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# What We Talk About When We Talk About the Duty of Care in Negligence Law: The Utah Supreme Court Sets an Example in *Boynton v. Kennecott Utah Copper*

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**Abstract:** Every day, state common law courts define the duty of care in negligence law. There is no formula for how courts should determine duty. Yet when judges are charged with important decisions about whether to open or shut the courthouse doors to whole categories of claimants, judges need some framework for decision. This article commends as an exemplar, the Utah Supreme Court's decision in *Boynton v. Kennecott Utah Copper*, a take-home asbestos exposure case. The power of *Boynton* is not only the answer it provides, but also the coherent framework for analysis that Justice Constandinos Himonas' opinion sets forth. The opinion's framework incorporates established principles as well as important tort policies such as harm prevention. *Boynton*'s structure at once provides the stability and consistency of precedent befitting common law adjudication while also incorporating the public policy and pragmatic concerns that have long guided tort law's development. *Boynton*'s framework achieves a similar result to the one in the Third Restatement—creating duty and no-duty rules with possibility of exception based on principle and policy factors. However, *Boynton* does so through traditional terminology that has acquired meaning through repeated historical application. Courts, scholars and students would be well advised to examine the Utah Supreme Court's approach to duty analysis.

**Keywords:** duty of care; negligence law; misfeasance; nonfeasance; omissions; take-home asbestos

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# 1 Introduction

Every day, state common law courts draw, maintain, and revise the boundaries of tort law. In a recent two-and-a-half-year period, the 50 states' highest courts alone wrote more than one hundred opinions about duty of care in negligence law.<sup>1</sup> The questions courts answered were wide-ranging. They included whether a duty of reasonable care applies to home healthcare companies whose providers conspire to victimize clients after work hours,<sup>2</sup> to gas stations that sell gasoline to visibly intoxicated drivers,<sup>3</sup> to grocery stores when food suppliers injure shoppers while stocking store shelves,<sup>4</sup> and to pet stores when pet-rescue organizations misrepresent material information while operating on store premises.<sup>5</sup>

Each time a litigant initiates a tort claim, that individual request raises systemic questions about the categories of cases that can be adjudicated through civil law. In negligence law in the United States, the element of duty raises these systemic boundary-line issues most forcefully and directly.<sup>6</sup> In their answers to duty questions, judges either open or shut the courthouse doors to entire categories of injured claimants<sup>7</sup>—a judicial act which may or may not deter future harms.<sup>8</sup>

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1 Ellen Bublick, *Duty of Care Factors: Principle and Policy Choices in State Supreme Courts in the United States*, in *TORTS ON THREE CONTINENTS* (Oxford University Press, forthcoming 2024).

2 *Keith v. Health-Pro Home Care Svcs., Inc.*, 873 S.E.2d 567, 574 ¶ 24 (N.C. 2022) (home health provider with criminal background conspired in violent felonies against elderly clients).

3 *Morris v. Giant Four Corners, Inc.*, 498 P.3d 238, 241–42 (N.M. 2021) (store clerk initially would not sell driver gasoline because of driver's visible intoxication but ultimately permitted driver to purchase gas and driver killed another in a crash shortly thereafter).

4 *Webb v. Giant of Maryland, LLC*, A.3d 339, 350 (2021) (Pepsi employee injured a customer while using grocery store's pallet jack).

5 *PetSmart, Inc. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 499 P.3d 1182, 1184 (Nev. 2021) (owner attacked by an aggressive dog that his partner adopted at a pet store rescue event on false information).

6 See generally Betsy J. Grey, *Preventing Student Suicide: Nguyen v. Massachusetts Institute of Technology*, 16:1 J. TORT L. 107 (2023). In the United States, duty is the element of the negligence case most completely assigned to judges rather than juries to resolve.

7 Cf. *Smith v Fonterra Co-operative Group Ltd and Others*, (SC 149/2021) [2024] NZSC 5 (private actions for public nuisance).

8 See THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR WRONGS THAT ARISE INDEPENDENT OF CONTRACT 21 (1879) ("Every remedy [even compensatory] is, in a certain sense, preventative, because it threatens certain undesirable consequences to those who violate the rights of others."); Gregory Gibson, *Why America Lets the Killings Continue*, N.Y. TIMES (Dec. 14, 2012), <https://www.nytimes.com/2012/12/14/opinion/why-we-let-the-school-shootings-continue.html> (lack of prevention with respect to gun violence).

Duty questions present courts with difficult substantive and procedural challenges. On the one hand, judges are charged with the responsibility of making the common law (charged by statute it turns out, although many judges are unaware of the statutory basis for their common-law authority).<sup>9</sup> On the other hand, there is no formula for how judges should make that law. Worse still, there *can be* no formula.<sup>10</sup> Precedent goes only so far and can become outdated. General principles may not easily translate into specific rules. Policies are multidirectional and raise issues of institutional legitimacy and competence. No one wants the free-for-all of judges tailoring case outcomes to their individual policy preferences *du jour*.<sup>11</sup> Yet it would be inconsistent with states' statutory election of a common law system for judges simply to decree that the common law should stand still.<sup>12</sup> Thus, when tort law dictates that courts must determine duty, judges need some framework for decision.

The opinion of the Utah Supreme Court in *Boynton v. Kennicott Utah Copper*,<sup>13</sup> a take-home asbestos exposure case, provides an excellent starting point for judicial analysis of duty. In *Boynton*, the Utah Supreme Court found that premises owners had a duty, and potential liability, for on-site asbestos exposure of workers that led to off-site exposure and injury to others with whom those workers lived (often referred to as "take-home asbestos exposure").<sup>14</sup> The power of *Boynton* is not only the answer it provides (a conclusion reached by a number of state supreme courts before it), but also the coherent framework for analysis that Justice Constandinos Himonas' opinion sets forth.<sup>15</sup> Though the multi-defendant facts are a bit of a slog at the start, the "Duty of Care" section provides an excellent launch point for judges, practitioners, and students examining duty.

Specifically, *Boynton* begins with three time-honored principles: act and omission, special relationship, and foreseeability of injury. The case also incorporates tort

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9 See generally Ellen M. Bublick, *Tort Common Law Future: Preventing Harm and Providing Redress to the Uncounted Injured*, 14:2 J. TORT L. 279 (2021).

10 See generally Jane Stapleton, *Duty of Care Factors: A Selection from Judicial Menus*, in THE LAW OF OBLIGATIONS: CHAPTERS IN CELEBRATION OF JOHN FLEMING 59 (Peter Cane & Jane Stapleton, ed., Oxford 1998); James Goudkamp & Donal Nolan, *Robinson v. Chief Constable of West Yorkshire Police: Taking Duty Back to Basics*, 16:1 J. TORT L. 125 (2023).

11 Greg Keating, *Putting "Duty" Back on Track*, 16:2 J. TORT L. (2024) (published in same issue as this Article).

12 Bublick, *supra* note 9; but see *Elephant Ins. Co., LLC v. Kenyon*, 644 S.W.3d 137, 159 (Tex. 2022) (Young, J., concurring) ("Perhaps we should just openly say that the era of tort exploration is over, at least in the face of regulatory saturation").

13 *Boynton v. Kennicott Utah Copper, LLC*, 500 P.3d 847, 867 ¶ 66 (Utah 2021).

14 *Id.*

15 *Id.*

law's main policy aim of harm prevention, alongside other public policy concerns. Throughout, *Boynton* incorporates Utah's thoughtful prior precedent as well as relevant secondary authority from other states and scholars. The opinion's structure at once provides the stability, familiarity, and consistency of precedent and principle befitting common-law adjudication while also incorporating public policy and pragmatic concerns that have long guided tort law's development. Moreover, *Boynton* addresses the difficult question of structural accountability for injury – a key issue of our time (and perhaps of every time).<sup>16</sup>

Ultimately the *Boynton* case focuses on preventing foreseeable, controllable physical risk and harm to others, at least to the extent that other policies don't eclipse this central aim.<sup>17</sup> The result might seem commonplace. Duty when active conduct works positive harm (misfeasance) has long been the norm in the U.S. and abroad.<sup>18</sup> But state courts sometimes overlook the powerful, if imperfect, distinction between actively injuring others and failing to confer a benefit on them – a distinction that underlies the traditional act-omission divide.<sup>19</sup> *Boynton* cuts away needless complexity and guides readers to such essentials of duty analysis.

With the *Boynton* opinion in the spotlight in this Article, Section 2 examines the case's facts and procedure, as well as the structure of the court's reasoning. Section 3 then compares *Boynton*'s framework to the approach of significant national authorities and highlights some merits of *Boynton*'s approach. Finally, Section 4 confronts the unavoidable choices that common law courts must make in terms of both analytical framework and substantive factors to determine duty. It also offers reflections about the “precedent and principle first, policy second” approach that has gained traction with courts and scholars in recent years.<sup>20</sup>

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16 Bublick, *supra* note 9. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916).

17 See generally *Boynton*, 500 P.3d 847.

18 See Dan Dobbs, Paul Hayden & Ellen Bublick, 2 *The Law of Torts* § 414 at 799 (2d ed. 2011); Goudkamp & Nolan, *supra* note 10.

19 See, e.g., *Quiroz v. Alcoa, Inc.*, 416 P.3d 824, 843 ¶ 88 (2018) (reaching for public policy from a state reckless endangerment statute in order to find a principle similar to common law misfeasance for a negligence action). The classic principle is well illustrated in an article quoted in *Boynton* and in many current cases. “There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.” Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 *UNIV. PA. L. REV.* 217, 219 (1908).

20 Goudkamp & Nolan, *supra* note 10. Keating, *supra* note 11.

## 2 The *Boynton* Decision

*Boynton* addresses duty of care in the context of second-hand asbestos exposure – an active, if vexing, dispute in courts throughout the United States and abroad. The gist of the facts in *Boynton*, as retold by the Utah Supreme Court for purposes of summary judgment, are these: For many years, Larry Boynton travelled to job sites each day to work as a laborer, and then, as an electrician. (The court used the plaintiffs' first names to avoid confusion given their shared last name, and this Article will do the same). Over this time period, Larry drove home from work with asbestos dust embedded in his clothes. His wife Barbara was exposed to asbestos dust scattered in the family car, tracked through the family home, lodged in the work clothes she shook out before washing, and settled on the laundry room floor that she swept.<sup>21</sup> After decades of exposure, Barbara Boynton died of malignant mesothelioma.

Larry filed suit against three of the six job sites that he had worked at in the 1960s and 1970s. Although the particulars of his work varied at each site, Larry had been either an employee of the premises operator or an employee of an independent contractor during his work. In all three work sites, Larry alleged that his job exposed him to substantial amounts of asbestos dust from activities such as cutting, scraping, sawing, and sweeping asbestos pipe insulation. This exposure was sometimes direct, as when Larry performed the work, and at other times, indirect, as when Larry was exposed to asbestos dust from the work of others at the job site. Larry alleged that his employers had never warned him about the dangers of asbestos or provided him with laundry services that would have allowed him to change clothes before travelling home.<sup>22</sup>

Larry's suit against the job site operators alleged strict premises liability and negligence.<sup>23</sup> With respect to one company that "did not use its own employees to handle asbestos materials" in the construction of its plant,<sup>24</sup> Larry also asserted vicarious-liability based on the company's retained control over its subcontractor.<sup>25</sup>

Precedent would ordinarily establish that premises operators have a duty of care with respect to on-site asbestos exposures to employees.<sup>26</sup> When operators "actively participate" in the performance of the work, including by retained contractual control according to the court, they also may be vicariously liable to

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<sup>21</sup> *Boynton*, 500 P.3d at n.12 ¶ 3.

<sup>22</sup> *Id.* at 852 ¶ 7.

<sup>23</sup> *Id.* at 853 ¶ 9.

<sup>24</sup> *Id.* at 852 ¶ 8.

<sup>25</sup> *Id.* at 853 ¶ 13.

<sup>26</sup> *Id.* at 863 ¶ 53. However, workers compensation benefits may prevent many tort claims by employees against employers.

employees of independent contractors.<sup>27</sup> However, in *Boynton*, the Utah courts were asked: Do jobsite operators have a duty of reasonable care with respect to the *off-site* asbestos exposures of “*co-habitants*” like Barbara?<sup>28</sup>

For the most part, the district court said no. It granted summary judgment to two of the operators but found an issue of disputed fact with respect to the third.<sup>29</sup> In accordance with state procedures for interlocutory appeal, the grants and denials of summary judgment were reviewed for “correctness” on direct appeal to the Utah Supreme Court.<sup>30</sup>

The Utah Supreme Court held that grants of summary judgment had not been correct. Rather, premises owners had a duty, and potential liability, to “their employees’ co-habitants for take-home asbestos exposure.”<sup>31</sup>

## 2.1 *Boynton*’s Legal Framework for Analyzing Duty

Whether a duty of care exists is “a purely legal question.”<sup>32</sup> Accordingly, the *Boynton* opinion first discussed precedent regarding state courts’ take-home asbestos exposure opinions in particular, and Utah’s standards for determining duty in general. The court noted that take-home asbestos exposure cases have yielded varied conclusions. Courts that focus on foreseeability of injury or misfeasance have generally recognized a duty.<sup>33</sup> Courts that focus on special relationships generally have not.<sup>34</sup> More courts have joined the former camp than the latter.<sup>35</sup> Because *Boynton* examines foreseeability and deems special relationships unimportant in the context of affirmative acts that risk physical harm to others, the Utah Supreme Court’s recognition of a duty in this second-hand asbestos exposure case seems unremarkable, if not foretold.

But *Boynton*’s mode of analysis is not quite so simple. As addressed more fully in the sections that follow, the opinion considers the level of generality at which courts should address duty. It then employs a five-factor test that, unlike many multi-factor tests of its ilk, grounds itself in tort-law’s central principles and policies.

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27 *Id.* at ¶ 56 (premises operator retained control over its independent contractor for purposes of duty and liability, when its contractual provisions managed the means and methods of the independent contractor’s activities).

28 *Id.* at 854 ¶ 15.

29 *Id.* at 853 ¶ 1, 9.

30 *Id.* at 853 ¶ 11.

31 *Id.* at 867 ¶ 66.

32 *Id.* at 855 ¶ 17.

33 *Id.* at 854 ¶ 16.

34 *Id.*

35 *Id.*

## 2.2 Analyzing Duties of Care at a Categorical Level

After examining precedent, the Utah Supreme Court highlights the need for courts to articulate a “relatively clear, categorical, bright-line rule of law applicable to a general class of cases.”<sup>36</sup> Detailed, case-specific facts should not be considered. As such, a rule that there is no-duty “to change lanes when traveling at a legal speed in either the No.2 or No.3 lane of a four-lane freeway at night, on dry pavement, in light traffic and clear weather,”<sup>37</sup> would not be consonant with Utah’s approach.

A broad level of generality not only creates a predictable guide for future conduct, but the wider lens also ensures that judges do not usurp the jury’s role as arbiter of the facts and decision-maker on the elements of breach and proximate cause.<sup>38</sup>

Employing a broad level of generality, *Boynton* looks at the duty of premises operators with respect to take-home asbestos exposure during the time-period at issue.<sup>39</sup> The court’s definition of the category at issue with respect to duty does not rely on *most* of the specific facts of defendant and plaintiff conduct.<sup>40</sup> But it does rely on some. For example, the rule applies to asbestos exposure during specific years because the question of reasonable foreseeability of harm may have varied during different time periods.

After the court configures duty at a general and categorical level, it then takes a second step. It looks at case specific facts but only for the limited purpose of determining the parties’ arguable fit within the category.

## 2.3 Choosing Factors and Their Weight

Multi-factored tests can be a quagmire. To devise them, courts must first decide which factors to take into account.

The factors *Boynton* considers are:

- (1) whether the defendant’s allegedly tortious conduct consists of an affirmative act or merely an omission;
- (2) the legal relationship of the parties;
- (3) the foreseeability or likelihood of injury;
- (4) public policy as to which party can best [prevent] the loss occasioned by the injury; and
- (5) other general policy considerations.<sup>41</sup>

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<sup>36</sup> *Id.* at 856 ¶ 22.

<sup>37</sup> Keating, *supra* note 11, (citing California’s *Monreal v Tobin*, 72 Cal. Rptr. 2d 168, 176 (Ct. App. 1998)).

<sup>38</sup> *Id.*

<sup>39</sup> *Boynton*, 500 P.3d at 856 ¶ 23.

<sup>40</sup> *Id.* at n.6 (the level of generality “is an art and not a science”).

<sup>41</sup> *Id.* at 855 ¶ 17.

This list of factors starts with three historically crucial doctrinal considerations: act and omission, special relationship, and foreseeability of injury. The court then focuses on the primary policy concern in tort law, “who can best prevent the loss,” before broadening the policy analysis.

With factors selected, the next difficulty with factor tests is how each factor relates to the others. When factors 1 and 3 tilt in one direction and 2, 4, and 5 in another, what is a court to do? Though raising this potential confusion, *Boynton* articulates well the factors’ relationship to each other.

As the Utah Supreme Court previously wrote, “not all factors were created equal.”<sup>42</sup> “The long-recognized distinction between acts and omissions – or misfeasance and nonfeasance – makes a critical difference and is perhaps the most fundamental factor.”<sup>43</sup> Thus Utah’s test begins with that distinction.

## 2.4 Factor 1: The Misfeasance-Nonfeasance Distinction

The traditional doctrinal line between affirmative acts that create risk of physical harm to others, and omissions that do the same, constitutes the first dividing line in *Boynton*. The court describes this doctrinal line through several terms: act and omission; misfeasance and nonfeasance; and creating, or not creating, a danger.<sup>44</sup> Each iteration of the standard varies slightly, but all share a similar gist or sting. As Justice Cardozo famously wrote, the question is “whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good.”<sup>45</sup>

The misfeasance-nonfeasance test cleaves duty cases into two parts.<sup>46</sup> In misfeasance, duty is the norm.<sup>47</sup> “Acts of misfeasance, or active misconduct working positive injury to others, typically carry a duty of care.”<sup>48</sup>

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<sup>42</sup> *Id.* at 855 ¶ 19.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 857–58 ¶¶ 26–28.

<sup>45</sup> *Id.* at 857 ¶ 26 (citing *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 898 (1928) (Cardozo, J.)).

<sup>46</sup> As Dean Prosser notes, “there arose very early a difference, still deeply rooted in the law of negligence, between ‘misfeasance’ and ‘nonfeasance’ – that is to say between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm.” Dan Dobbs, Robert Keeton & David Owen, *Prosser and Keeton on Torts* § 56 at 373 (5th ed. 1984).

<sup>47</sup> *Boynton*, 500 P.3d at 857 ¶ 26. *See also* 2 Dobbs, Hayden & Bublick, *The Law of Torts* § 405 (2d ed. 2011).

<sup>48</sup> *Id.* (quoting *Jeffs v. West*, 275 P.3d 228 (Utah 2012), which in turn quoted Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908)).



In the second part, nonfeasance – “passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not caused by the wrongful act of defendant” – generally implicates no duty of care unless additional circumstances are present.<sup>49</sup> Special relationships are the most prominent circumstance that founds a duty of care in the nonfeasance category.

Although separating acts from omissions requires judgment and reliance on social norms, the core principle of the divide is an important one. “In general, we are all obligated not to impose unreasonable risks on others through our actions but, in general, we are not obligated to protect others from harm at the hands of perils we are not responsible for creating.”<sup>50</sup>

Applying the affirmative act-omission split to the context of premises operators, *Boynton* holds that operators act affirmatively to launch an instrument of harm when they: instruct workers to handle asbestos, have nearby workers handle asbestos, place asbestos on the premises, send employees to a workplace containing asbestos, or purchase a workplace containing asbestos and invite workers onto it.<sup>51</sup> These affirmative acts ground operators’ presumptive duty. Because the plaintiff had presented adequate evidence that defendants directed Larry Boynton, and those near him, to handle asbestos at the worksite, the court found that this first factor warranted a finding that “defendants in this case created the initial danger,” such that a presumptive duty of care applied.<sup>52</sup>

## 2.5 Factor 2: The Place for Special Relationships

*Boynton* next makes clear that the place for examining special relationships is on the nonfeasance side of the ledger. When an affirmative act works positive harm, a “special relationship is not typically required to sustain a duty of care to those who could be injured by the defendant’s affirmative acts.”<sup>53</sup>

Omission cases are different. When an omission is at issue, no-duty is the norm. Thus, “an omission or failure to act can generally give rise to liability only in the presence of some external circumstance,” often a special relationship.<sup>54</sup> Such relationships include parties that assume “responsibility for the safety of another or their

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<sup>49</sup> *Id.*

<sup>50</sup> Keating, *supra* note 11.

<sup>51</sup> *Boynton*, 500 P.3d at 857 ¶ 27.

<sup>52</sup> Although most U.S. courts address “class of persons” in the proximate cause analysis, the court’s decision addresses “co-habitants” and not others – a way of narrowing the class through duty. See Restatement (Third) of Torts: Liability for Phys. & Emot. HARM § 29 (Am. L. Inst. 2010).

<sup>53</sup> *Id.* at 858 ¶ 29.

<sup>54</sup> *Id.*

opportunities for self-protection,” as with innkeepers, guardians, and common carriers, and other long-enumerated categories.<sup>55</sup>

Duties on this nonfeasance side of the ledger are often termed “affirmative duties” because they are cases in which actors, despite usual no-duty rules, are required to act affirmatively. Though the term is an established descriptor, the “affirmative duty” locution in omission cases is unfortunate, as it can create confusion with the other side of the duty ledger – “affirmative acts” in misfeasance.<sup>56</sup>

In summary, under *Boynton*’s second factor, a defendant’s “affirmative act” creates a duty for which no additional relationship is required. However, a defendant’s failure to act that usually raises no obligation can sometimes require an “affirmative duty” to act in light of a special legal relationship, and at times, in light of additional principles or policies.

On the facts of *Boynton*, because misfeasance had been shown, examination of special relationship was of little import. However, the court noted that the presence of a special relationship on the misfeasance side could serve as an additional “plus factor” to negate negative policy factors.<sup>57</sup> Here, the court also noted that it is not required to needlessly march through every factor. Because *Boynton* involved misfeasance, the plaintiff “doesn’t need to establish a special legal relationship in order to establish a duty of care,” and discussion of relationships was spare.<sup>58</sup>

## 2.6 Factor 3: Foreseeability of Harm

A plaintiff must establish foreseeability in both affirmative act and omissions’ “affirmative duty” cases. *Boynton* first examines foreseeability in duty at a broad level of generality. It contrasts that broad foreseeability test with the more directed foreseeability query performed in proximate-cause analysis. In duty, the court asks only whether “a reasonable person could anticipate some type of risk.”<sup>59</sup> That risk need not be directed at the plaintiff. Injury can be foreseeable even when a defendant acts affirmatively towards one person and thereby injures another.<sup>60</sup> As such, the relevant duty-related foreseeability question in *Boynton* was whether premises

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<sup>55</sup> *Id.*

<sup>56</sup> Restatement (Third) of Torts: Liability for Phys. & Emot. Harm § 47 (Am. L. Inst. 2012) (using the term “affirmative duties”).

<sup>57</sup> *Boynton*, 500 P.3d at 858 ¶ 29 (citing Jeffs, 2012 UT 11, ¶ 9, 275 P.3d 228 to explain that “if an affirmative act has occurred, a special legal relationship creates an additional ‘duty-enhancing, plus factor’”).

<sup>58</sup> *Id.* at 858 ¶ 30.

<sup>59</sup> *Id.* at 859 ¶ 31.

<sup>60</sup> *Id.* at 859 ¶ 32.

operators, who direct workers to come into contact with asbestos, could foresee injury.<sup>61</sup> “The more specific question – whether Larry’s asbestos exposure could have foreseeably caused harm to Barbara – may be addressed when the lower court considers proximate cause.”<sup>62</sup>

Court examination of risks of take-home asbestos exposure, included varied evidence. A 1965 study acknowledged such risks. In 1972, the Occupational Safety and Health Administration regulated take-home asbestos hazards. As early as the late 1800s and early 1900s, evidence demonstrated some knowledge of the toxicity of asbestos, and that workplace toxins might affect people outside the worksite. In particular, past evidence showed an awareness that laundresses faced dangers from clothes exposure and that poisons could be transmitted on work clothes. The court also made note of other state court determinations of foreseeability from those years.<sup>63</sup>

The implication: premises operators’ actions created off-site injury risks which risks were or could have been reasonably foreseeable at the time of exposure. Because premises operators could have reasonably foreseen risks from take-home asbestos exposure they also could have anticipated the need to use reasonable care to address those risks.

## 2.7 Factor 4: Who Can Best Prevent Physical Harm

In prior cases, the Utah Supreme Court had examined “who can best bear the loss” occasioned by the injury.<sup>64</sup> In this case, the court noted that the interest, at its heart, is *not* a compensatory one: not “who has the financial resources to pay for the resulting damages.”<sup>65</sup> Instead, the policy question seeks to determine “whether the defendant is best situated to take reasonable precautions to avoid injury.”<sup>66</sup> The question looks at who is in the “superior position of knowledge or control” to prevent the loss.<sup>67</sup> With regard to asbestos, premises operators make the key decisions. They decide whether to use asbestos in the workplace; whether to institute policies to reduce take-home exposure; and whether to conduct research and seek information about asbestos on behalf of a large number of people. Therefore, the court determined that the operators’ greater control and efficiency put them in the best position to prevent asbestos-related harms.

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<sup>61</sup> *Id.* at 859 ¶ 33.

<sup>62</sup> *Id.* at 859 ¶ 34.

<sup>63</sup> *Id.* at 860 ¶ 37.

<sup>64</sup> *Id.* at 861 ¶ 39.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

Tellingly, the court ends analysis of this factor with the conclusion that the loss-prevention policy factor “doesn’t caution against the imposition of a duty.”<sup>68</sup> The phraseology reminds readers that in the case in which an act, rather than omission, grounds the duty, a duty of care exists *unless unique policy concerns warrant an exception*.<sup>69</sup> Here, the plaintiffs need only avoid a showing that the policy of preventing physical harm particularly and uniquely militates *against* a duty finding.

## 2.8 Factor 5: Other Policy Considerations

At the start of factor five’s policy discussion, *Boynton* again reminds readers that the public policy question in both factors four and five, in affirmative act/misfeasance cases, is about “whether general policy considerations require a categorical decision removing duty from a class of cases.”<sup>70</sup> The court then counsels that even when public policy militates against a duty in such cases, the concerns normally “don’t endorse the wholesale rejection of a duty.” Rather, the concerns might warrant limits on the duty.<sup>71</sup>

The premises operators argued that recognition of a duty with respect to take-home asbestos exposures would lead to an “overlarge, indeterminate class of plaintiffs.”<sup>72</sup> However, the court (as the entity that ultimately defines the contours of that class), thought the duty to co-habitants would not create such an unlimited class. Whether liability would arise for take-home exposures beyond co-habitants, as in the case of friends exposed to the toxins, would be examined in future cases.<sup>73</sup> Moreover, the court noted that even household-member plaintiffs would need to prove elements beyond duty in order to establish liability. According to the court, the difficulty of meeting all doctrinal elements of a negligence case, coupled with the costs of suit such as attorney fees, would create practical disincentives for suit.<sup>74</sup> As such, an onslaught of minor cases seemed unlikely and no policy reason “counsels against imposing a duty for creating this risk.”<sup>75</sup>

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<sup>68</sup> *Id.* at 861 ¶ 43.

<sup>69</sup> *Id.* at 855 ¶ 19.

<sup>70</sup> *Id.* at 861 ¶ 44.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 862 ¶ 45.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 862 ¶ 46.

<sup>75</sup> *Id.* at 862 ¶ 47.

## 2.9 The Combined Test

Putting the court's five factors together, a flowchart of the court's duty analysis would look as follows. First, judicial decisions should begin with the key principle of duty analysis. Whether described as act/omission, misfeasance/nonfeasance, or risk creating/non-risk-creating conduct, the first and central question is "whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good."<sup>76</sup>

Once divided into these two sets, cases placed on the act/misfeasance/risk-creation side of the divide, as was the case in *Boynton*, do not require special relationship analysis (although this can be a plus factor when policy exceptions are considered). But affirmative act cases must still meet a general foreseeability test – whether "a reasonable person could anticipate some type of risk." Finally, in affirmative act cases, the court looks at the policy of preventing harm as well as other public policies, but only to see if a unique policy exception should prevent recognition of a duty.

On the nonfeasance side of the ledger, cases face more searching review. Specifically, after an omission is found under factor one, the default rule becomes no duty. Factor two's category of special relationships then becomes important, though perhaps not essential to the question of whether an "affirmative duty" to act can be found.<sup>77</sup> Next, under factor three, foreseeability of harm, at a broad level of generality, is required. Finally, under factors four and five, the policy of harm prevention and of public policies more generally requires careful examination to determine whether those policies support an exception to the no-duty rule.

In this case, following the affirmative act pathway, the *Boynton* court held: "When premises operators engage in affirmative acts that cause employees to come into contact with asbestos, they create a foreseeable risk that employees will carry asbestos into their homes."<sup>78</sup> This risk was foreseeable at the time of Larry Boynton's work, and policy did not counsel "against imposing a duty for creating this risk."<sup>79</sup> In factor terms: factors one and three were satisfied, factor two was not needed under the circumstances, and factors four and five did not militate against the presumptive result.

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<sup>76</sup> *Id.* at 857 ¶ 26 (citing *H.R.Moch Co. v. Rensselaer Water Co.*, 159 N.E.896, 898 (1928) (Cardozo, J.)).

<sup>77</sup> *Id.* at 855 ¶ 21 (foreseeability has at times "played the primary role" in affirmative duty analysis).

<sup>78</sup> *Id.* at 862 ¶ 47.

<sup>79</sup> *Id.*

### 3 Merits of the *Boynton* Approach in Comparison with Restatement Approaches

Courts have many choices for structuring duty analysis. Standards for determining duty in state supreme courts today are as varied as they are surprising.<sup>80</sup> Most appealing about the *Boynton* approach is its dual focus on the core traditional principles of duty and the core policy of harm-prevention that animates U.S. tort law. Additionally, *Boynton*'s framework comports with the current view of many judges and scholars that principle and precedent should lead common law analysis, with express policy analysis as a secondary consideration.<sup>81</sup>

In many ways, *Boynton*'s approach to duty analysis is quite similar to standards from the Second and Third Torts Restatements. Indeed, at various times, Utah has employed blackletter rules about duty from both Restatements.<sup>82</sup> But *Boynton*'s framework also differs from those approaches. In particular, *Boynton* is less formulaic than the Second Restatement, and uses more traditional terminology than does the Third.

To compare, a brief outline of the Restatements' duty provisions may be of use.

#### 3.1 Improvements Over the Second Restatement of Torts

The Second Restatement of Torts is the secondary authority most cited by state supreme courts.<sup>83</sup> According to the Second Restatement:

Normally, where there is an affirmative act which affects the interests of another, there is a duty not to be negligent with respect to the doing of the act. On the other hand, where the negligence of the actor consists in a failure to act for the protection or assistance of another, there is normally no liability unless some relation between the actor and the other, or some antecedent action on the part of the actor, has created a duty to act for the other's protection or assistance.<sup>84</sup>

The difference is that the plaintiff "is positively injured by the actor's affirmative action," while with respect to an omission the plaintiff "merely fails to receive the benefit which he would receive if the actor had taken the action necessary for his protection or assistance." According to the Restatement, the courts had focused on

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<sup>80</sup> Bublick, *supra* note 1.

<sup>81</sup> Keating, *supra* note 11.

<sup>82</sup> Feasel v. Tracker Marine LLC, 496 P.3d 95, 102 (Utah 2021) (citing both the Second and Third Restatements on the duty to issue adequate product warnings).

<sup>83</sup> Bublick, *supra* note 1.

<sup>84</sup> Restatement (Second) of Torts, General Principles, ch. 12 Topic 4 Scope Note (Am. L. Inst. 1965).

misfeasance, because they “were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing.”<sup>85</sup>

At the time of the Second Restatement’s writing, it was so clear that affirmative acts that risk others founded a duty, that the Restatement pays scant attention to duty in misfeasance cases. “Duty” is not even listed as an element of the negligence case.<sup>86</sup> In comments the Restatement notes “the duty established by law to refrain from negligent conduct is established in order to protect the other from the risk of having his interest invaded ...”<sup>87</sup> The misfeasance question of import in the Second Restatement is breach, referred to as “negligence.” (Using the term “negligence” to refer to both the entire cause of action and the single breach element is a common practice but can create confusion.) In the Restatement, many types of breach are identified with particularity.<sup>88</sup>

While the Second Restatement presumes duty and skips right to breach in affirmative act cases, in omissions cases the Restatement focuses on both breach (the harmful failure to act) *and* whether “the actor is under a duty to do it.”<sup>89</sup> The Second Restatement lists more than a dozen affirmative duties to act, described in sub-headings concerning the “Duty to control the conduct of third persons” and “Duty to aid others and services gratuitously undertaken.”<sup>90</sup>

The Second Restatement also highlights the importance of foreseeability to negligence liability. Negligent conduct is defined as “an act *which the actor as a reasonable man should recognize* as involving an unreasonable risk of causing an invasion of an interest of another.”<sup>91</sup>

The *Boynton* test well reflects the Second Restatement’s act-omission divide, the importance of special relationships and other exceptions to omissions cases, and the role of foreseeability.<sup>92</sup>

Yet the Utah Supreme Court’s framework contains significant additional factors that the Second Restatement analysis lacks. The Second Restatement itself uses policy analysis to draw doctrinal lines and then asks state courts to accept these specific doctrines. However, the *Boynton* factors direct courts to look at doctrines and then consider these policy factors for themselves. Moreover, *Boynton* examines harm prevention first among policy factors, and only then brings in other public policies.<sup>93</sup>

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<sup>85</sup> *Id.* at § 314.

<sup>86</sup> *Id.* at §284.

<sup>87</sup> *Id.* at § 281 cmt. e.

<sup>88</sup> *Id.* at §§ 297–13.

<sup>89</sup> *Id.* at § 299.

<sup>90</sup> *Id.* at Topic 7 Title A and B.

<sup>91</sup> Restatement (Second) of Torts § 284 (1965).

<sup>92</sup> *Id.* § 284(b).

<sup>93</sup> See generally *Boynton*, 500 P.3d 847.

Openly acknowledging the policy choices inherent in common law rules reflects realist teachings.<sup>94</sup> As Dean Prosser famously wrote, “duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.”<sup>95</sup> By directing courts to be more open about the policy interests underlying their duty doctrines, *Boynton* aids courts’ transparency. Others can more readily understand and critique the policies that animate court decisions. An open discussion of policy factors the court follows can also encourage courts to be more consistent in developing law across doctrinal categories.

Courts that are reluctant to articulate policy themselves may prefer to follow the more detailed standards of the Restatement Second. That said, the sections in the Restatement, or in any set of doctrines, are informed by policies, even if not the court’s own.

### 3.2 Improvements Over the Third Restatement of Torts

The *Boynton* test has some advantages over the Third Restatement as well. The *Boynton* factors and the Third Restatement have a very similar structure and would seem to yield similar outcomes. Both approaches incorporate both principle and policy. However, *Boynton* uses traditional doctrinal terms while the Third Restatement eschews that terminology in favor the similar, but poorly defined, term of risk-creation.

The Third Restatement approach has been referred to as “risk architecture.”<sup>96</sup> That Restatement’s blackletter duty rules divide cases into presumptive duty and no-duty segments based on whether an actor did or did not create a risk. Under § 7, “An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”<sup>97</sup> By contrast, under § 37, generally “An actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other.”<sup>98</sup>

Both of the Third Restatement’s default duty rules admit possibility of exception. With respect to cases in which an act creates a risk and duty is presumed, courts may craft no-duty or limited-duty exceptions in extraordinary circumstances based on “countervailing principle or policy.”<sup>99</sup> Similarly, with respect to cases in which the

<sup>94</sup> RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 5 (2013).

<sup>95</sup> W. Page Keeton & Dan B. Dobbs, et al., *PROSSER AND KEETON ON TORTS* § 54, at 358 (5th ed.1984).

<sup>96</sup> See generally Jane Stapleton, *The Risk Architecture of the Restatement (Third) of Torts*, 44 *WAKE FOREST L. REV.* 1309 (2009).

<sup>97</sup> Restatement (Third) of Torts: Liability for Phys. & Emot. Harm § 7 (Am. L. Inst. 2010).

<sup>98</sup> Restatement (Third) of Torts: Liability for Phys. & Emot. Harm § 37 (Am. L. Inst. 2012).

<sup>99</sup> *Id.* (“In exceptional cases, when ... policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.”).



defendant has not created a risk and no-duty is the baseline, courts can recognize “affirmative duties” based on traditional exceptions such as special relationships, undertaking, and the like. Many of the affirmative duties listed in the Third Restatement directly trace back to the First Restatement of Torts, enacted in 1934, if not earlier. Thus, the Third Restatement structure creates duty and no-duty default rules plus the potential for exceptions on either side. The Third Restatement also contains additional duty and no-duty provisions with respect to special topics such as economic loss,<sup>100</sup> emotional harms,<sup>101</sup> and landowner responsibilities.<sup>102</sup>

The Third Restatement approach has much to commend it.<sup>103</sup> The risk architecture at the doctrine’s core is designed to draw on the insights of the Second Restatement’s misfeasance/nonfeasance principle. The Third Restatement’s emphasis on whether the actor *created a risk*, rather than on whether an *affirmative act* created a risk, is designed to emphasize the central concern of the traditional rule, which is not acting but risking – specifically, risking an invasion of another’s interest in physical security.<sup>104</sup> The Restatement’s reference to “creating a risk” is also meant to encompass risks created by some omissions.<sup>105</sup>

The Restatement Third’s construct is appealing. However, its pivotal concept of risk-creation is underdeveloped.<sup>106</sup> It is not that tests concerning act and omission, misfeasance and nonfeasance, or foreseeability are themselves self-evident.<sup>107</sup> Rather, existing tests have already been imbued with meaning by centuries of use. In Utah, for example, affirmative acts include “prescrib[ing] medicine, provid[ing]

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**100** Duties with respect to economic harm are set forth in the Restatement (Third) of Torts: Liability for Economic Harm, particularly § 1 (Tentative Draft No. 1 2012) (“An actor has no general duty to avoid the unintentional infliction of economic loss on another.”).

**101** See Restatement (Third) of Torts: Liability for Phys. & Emot. Harm §§ 47–48 (Am. L. Inst. 2012) (noting the “general rule that an actor is not liable for negligent conduct that causes only emotional harm”).

**102** Duties of land possessors are set out in the Restatement (Third) of Torts: Liability for Phys. & Emot. Harm §§ 49–54 (Am. L. Inst. 2012).

**103** *Gipson v. Kasey*, 150 P.3d 228, 235 (2007) (Hurwitz, J., concurring) (“My tentative sense ... is that the Third Restatement rubric would simplify our analytical task in future cases and remove some understandable confusion among the bar and lower courts on the duty issue.”).

**104** *Brown v. USA Taekwondo*, 483 P.3d 159, n.6 (Cal. 2021), (“The proper question is not whether an actor’s failure to exercise reasonable care entails the commission or omission of a specific act. Rather, it is whether the actor’s entire conduct created a risk of harm.”); Restatement (Second) of Torts § 281, 289 (1965) (“Conduct is negligent because it tends to subject the interests of another to an unreasonable risk of harm.”).

**105** Keating, *supra* note 11.

**106** See generally Stapleton, *supra* note 96.

**107** *Boynton*, 500 P.3d at 857 ¶ 26 (“The line between acts and omission is sometimes subtle”).

therapy, plac[ing] inmates in a work-release program,” and supplying an intoxicated person with access to a gun.<sup>108</sup>

The risk-creation term avoids historical baggage. True. But the term is vacuous precisely because it has not obtained substantive meaning through repeated historical application. Common law terms that lack precedent can be a heavy lift in a system reliant on historical articulation. Restatement Reporters adopt new terms at the peril of rejection<sup>109</sup> and misinterpretation.<sup>110</sup> Courts may well adopt the Restatement Third and explain its new terms’ meaning through current application, or by reference to prior rules of misfeasance. Another choice, would be to adopt *Boynton*’s factors and retain traditional tests and exceptions alongside policy analysis.

Not only do *Boynton*’s doctrinal terms provide more clarity, but also its description of policy factors admits some advantages over the Restatement Third too. First, *Boynton* focuses on the specific tort policy of preventing physical harm – a policy that animates so much of U.S. duty analysis.<sup>111</sup> Only then does *Boynton* move to more general policies. Through its factors, the *Boynton* test instantiates the principle of preventing harm by requiring reasonable care when an actor creates foreseeable risks to the interests of another in order to prevent physical harm. Second, *Boynton* factors would seem to permit explicit policy-based development on the affirmative-duty side of the ledger – acknowledging that existing exceptions are not sent down from on high but rather based on past understandings of principle and policy.

### 3.3 Common Law Policy and Political Legitimacy

Some might chafe at the prospect of courts explicitly considering policy in duty analysis.<sup>112</sup> However, when a jurisdiction chooses a common law system, rather than a civil code, judicial policy evaluation is built into that framework. In the United States, reception statutes articulate judicial power in ways like this:

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<sup>108</sup> *Id.*

<sup>109</sup> Restatement (Third) of Torts: Phys. & Emot. Harm § 52 (2012) (“the concept of a flagrant trespasser is new to the Restatement of Torts”). Had the Restatement simply retained the rule for trespassers and endorsed existing exceptions for child trespassers and the like, the standard might be more meaningful and more used.

<sup>110</sup> In some cases, courts that have abandoned traditional terms have achieved opposite results from those intended by the Restatement’s change. For example, *Quiroz v. ALCOA Inc.*, 416 P.3d 824 (Ariz. 2018), used the Restatement’s abolition of foreseeability in duty as a reason to find no duty so as to send many fewer cases to the jury.

<sup>111</sup> Bublick, *supra* note 1.

<sup>112</sup> Goudkamp & Nolan, *supra* note 10, at 13.

The common law only so far as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decision in all courts of this state.<sup>113</sup>

Statutory direction for judges to adapt common law to conditions and “necessities of the people” requires common law evolution. In addition, judges are elected or appointed through a political process – making them legitimate political actors for the purpose of the common law.

It is an important but often overlooked point that state reception statutes are not a blank check but rather have specific terms.<sup>114</sup> Moreover, it can be argued that courts should look more at principle rather than policy. Professor Keating teaches that principle is thought to ground claims that people make on their own behalf, and policy is based on “socially desirable objectives.”<sup>115</sup> But adapting to necessities of people and places has seemed, to even judges at the time of statehood, to call for at least some policy evaluation.

Also, concepts of principle and policy are not easily disentangled. Doctrines that courts rely on to simplify analysis often stem from well-established policies. As California Supreme Court Justice Tino Cuellar explained in an extraordinary concurrence:

“Special relationship” is merely a label for those policy considerations that our shared experience has taught us to treat as especially relevant. ... As the Restatement explains, “The term ‘special relationship’ has no independent significance. ... Whether a relationship is deemed special is a conclusion based on reasons of principle or policy.” (Rest.3d, *supra*, § 40, com. h.) Among reasons of principle or policy, our precedents place special emphasis on two reasons in particular: defendant’s ability to control the environment, to predict and prevent the risk, and plaintiff’s reasonable dependency. ...<sup>116</sup>

One oddity of the special relationship analysis in take-home asbestos exposure cases is the extent to which plaintiffs seem to have given up on explicit special relationship claims despite factors of defendant control and plaintiff dependence in that context. Although in *Boynton*, a special relationship was not needed to support a duty, such a relationship may well exist. This is because special relationships need not be between a defendant and the injured plaintiff. Rather, in a host of cases, a defendant’s special relationship with *the injurer* provides the grounds for duty and liability. As

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<sup>113</sup> ARIZ. REV. STAT. § 1–201 (1907).

<sup>114</sup> *Torres v. JAI Dining Servs. (Phoenix), Inc.*, 256 Ariz. 212, 536 P.3d 790, 800 (2023) (Bolick, concurring) (“adopting the common law only insofar as it is ‘not repugnant to or inconsistent with ... the laws of this state.’”).

<sup>115</sup> Keating, *supra* note 11.

<sup>116</sup> *Brown v. USA Taekwondo*, 483 P.3d 159, 227 (Cal. 2021) (Cuellar, J., concurring).

but one example, the bartender who overserves a patron may later face liability if the patron drives drunk and crashes into the plaintiff's vehicle.<sup>117</sup> The California Supreme Court underscored the argument that special relationships can be the defendant's relationship to the injurer in a take-home asbestos exposure case when it described negligent employers as making their employees unwitting "vectors of harm" to others.<sup>118</sup>

Acknowledging policy-based development of common law makes good sense for additional reasons. First, policy decisions are unavoidable in duty cases, particularly in cases of first impression. Avoiding discussion of policy that animates a decision does not prevent policy-informed decision-making. Even in the absence of forthright policy discussion, unaddressed policy factors may shape courts' decisions.<sup>119</sup> Furthermore, if courts err in their explicit policy judgments, legislatures can – and frequently do – modify common law by subsequent statute. As such, judicial common law rules may be undone by legislative policy. Bad (and even good) judicial policy decisions are often subject to revision. Consequently, as Judge Calabresi has counselled, a judge's role in the age of statutes is "to be the allocator of that burden of inertia which our system of separation of powers and checks and balances mandates."<sup>120</sup>

## 4 Unavoidable Choices: Choosing an Approach

*Boynton* makes the courts' common law task of drawing, maintaining, and revising the boundaries of tort law look straightforward. Its framework (i) retains the familiar structure of past legal doctrine, (ii) incorporates the public policies that have long informed decisions, and (iii) makes the outcome seem inevitable. Of course, neither the court's holding, nor its mode of analysis is essential. The court could have reached any number of outcomes using a variety of different approaches. Yet *Boynton*'s structure balances the competing tensions of precedent and policy – of common law rule-following and rule-making – as well as any decision in recent times.

Common law courts cannot avoid choices about the approach to employ to decide cases. Typical common law approaches involve applying established legal doctrines, reasoning by analogy to existing precedent or authority, invoking philosophical principles, addressing pragmatic and policy issues, or a combination of all of these.<sup>121</sup>

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<sup>117</sup> *Torres v. Jai Dining Servs. (Phoenix) Inc.*, 252 Ariz. 28, 497 P.3d 481 (2021).

<sup>118</sup> *Kesner v. Super. Ct.*, 384 P.3d 283, 302–05 (2016).

<sup>119</sup> Stapleton, *supra* n.10.

<sup>120</sup> GUIDO CALABRESI, *A Common Law for the Age of Statutes* 165 (1982).

<sup>121</sup> Bublick, *supra* note 1.

On the one hand, there can be no “test” for duty.<sup>122</sup> Substantive normative judgments, and not a written formula, always accompany common law decision making. On the other hand, any framework that courts use to resolve cases is itself a test. In the United Kingdom, for example, one sort of test asks if imposing a duty would be “fair, just and reasonable.”<sup>123</sup> Another sort of test asks if the existing case fits into “more traditional categorization of distinct and recognizable situations,” i.e., into recognized legal pigeonholes descended from England’s royal writs.<sup>124</sup> The fair, just and reasonable test would seem to require an open-ended principle and policy inquiry. The familiar-category test requires pattern recognition – comparing contemporary choices against a template of courts’ historic actions and inactions.

The two tests make different requests of judges. The difference is akin to the jury’s role in deciding the element of breach in negligence versus negligence per se. A broad standard – “fair, just and reasonable” in duty, or “reasonable care” in breach – asks decision-makers to generate norms from their own “general normative sense of the situation.”<sup>125</sup> A narrower rule – fit with historical categories, or fit with the language of a statute – asks decision makers to comply with external norms rather than generate new ones (though surely there is slippage).<sup>126</sup> The broad standard would seem to afford judges a wider role in norm-creation. And yet, the fact that common law categories can evolve reveals judicial norm creation within the category-fit test too, even when the courts elect not to revise the categories.

In both tests, the judge has a strong role in norm creation and legitimation. That role is apparent in an open-ended standard such as fair, just and reasonable. But normative choices are also implicit in a rule of historical fit. Hewing closely to the historical framework of choices previously made in actions recognized by the Court of the King’s Bench in England in the 13<sup>th</sup> Century has a normative valence too.<sup>127</sup>

## 4.1 Selecting Substantive Factors

Whether common law courts should do more rule-creating or more rule-following (of course courts always do both), depends not only on the role of the judge in a common law system, but also on the substantive soundness of existing common law. Examining that soundness is not a usurpation of legislative authority by common law

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<sup>122</sup> Bublick, *supra* note 1.

<sup>123</sup> See generally *Caparo Industries PLC v. Dickman et al.* [1990] 2 A.C. 605 (Bridge).

<sup>124</sup> Goudkamp & Nolan, *supra* n.10.

<sup>125</sup> Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187, 1190 (2001).

<sup>126</sup> *Id.*

<sup>127</sup> See generally John Baker, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* (5th ed. 2019).

judges, but the mandated exercise of it.<sup>128</sup> The legislative choice of a common law legal system rather than a civil law system is a choice that requires a stronger judicial role.

Precedent, which ensures consistency and predictability, is an important norm in a common law system. But there are other norms that can be equally, or even more, important. For example, in the United States, state common law courts wrote decisions protecting slaveholders in the sale of people as property during slavery.<sup>129</sup> Judicial rule-following in such a circumstance was contemptible rather than praiseworthy precisely because norms of liberty and freedom are more important than fealty to statute and precedent. Nazi judges enabled atrocities without judicial protest.<sup>130</sup> These permanent judicial failings are extremes, of course. But they highlight the need for common law judges always to keep one eye on precedent and another on the substantive rules and outcomes that their decisions reinforce, create, and legitimate.<sup>131</sup>

When prior common law is either appropriate to modern times, not so inappropriate as to require substantial correction, or able to be distinguished and limited rather than overruled, the orderliness of preserving precedent through an incremental approach can make sense. If, however, prior common law depends on views that are now immoral or inappropriate, judges' role may be to revise common law rules more rapidly. For example, if a court believes that prior precedent relied on historical racism or sexism, it may want to abandon that court-created rule rather than embrace and re-legitimate it.<sup>132</sup>

## 4.2 Talking About Duty of Care

Even if courts keep a dual focus on precedent and policy, they may or may not want to openly acknowledge it. The California Supreme Court's factor list led it to a very open discussion of policy in its excellent take-home asbestos decision in *Kesner v. Superior*

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<sup>128</sup> Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791 (1951) (describing state reception statutes).

<sup>129</sup> See, e.g., *Sample v. Looney*, 1 Tenn. 85, 90 (Tenn. Super. L. & Eq. 1804) (treating enslaved people as goods subject to the law of sales; fraud in the sale of a girl who was "subject to fits"). The author and Dean John Goldberg have asked the Tennessee Supreme Court to formally repudiate this case.

<sup>130</sup> See generally Ingo Muller, *HITLER'S JUSTICE* (1992).

<sup>131</sup> RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 1 (2013).

<sup>132</sup> See, e.g., *Dynamex Operations v. Superior Ct.*, 416 P.3d 1 (Cal. 2018) (inferior treatment in injury law of independent contractors). William Cowper, *THE TASK* (1785) ("Such dupes are men to custom, and so prone to reverence what is ancient, and can please a course of long observance for its use, that even servitude, the worst of ills, because delivered down from sire to son, is kept and guarded as a sacred thing. But is it fit or can it bear the shock of rational discussion ...").

*Court*.<sup>133</sup> By contrast, in the United Kingdom, it has been argued that judges should only examine policy considerations in novel cases and even then, count them as only of secondary significance.<sup>134</sup>

In a recent examination of U.S. duty cases by contrast, 92 % of state supreme court decisions mentioned public policy as a factor.<sup>135</sup> After legal realism, it seems implausible in the United States to suggest that perceptions of sound policy do not significantly contribute to common law decisions. Judge Posner, for example, decries formalist approaches “premised on a belief that all legal issues can be resolved by logic, text, or precedent, without a judge’s personality, values, ideological leanings, background and culture, or real-world experience playing any role.”<sup>136</sup>

One virtue of the *Boynton* framework is that it treads a careful path between precedent and policy. By starting with classic doctrinal questions, it permits judges to speak about cases in terms of past principle. With that baseline set, it then asks courts to measure the soundness of the baseline against goals of preventing harm and meeting other public policies. Such an approach is an improvement over the Restatement Second’s enumerated categories of responsibility and non-responsibility, because it also permits evaluation of those categories. While *Boynton* achieves a similar result to the Third Restatement – creating liability and no-liability rules with possibility of exception – *Boynton* offers the advantage of reaching the same destination through traditional terminology that courts have imbued with prior meaning. It also roots policy analysis in the main tort policy of harm prevention.

Courts that must decide whether to open or close the courthouse doors to entire groups of claimants would do well to start with the key that the Utah Supreme Court’s jurisprudence provides.

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<sup>133</sup> 384 P.3d 283 (Ca. 2016).

<sup>134</sup> Goudkamp & Nolan, *supra* note 10, at 12.

<sup>135</sup> Bublick, *supra* note 1.

<sup>136</sup> Posner, *supra* note 94, at 1.