financiers in favor of the housing consumer. The “privity” rationale may have been intended to forestall fears of the automatic applicability of the Connor holding to the financing of other mass produced and merchandised products in cases in which the producer’s undercapitalization, or the financially risky nature of the producer’s enterprise, creates a reasonable foreseeability of the products being defective. That

nor] did not recognize that ‘[T]he issue of how courts should protect homebuyers is best answered not by focusing on the consumer’s problems alone, but by considering as well the entire operation and structure of the industry—the total land development context.” See the suggested approach to interpreting Connor and construing new section 3434 of the Civil Code, note 166 supra.

171. Of the six Biakanja factors (see note 160 supra), the only one which appears to relate to the degree of Great Western’s “participation” is the fourth: whether the injury suffered by the home buyers was closely connected to Great Western’s conduct. However, once it is accepted that the “end and aim” of Great Western’s financial transactions with Conejo was to develop homes to be purchased by individuals such as the plaintiffs (see 49 Cal. 2d at 650, 320 P.2d at 19, quoting Glanzer v. Shepard, 233 N.Y. 236, 238, 135 N.E. 275, 275 (1922)), the nature of the construction project itself, the inexperience and undercapitalization of Conejo, and Great Western’s failure to follow its usual procedure of examining foundation plans, requiring soil tests, etc., (see note 157 supra and accompanying text) would appear sufficient to satisfy this fourth Biakanja criterion as well as the first (whether Great Western’s transactions were intended to significantly affect the plaintiffs) and the second (whether Great Western could reasonably have foreseen harm to the plaintiffs).


173. See 69 Cal. 2d at 869, 447 P.2d at 619, 73 Cal. Rptr. at 379: “At least since [MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916)] there has been a steady expansion of liability for harm caused by the failure of defendants
is, basing the *Connor* decision upon an initial duty owed by Great Western to its shareholders to prevent impairment of the security for the loan to the tract developer may have been considered the only or the easiest way to distinguish financiers of other enterprises from the residential tract financier. Basing *Connor* on a primary duty to protect the security ensures the possibility of such a distinction because the relationship between the value of the security and the quality of the completed product is much more interdependent in real property development than in commodities manufacturing.¹⁷⁴

The same facts which render *Connor* a paradigmatic case for a “status” approach, however, also serve to more than adequately distinguish the residential tract financier from institutional lenders involved with other types of enterprises. Moreover, most of these facts are recognized or relied upon in one form or another by Chief Justice Traynor in various places in his *Connor* opinion. For example, he points to the unique nature of an individual's purchase of a home in his discussion of the applicability of the *Biakanja* criteria to Great Western;¹⁷⁸ and in his discussion both of Great Western's breach of the duty of care owed to its shareholders¹⁷⁶ and of the foreseeability of injury from this breach to persons not in “privity” with Great Western, he expressly relies upon the foreseeability of the risk of defective homes being created by financing an undercapitalized developer.¹⁷⁷ Furthermore, Chief Justice Traynor explains in detail both the extensive eco-

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¹⁷⁴ With respect to a commodities manufacturer, the financier’s security may consist of floating liens on the inventory, equipment, etc., of the manufacturer which have a value independent of the final product, the development, manufacture and/or distribution of which is made possible through the financier’s backing. In the case of the residential tract developer, on the other hand, the financier’s security for the construction loan generally consists solely of a mortgage on the property to be developed. Moreover, since savings and loan associations usually finance tract housing construction only when they can negotiate a right of “first refusal” on the purchase-money loans to the home buyers (or some other arrangement with a similar economic effect, as discussed in notes 148 & 149 supra), their long-range financial gain or loss from the project depends entirely on the value of the security (the property as residually developed). This is particularly true in states such as California which have anti-deficiency statutes which protect home purchasers such as the plaintiffs in *Connor* against third-party purchase-money lenders as well as vendor-mortgagees. See note 152 supra. Thus, by basing the residential construction lender’s liability to the home purchaser on a primary duty owed to the shareholders to protect the value of the security for the construction loans and permanent home financing, the court could readily distinguish non-real property enterprise financiers from the type of lender involved in *Connor*.

¹⁷⁵ See note 160 supra.

¹⁷⁶ See text accompanying note 154 supra.

¹⁷⁷ See note 160 supra.
nomic involvement of Great Western in all aspects of the residential tract project, from the initial acquisition of the tract property through the final sale and financing of the homes, as well as Great Western's paramount control over and financial stake in the quality of the planning, building, and completion stages of the development.\textsuperscript{178} The critical factor which appears to have been overlooked in \textit{Connor}, however, is that its factual context is typical of and unique to the financing of large residential tracts by savings and loan associations.\textsuperscript{179} Had this typicality and uniqueness been recognized, and the role of the savings and loan association in the residential tract industry been made the focal point of the decision, \textit{Connor} would have realized its potentiality as a landmark "status" case paralleling in significance \textit{MacPherson} and the demise of the "privity" approach in the products liability field.

CONCLUSION

\textit{Barrera, Elmore, Dillon,} and \textit{Connor}, considered independently, represent precedent-breaking steps toward increased protection for injured individuals. Considered together, they serve as indicia of the degree to which tort law has evolved from "privity" rationales for liability, toward the new-"status" approach to the delineation of the basis and scope of nonconsensual obligations. This approach is explicitly adopted in \textit{Barrera} and implicitly recognized in \textit{Elmore}—two cases involving enterprises which are present day analogs to the common law's concept of a "common calling." That this approach alone cannot serve as the panacea for all compensation issues traditionally assigned to tort law is made clear by \textit{Dillon}. However, even in cases such as \textit{Dillon}, in which retention of "privity" rules may not only be justified but at least temporarily necessary, understanding and application of the new-"status" approach serves to place the particular compensation issue in perspective. In a case like \textit{Connor}, on the other hand, a new-"status" analysis shows that retention of "privity" rules is neither reasonable nor necessary. Thus, the new-"status" approach not only is an increasingly important basis for the adjudication of tort liability; it also provides an analytically sound method to examine what may be the unarticulated economic and social policy considerations underlying decisions couched in terms of traditional tort law criteria.

178. See text accompanying note 166 \textit{supra} and notes 167 & 168 \textit{supra}.
179. See text accompanying notes 135-38, 146-49 \textit{supra}; note 174 \textit{supra}. See the comparison of \textit{Connor} with \textit{Rowland}, note 15 \textit{supra} and accompanying text.