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# Actions Speak Louder Than Words: When *Should* Courts Find that Institutions have a Duty to Protect Minor Children from Sexual Abuse?

Emily C. Hoskins\*

## INTRODUCTION

*“Our greatest responsibility as members of a civilized society is our common goal of safeguarding our children, our chief legacy, so they may grow to their full potential and can, in time, take our places in the community at large.”*<sup>1</sup>

It is hard to disagree with this statement, and rightfully so. Minor children are one of the most vulnerable classes of people, yet when it comes to ensuring their safety against sexual abuse, the courts, the legislature, and society as a whole, have utterly failed them. Nearly sixty years ago, the court acknowledged sexual molestation and assault by third parties was a foreseeable crime for which children involved in youth programs should be protected.<sup>2</sup> Yet here we are as a society, decades later, still dealing with continuous allegations of sexual abuse, like those lodged against USA Gymnastics doctor, Larry Nassar. The stories of abuse are horrifying, and the lifelong effects on the young children who suffered the abuse are even worse. Instead of working to solve the problem on an institutional level, these youth programs are spending countless hours and millions of dollars attempting to dodge all responsibility. They argue as institutions—designed to improve and benefit the lives of young children—they owe no duty to protect those young children involved in their programs. What is even more disheartening than the fact that institutions are still making these arguments, is the fact that they are getting away with it.

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\* J.D. Candidate, Expected May 2021, Chapman University Dale E. Fowler School of Law. Thank you to my faculty advisor, Professor Jenny Carey, for her guidance and confidence in my writing. Also, thank you to my family for supporting me and always believing in me. A special thank you to the women of the *Chapman Law Review*, who have encouraged me and inspired me throughout this process. Last, thank you to all the brave women and children who have come forward about their abuse. Without them, accountability and change may never happen.

<sup>1</sup> *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 33 (Ct. App. 2000) (emphasis added).

<sup>2</sup> *See Wallace v. Der-Ohanian*, 18 Cal. Rptr. 892, 896 (Ct. App. 1962).

There is no shortage of literature on the drastic and lifelong impacts sexual abuse has on a minor child.<sup>3</sup> The impacts of childhood sexual abuse are also felt by the legal field, as the effects of childhood sexual abuse have served as the basis of many legal and policy driven pieces.<sup>4</sup> For example, many academics have written advocating for the importance of an extended statute of limitations when it comes to cases of childhood sexual abuse.<sup>5</sup> Additionally, many papers have explored the types of claims survivors of childhood sexual abuse can bring against the institutions that played a role in their abuse.<sup>6</sup> One theory of liability, based on the existence of a special relationship, has been explored in the context of school districts, psychotherapists, and police officers.<sup>7</sup> This Article will also focus on the issue of special relationships, but under the lens of youth sports and recreation organizations. Many articles have recently been published regarding the liability of sports organizations for abuse of their athletes, in part due to the very public scandals within the United States Olympic Committee (“USOC”) and its National Governing Bodies (“NGB”).<sup>8</sup> However, these articles

<sup>3</sup> See, e.g., Damyan Edwards, *Childhood Sexual Abuse and Brain Development: A Discussion of Associated Structural Changes and Negative Psychological Outcomes*, 27 CHILD ABUSE REV. 198 (2018); Abdul Wohab & Sanzida Akhter, *The Effects of Childhood Sexual Abuse on Children’s Psychology and Employment*, 5 PROCEDIA – SOC. & BEHAV. SCIS. 144 (2010); Gaon et al., *Dissociative Symptoms as a Consequence of Traumatic Experiences: The Long-Term Effects of Childhood Sexual Abuse*, 50(1) ISR. J. OF PSYCHIATRY & RELATED SCIS. 17 (2013); Buzi et al., *The Relationship Between Adolescent Depression and a History of Sexual Abuse*, 42(168) ADOLESCENCE 679 (2007).

<sup>4</sup> See, e.g., Elizabeth A. Wilson, *Suing for Lost Childhood: Child Sexual Abuse, the Delayed Discovery Rule, and the Problem of Finding Justice for Adult-Survivors of Child Abuse*, 12 UCLA WOMEN’S L.J. 145 (2003); Lois A. Weithorn, *A Constitutional Jurisprudence of Children’s Vulnerability*, 69 HASTINGS L.J. 179 (2017).

<sup>5</sup> See, e.g., Gregory G. Gordon, *Adult Survivors of Childhood Sexual Abuse and Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule*, 20 PEPP. L. REV. 1359 (1993); Erin Khorram, *Crossing the Limit Line: Sexual Abuse and Whether Retroactive Application of Civil Statutes of Limitation are Legal*, 16 U.C. DAVIS J. JUV. L. & POL’Y 391 (2012).

<sup>6</sup> See, e.g., Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133 (2003); Joseph B. Conder, Annotation, *Liability of Church or Religious Society for Sexual Misconduct of Clergy*, 5 A.L.R. 5th 530 (1992); Catherine Blumenfeld, *C.A. v. William S. Hart Union School District: California’s Shift in Vicarious Liability Leaves School Districts with No Protection*, comment, 47 LOY. L.A. L. REV. 883 (2014).

<sup>7</sup> See, e.g., Anita Binayifaal, *Reexamining School Liability and the Viability of a Special Relationship Claim in the Aftermath of Deshaney v. Winnebago County Department of Social Services*, 87 ST. JOHN’S L. REV. 1071 (2013); Calista Menzhuber, *In the Absence of Parents: Expanding Liability for Caretaker’s Failure to Protect Minors from Third-Party Harm – Bjerke v. Johnson*, 35 WM. MITCHELL L. REV. 714 (2009); Susanna M. Kim, *Section 1983 Liability in the Public Schools After Deshaney: The “Special Relationship” Between School and Student*, 41 UCLA L. REV. 1101 (1994).

<sup>8</sup> See, e.g., Alexandria Murphy, *Better Late Than Never: Why the USOC Took So Long to Fix a Failing System for Protecting Olympic Athletes from Abuse*, 26 JEFFREY S. MOORAD SPORTS L.J. 157 (2019); Maureen A. Weston, *Tackling Abuse in Sport Through Dispute System Design*, 13 U. ST. THOMAS L.J. 434 (2017); Daniel Fiorenza, *Blacklisted:*

mainly focus on actions taken outside of the courtroom to fix problems of sexual abuse within organizations. This Article fills the gap in the literature by analyzing the law of negligence, specifically the duty arising from a special relationship and other policy considerations, and using it to simplify and enunciate a test which should be used to determine when a duty exists.

In 2019, a case was certified for appeal to the Supreme Court of California involving minor athletes who were sexually abused by their coach while participating in a youth sports program sanctioned by USOC and one of its NGBs.<sup>9</sup> In that case, the court is tasked with answering the question of when an institution has a duty to protect a minor child participating in its program from sexual abuse by a third party.<sup>10</sup> In previous cases involving sexual abuse within institutions, the courts analyzed one set of factors indicating the existence of a special relationship and analyzed a separate set of factors as policy considerations. After reviewing negligence law and the cases interpreting it in California, to determine whether or not to impose a duty, the court should analyze only the factors of (1) the dependence of the child on the institution for protection, (2) the control the institution has over the means of protection, and (3) the burden on the institution and consequences to the community of imposing a duty, with the rest of the policy factors automatically weighing in favor of imposing a duty. This test will be easier for courts to apply, thereby improving judicial efficiency. Additionally, it will lead to more consistent and predictable results.

The outcome of the *Brown v. USA Taekwondo* case and the standard used to impose, or not impose a duty, will have profound effects not only on survivors of sexual abuse bringing lawsuits, but also on how institutions behave and structure themselves. In recognizing the higher likelihood that a duty will be imposed under this test, the institutions will do everything they can to act reasonably instead of everything they can to avoid liability. For years institutions have been able to escape liability by turning a blind eye to the sexual abuse committed by their members and happening within their programs. Hundreds of brave survivors of sexual abuse have come forward to share their stories and to hold those who are responsible accountable. If nothing else, this paper

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*Safe Sport's Disciplinary Policy Restrains a Coach's Livelihood*, 27 MARQ. SPORTS L. REV. 113 (2016); Haley O. Morton, *License to Abuse: Confronting Coach-Inflicted Sexual Assault in American Olympic Sports*, 23 WM. & MARY J. WOMEN & L. 142 (2016).

<sup>9</sup> See *Brown v. USA Taekwondo*, 253 Cal. Rptr. 3d 708, 715 (Ct. App. 2019).

<sup>10</sup> While this article was in the editing process, the California Supreme Court released its decision. See *Brown v. USA Taekwondo*, 11 Cal. 5th 204 (2021). The implications of the Court's decision are discussed below in Part IV.

serves as a call to action. As a society, we cannot continue to just talk about how much we care about protecting vulnerable children, we must show them with our actions. The Supreme Court of California had the opportunity to do precisely that.

Part I of this Article describes the rampant childhood sexual abuse<sup>11</sup> that is occurring in American institutions. It also discusses recent legislative attempts to improve the safety of children within these institutions and the legal actions survivors of childhood sexual abuse have taken. Last, Part I discusses the brief history of the *Brown* case, including the courts' decisions at both the trial and appellate level.

Part II begins with the question posed to the Supreme Court of California in the *Brown* case. Part II then examines the law of negligence in California state courts, specifically focusing on the exception to the general rule that the existence of a special relationship can create an affirmative duty to act.

Part III discusses the cases leading up to *Brown*, concentrating solely on the special relationship argument presented in those cases. This section highlights the inconsistencies in the court's analysis and the need for a simplified and standardized test. Part III will also assess the special relationship argument presented in *Brown*, reviewing the court's findings against USA Taekwondo ("USAT") and USOC.

Part IV details and analyzes the decision of the Supreme Court of California in *Brown* issued on April 1, 2021, including a critique of its decision to not proceed to the policy factors if a special relationship is not first established.

Part V describes a synthesized and simplified test a minor plaintiff must satisfy to establish a defendant owed a duty to protect the plaintiff from sexual abuse by a third party. This section will also explain how prior court decisions align and are consistent with the proposed test, suggesting the court was already using the proposed factors as the vital considerations in its decisions. Last, Part V will discuss the implications and benefits of the suggested test.

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<sup>11</sup> For purposes of this Article, "childhood sexual abuse" also refers to "childhood sexual assault" as defined in *California Code of Civil Procedure* section 340.1. See CAL. CODE CIV. PRO. § 340.1 (Deering, LEXIS through ch. 3 of the 2020 Reg. Sess.). The 2020 amendment to the statute changed the wording from childhood sexual abuse to childhood sexual assault to expand the definition of conduct that would be included. See Nelson & Schwabke, *New California Law Allowing Childhood Sexual Assault Victims More Time to Report Draws Widespread Praise*, ORANGE CNTY. REG. (Oct. 14, 2019), <https://www.ocregister.com/2019/10/14/new-california-law-allowing-childhood-sexual-assault-victims-more-time-to-report-draws-widespread-praise/> [http://perma.cc/8GJT-M8CR]. For ease of understanding and consistency, and due to the use of the term "childhood sexual abuse" in prior case law, "childhood sexual abuse" will be used throughout this paper.

## I. BACKGROUND

“The ripple effect of our actions—or inactions—can be enormous, spanning generations. Perhaps the greatest tragedy of this nightmare is that it could have been avoided. Predators thrive in silence.”<sup>12</sup> These words were spoken as Aly Raisman, Sarah Klein, and Tiffany Thomas Lopez, along with over 100 survivors of Larry Nassar’s decades of sexual abuse, filled the ESPY’s stage to accept the Arthur Ashe Courage Award.<sup>13</sup> These “sister survivors”<sup>14</sup> took a stand to bring awareness to the issue of sexual abuse within sports organizations and call out the institutions that silenced their allegations of abuse for years.<sup>15</sup> But their story is just one of many. There have been complaints of sexual misconduct against members and/or coaches in USA Basketball, USA Boxing, USA Diving, US Equestrian Federation, US Figure Skating, USA Gymnastics, USA Hockey, USA Rugby, US Soccer, USA Swimming, USA Taekwondo, US Tennis Association, USA Track and Field, USA Wrestling, and USA Volleyball, to name a few.<sup>16</sup> With more than 290 coaches and officials in the United States facing accusations of sexual misconduct and counting,<sup>17</sup> it is clear these institutions are “plac[ing] money and medals above the safety of child athletes.”<sup>18</sup>

However, sports institutions are not alone. Instances of childhood sexual abuse and assault are occurring at alarming rates, the actual magnitude of which may never be fully known.<sup>19</sup>

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<sup>12</sup> Aly Raisman, Address Accepting at the Excellence in Sports Performance Yearly Awards (July 18, 2018) (accepting the Arthur Ashe Courage Award alongside dozens of fellow athletes and sexual abuse survivors for bravery that transcends sports) (transcript available at *Cosmopolitan* website).

<sup>13</sup> Michelle R. Martinelli, *Aly Raisman and 140 Abuse Survivors Unite for Powerful ESPYS Moment, FOR THE WIN* (July 19, 2018, 8:48 AM), <https://ftw.usatoday.com/2018/07/aly-raisman-espys-arthur-ashe-courage-award-abuse-nassar-survivors-powerful-video> [<http://perma.cc/LHX5-EKDW>].

<sup>14</sup> Sarah Klein, Address Accepting at the Excellence in Sports Performance Yearly Awards (July 18, 2018) (referring to the hundreds of women who survived years of sexual abuse by Larry Nassar) (transcript available at *Cosmopolitan* website).

<sup>15</sup> Martinelli, *supra* note 13.

<sup>16</sup> See *Centralized Disciplinary Database*, U.S. CTR. FOR SAFESPORT, <https://uscenterforsafesport.org/response-and-resolution/disciplinary-database/> [<http://perma.cc/V6PK-LJF5>] (last visited Apr. 29, 2020). This list is not exhaustive and does not include instances of sexual misconduct where the survivor has yet to come forward. See *id.*

<sup>17</sup> See Murphy, *supra* note 8, at 158.

<sup>18</sup> Klein, *supra* note 14.

<sup>19</sup> See *Child Abuse Statistics*, CTR. FOR FAM. JUST., <https://centerforfamilyjustice.org/community-education/statistics/> [<http://perma.cc/D2PM-YMMZ>] (last visited Apr. 29, 2020) (explaining that roughly “1 in 3 girls and 1 in 7 boys will be sexually assaulted by the time they reach 18,” according to the Department of Justice); *Child Sexual Abuse Statistics: The Magnitude of the Problem*, DARKNESS TO LIGHT (Dec. 22, 2015), [http://www.d2l.org/wp-content/uploads/2017/01/Statistics\\_1\\_Magnitude.pdf](http://www.d2l.org/wp-content/uploads/2017/01/Statistics_1_Magnitude.pdf) [<http://perma.cc/QJc9-3D7J>] (finding the magnitude of the problem of childhood sexual abuse is largely unknown due to the fact that only about 38% of child victims disclose their sexual abuse).

Over the past few decades, many trusted institutions have become the center of allegations involving rampant and uninhibited sexual abuse of vulnerable children.<sup>20</sup> Sexual abuse within religious institutions is a worldwide problem.<sup>21</sup> Most notably, this centuries-old problem characterized by cover-ups and lack of accountability has placed the Catholic Church under international scrutiny.<sup>22</sup> Additionally, sexual abuse is repeatedly occurring in schools and other children's recreation programs, leaving countless children to cope with the lifelong effects of abuse.<sup>23</sup> As an illustration, an investigation in the 1990s revealed the Boy Scouts of America have reported, "on average, more than one incident of sexual abuse per week for the past two decades" not including the number of unreported cases.<sup>24</sup>

Childhood sexual abuse is not simply a problem of abusive individuals but a problem of systematic failures within institutions<sup>25</sup>—institutions that failed to take action to adequately protect the children they were entrusted to care for.<sup>26</sup>

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<sup>20</sup> Chamallas, *supra* note 6, at 133.

<sup>21</sup> See *Child Sexual Abuse in the Catholic Church*, CHILD RTS. INT'L NETWORK, <https://home.crin.org/issues/sexual-violence/child-sexual-abuse-catholic-church> [<http://perma.cc/5D6W-FP3V>] (last visited Apr. 29, 2020).

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., *LAUSD Agrees to Multimillion-Dollar Settlement of Child Sex Abuse Claims Against Ex-Teachers*, ABC 7 EYEWITNESS NEWS (Jan. 16, 2020), <https://abc7.com/child-sex-abuse-sexual-misconduct-laugd-los-angeles-unified-school-district/5855667/> [<http://perma.cc/24W9-X82E>] (questioning the Los Angeles Board of Education's steps "to reform a culture which places the reputation of the district and its employees above the safety of children in its care" after paying out more than \$300 million in settlement of sexual abuse cases); Joe Nelson, *Redlands Unified Slapped with Sex Abuse Lawsuit Under New State Law*, REDLANDS DAILY FACTS (Jan. 23, 2020, 3:01 PM), <https://www.redlandsdailyfacts.com/2020/01/21/redlands-unified-slapped-with-sex-abuse-lawsuit-under-new-state-law/> [<http://perma.cc/4WMP-JUCK>] (exposing 20 years of covering up sexual abuse by teachers in the district); Cara Kelly, *Boy Scouts Face 'Flood of Litigation' Over Child Sexual Abuse*, USA TODAY (Jan. 7, 2020, 1:17 PM), <https://www.usatoday.com/story/news/investigations/2020/01/06/boy-scouts-hit-more-lawsuits-claiming-child-sex-abuse/2806124001/> [<http://perma.cc/9VFD-MFF9>] ("Boy Scouts of America faces mounting legal liability as lawsuits alleging sexual abuse by leaders and volunteers continue to roll in."); Carter Sherman, *Hundreds of Kids Across the Country Were Abused at Boys & Girls Clubs of America, Report Reveals*, VICE (Aug. 15, 2019, 9:57 AM), [https://www.vice.com/en\\_ca/article/mbma98/hundreds-of-kids-across-the-country-were-abused-at-boys-and-girls-clubs-of-america-report-reveals](https://www.vice.com/en_ca/article/mbma98/hundreds-of-kids-across-the-country-were-abused-at-boys-and-girls-clubs-of-america-report-reveals) [<http://perma.cc/8HS3-SE2F>] ("More than 200 people across 30 states say that they were sexually abused as children by people with ties to the Boys & Girls Clubs of America, which serves more than 4 million children as the nation's largest youth development nonprofit.").

<sup>24</sup> See Mark C. Lear, *Just Perfect for Pedophiles? Charitable Organizations that Work with Children and Their Duty to Screen Volunteers*, 76 TEX. L. REV. 143, 144 n.8 (1997); Patrick Boyle, *Scout's Honor: Scouting's Sex Abuse Trail Leads to 50 States*, WASH. TIMES, May 20, 1991, at A1 (finding sex abuse by scout leaders more common than the amount of accidental deaths and serious injuries to youth scouts combined).

<sup>25</sup> See Chamallas, *supra* note 6, at 133.

<sup>26</sup> Jennifer Shore, *Institutional Sex Abuse of Children: Part 1: The Scope of the Problem*, FOCUS FOR HEALTH (Feb. 14, 2019), <https://www.focusforhealth.org/institutional->

Sex abuse rises to the level of institutional abuse when the organization and institutional structure these individuals are affiliated with does not respond appropriately to allegations when they come forward. . . . In all these cases, the actions of the predator were either ignored or accepted by the institution, and the focus of the system shifted to covering up the allegation to avoid scandal and preserve the institution itself instead of protecting children. The collective inaction of the institution allowed the abuse to continue and more children became victimized. When abuse occurs to children in the very settings that are designed to enhance their lives and to protect them, it is especially egregious and difficult to understand. We no longer have one sexual deviant to blame for the exploitation of a child, but an entire system that has allowed for the abuse to continue, and in the process, enabled more children to be victimized.<sup>27</sup>

The destructive impacts of childhood sexual abuse on children are undeniable.<sup>28</sup> Children who are sexually abused suffer immediate impacts as well as long term consequences.<sup>29</sup> Some immediate impacts of childhood sexual abuse include lower self-esteem, depression, anxiety, guilt, shame, anger, sleep disturbances, lack of trust, and withdrawn behavior.<sup>30</sup> Unfortunately, these problems do not simply disappear when the abuse stops. Victims of childhood sexual abuse are more likely to develop substance abuse problems, develop mental health problems including anxiety, depression, post-traumatic stress disorder and eating disorders, encounter problems with authority including law enforcement, and have problems with intimacy and sexual relationships.<sup>31</sup>

Action must be taken to prevent institutions from continually failing to protect defenseless and vulnerable children. Allegations must be taken seriously, and children must be believed. It is not enough to address issues of childhood sexual abuse after they have already occurred. But how do we compel institutions to take allegations of sexual abuse seriously? What proactive and preemptive measures can be taken to safeguard children before the abuse ever occurs? Should this problem be left up to the legislators to decide? At both a federal and state level,

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sex-abuse-of-children-part-1-scope-of-the-problem/ [http://perma.cc/JC52-98T2].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See *Effects*, NAT'L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/what-is-child-trauma/trauma-types/sexual-abuse/effects> [http://perma.cc/PRH8-K9XB] (last visited May 1, 2020).

<sup>30</sup> See *id.*; *Immediate and Lasting Effects*, RACE AGAINST ABUSE OF CHILD. EVERYWHERE, [raace.org/immediate-lasting-effects](http://raace.org/immediate-lasting-effects) [http://perma.cc/79L9-6T57] (last visited May 1, 2020).

<sup>31</sup> See *Effects*, *supra* note 29; *Long Term Consequences of Child Sexual Abuse*, DARKNESS TO LIGHT (Jan. 2017), <https://www.d2l.org/wp-content/uploads/2017/01/Long-Term-Consequences-4.11.14.pdf> [http://perma.cc/7YKD-KJ5U].



the United States is recognizing the need to take action to protect children from sexual abuse. For example, in 2018, the Safe Sport Authorization Act was enacted to improve protection for young athletes, including the creation of the United States Center for SafeSport as an independent entity that investigates reports of abuse in Olympic programs.<sup>32</sup> In addition, multiple states have recently extended their statute of limitations<sup>33</sup> and made necessary updates to the laws governing childhood sexual abuse claims, in recognition of delays in reporting and other hurdles attributed to the nature of this type of abuse.<sup>34</sup> Specifically, California's Assembly Bill 218 extended the time to bring a claim of childhood sexual assault to twenty-two years after the adult survivor reaches the age of majority.<sup>35</sup> Moreover, it revived previously time barred claims that had not been litigated to finality for a period of three years.<sup>36</sup> Time and again, the state of California has recognized its compelling interest in protecting citizens, particularly those most vulnerable, like minor children, from the devastation of such atrocious crimes as sexual assault and molestation.<sup>37</sup>

While the changes in law represent a step in the right direction, these changes will be meaningless unless they impact and alter the behavior of the institutions that are continuing to allow childhood sexual abuse to take place. Since these institutions have repeatedly prioritized money and reputation over children's safety, it appears that impacting an institution's reputation and finances may be the precise motivation needed to improve child safety measures and precautions within the institutions. Survivors of childhood sexual abuse have instituted civil actions against their perpetrators and the institutions that

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<sup>32</sup> Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115–126, 132 Stat. 318 (2018).

<sup>33</sup> *Statute of Limitations*, CAL. CTS.: THE JUD. BRANCH OF CAL., <https://www.courts.ca.gov/9618.htm?rdeLocaleAttr=en> [http://perma.cc/JM8H-SVJB] (last visited Apr. 30, 2020) (“A statute of limitations is the deadline for filing a lawsuit. Most lawsuits MUST be filed within a certain amount of time. In general, once the statute of limitations on a case ‘runs out,’ the legal claim is not valid any longer. The period of time during which you can file a lawsuit varies depending on the type of legal claim.”).

<sup>34</sup> See S.B. 2440, 242nd Ann. Legis. Sess., Ch. 11 (N.Y. 2019) (allowing childhood sexual abuse victims to seek civil action against their abusers and institutions that enabled them until they turn age 55); S.B. 477, P.L. 2019, Ch. 120 (N.J. 2019) (extending the statute of limitations in civil actions for childhood sexual abuse and creating a two-year window for civil lawsuits that would otherwise be time barred even under the new statute of limitations); Assemb. B. 218, 2019-2020 Ch. 861 (Cal. 2019) (expanding the definition of childhood sexual assault, extending the statute of limitations, broadening notice requirements, and reviving previously time barred claims).

<sup>35</sup> Assemb. B. 218 (resulting in any person under the age of forty (40), age of majority (18) plus twenty-two (22) years, able to bring a claim of childhood sexual assault).

<sup>36</sup> *Id.*

<sup>37</sup> *Burt v. County of Orange*, 15 Cal. Rptr. 3d 373, 382 (Ct. App. 2004).

were supposed to be protecting them in the hopes that significant monetary and reputational losses will inspire better childcare procedures and safeguards.

Under the recently updated *California Code of Civil Procedure* section 340.1, a person can bring a civil action for the recovery of damages suffered as a result of sexual abuse for the following:

- (1) An action against any person for committing an act of childhood sexual assault.
- (2) An action for liability against any person or entity who owed a duty of care to the plaintiff, if a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff.
- (3) An action for liability against any person or entity if an intentional act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff.<sup>38</sup>

While many theories of liability have been advanced in California state courts against institutions, this paper will focus on a theory of negligence based on an affirmative duty created by the special relationship between the institution and the child who was the victim of sexual abuse, or the special relationship between the institution and the perpetrator of the sexual abuse.<sup>39</sup>

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<sup>38</sup> CAL. CODE CIV. PRO. § 340.1 (Deering, LEXIS through ch. 3 of the 2020 Reg. Sess.).

<sup>39</sup> There are many other theories of liability survivors of sexual assaults use in civil lawsuits including, but not limited to: vicarious liability, direct liability through negligence, intentional torts, agency, and premises liability. California courts have held institutions vicariously liable for sexual misconduct committed by their employees in some situations, but not in others. See *John R. v. Oakland Unified Sch. Dist.*, 769 P.2d 948, 956–57 (Cal. 1989) (finding the school district was not vicariously liable for its teacher’s act of sexually assaulting a student while the student was participating in a district sanctioned extracurricular activity at the teacher’s home); *White v. County of Orange*, 212 Cal. Rptr. 493, 496 (Ct. App. 1985) (finding a police officer who sexually assaults a member of the community while on duty carries with them the authority of the law, and when the wrongful acts flow from that exercise of authority, the employer (the government) must be held responsible). Additionally, California courts have held institutions directly liable for their employee’s negligence. See *C.A. v. William S. Hart Union High Sch. Dist.*, 270 P.3d 699, 702 (Cal. 2012) (finding the employer liable for the negligence of supervisory and/or administrative employees who knew or should have known of the sexually abusive employee’s propensities and nevertheless hired, retained, or inadequately supervised that employee). Survivors of sexual abuse have attempted to bring claims of premises liability, intentional torts, and claims based on agency, but have not always been successful. See *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 17 (Ct. App. 2000) (affirming summary judgement for the defendants on an action for premises liability); *Boy Scouts of Am. Nat’l Found. v. Superior Ct.*, 141 Cal. Rptr. 3d 819, 833–34 (Ct. App. 2012) (finding a claim for intentional infliction of emotional distress was time barred under the applicable statute of limitations); *Doe v. Roman Cath. Archbishop of L.A.*, 202 Cal. Rptr. 3d 414, 426 (Ct. App. 2016) (asserting “a principal may be liable for the wrongful conduct of its agent, even if that conduct is criminal, in one of three ways”).

In the 2019 *Brown* case, three young women sued their coach for sexually abusing them while they were minor children.<sup>40</sup> They also sued USAT and USOC for their inaction and negligence in failing to protect the minor girls from the coach's sexual abuse.<sup>41</sup> The trial court dismissed the minor plaintiffs' claims against USAT and USOC.<sup>42</sup> On review, the Court of Appeal of California found USAT was in a special relationship with the coach that sexually abused the plaintiffs, thus USAT owed the plaintiffs a duty to act affirmatively to protect them.<sup>43</sup> In contrast, the court found USOC did not owe the plaintiffs a duty because it did not have a special relationship with the sexually abusive coach or with the plaintiffs.<sup>44</sup> The plaintiffs petitioned for review which the Supreme Court of California granted.<sup>45</sup>

## II. THE SPECIAL RELATIONSHIP EXCEPTION IN CALIFORNIA NEGLIGENCE LAW

The issue in the *Brown* case presents a question of duty: when do institutions have a duty to protect minor children from sexual abuse by third parties?<sup>46</sup> In order to answer that question, a discussion of negligence, specifically focusing on the element of duty is necessary.

The elements of a cause of action for negligence are: (1) the existence of a duty on the part of the actor toward another to take action to protect against risk; (2) the failure on the part of the actor to conform to a required standard of conduct in light of the duty imposed; (3) a reasonably close connection between the conduct and the resulting injury, commonly called "proximate cause"; and (4) actual loss or damage resulting from such injury.<sup>47</sup>

### A. Duty as a Necessary Element of Negligence

A duty is a legally recognized obligation requiring an actor to follow a standard of conduct for the safety of others against

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<sup>40</sup> *Brown v. USA Taekwondo*, 253 Cal. Rptr. 3d 708, 715 (Ct. App. 2019).

<sup>41</sup> *Id.* at 715–16.

<sup>42</sup> *Id.* at 716.

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

<sup>44</sup> *Id.*

<sup>45</sup> *Summary of Cases Accepted and Related Actions During Week of December 30, 2019*, CAL. CTS. at 1 (Jan. 3, 2020), <https://www.courts.ca.gov/documents/ws123019.pdf> [<http://perma.cc/7G69-FA69>] (press release).

<sup>46</sup> *Pending Issues Summary*, CAL. CTS. at 2, <https://www.courts.ca.gov/documents/MAY0820civpend.pdf> [<http://perma.cc/HHX4-C7X2>] (last updated May 8, 2020).

<sup>47</sup> See *Koepke v. Loo*, 23 Cal. Rptr. 2d 34, 36 (Ct. App. 1993) (citing W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS*, §30 at 164–65 (5th ed. 1984)); SHERYL L. HECKMANN & HOWARD C. ANAWALT, 1 CALIFORNIA TORTS §1.01, Westlaw (database updated 2020).

unreasonable risks.<sup>48</sup> “A duty to do something for another person or entity often creates a right in the other that the duty be performed, and a breach of such a duty gives rise to a cause of action for violation of the right.”<sup>49</sup> The existence of a duty is generally a question of law to be determined by the court.<sup>50</sup> The existence of a duty is not a “discoverable fact[] of nature, but merely [a] conclusory expression[] that, in cases of a particular type, liability *should* be imposed for damage done.”<sup>51</sup> In many cases, a duty may be obvious.<sup>52</sup> But the issue of duty in a legal context may arise when a defendant insists that he or she was under no legal obligation to act carefully.<sup>53</sup> As will be discussed *infra*, a duty is a judicial determination that a person is liable to another person who was injured, based on a variety of policy considerations.<sup>54</sup>

In California, there is a general duty to exercise reasonable care under the circumstances.<sup>55</sup> California has codified its general duty in California Civil Code Section 1714(a), which states:

Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.<sup>56</sup>

This is a very broad rule requiring every person to exercise reasonable care to avoid causing injury to every other person.<sup>57</sup> However, a person will not be held liable for a failure to act to protect or aid another who is imperiled by the circumstances, by that person’s own actions, or by the actions of a third party.<sup>58</sup>

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<sup>48</sup> HECKMANN & ANAWALT, *supra* note 47, §1.02; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, §30 at 164 (5th ed. 1984); *see* Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854, 859 (Ct. App. 1976).

<sup>49</sup> *Duty*, BOUVIER LAW DICTIONARY (2012) (desk edition).

<sup>50</sup> *See* HECKMANN & ANAWALT, *supra* note 47, § 1.02; *Peter W.*, 131 Cal. Rptr. at 859; *Raymond v. Paradise Unified Sch. Dist.*, 31 Cal. Rptr. 847, 851 (Ct. App. 1963); *Cabral v. Ralphs Grocery Co.*, 248 P.3d 1170, 1175 (Cal. 2011) (stating the determination of a duty owed is for the court to make, but the determination of whether the defendant breached that duty is for the jury in a jury trial to make).

<sup>51</sup> *Thompson v. County of Alameda*, 614 P.2d 728, 732 (Cal. 1980) (emphasis added) (citing *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976)).

<sup>52</sup> *See* HECKMANN & ANAWALT, *supra* note 47, § 1.02 (indicating no judge would welcome lengthy argument regarding automobile drivers owing a duty to other drivers and pedestrians on the road, since the duty owed is very clear).

<sup>53</sup> *Id.*; CHARLES O. GREGORY & HARRY KALVEN, JR., CASES AND MATERIALS ON TORTS 260 (2d ed. 1969).

<sup>54</sup> HECKMANN & ANAWALT, *supra* note 47, § 1.02.

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

<sup>56</sup> CAL. CIV. CODE § 1714(a) (Deering 2020); HECKMANN & ANAWALT, *supra* note 47, § 1.02.

<sup>57</sup> HECKMANN & ANAWALT, *supra* note 47, § 1.02.

<sup>58</sup> *Id.* § 1.10 (“Generally, one was not held liable for his or her ‘mere’ nonfeasance.

A person is not required to take affirmative action that benefits another person unless there was some preexisting legal duty obligating them to do so.<sup>59</sup> Without a legal duty, any injury suffered is said to be “damnum absque injuria” or an injury without a wrong.<sup>60</sup> This failure to act affirmatively where an action is required is referred to as nonfeasance, and courts are more reluctant to impose liability for nonfeasance as opposed to malfeasance, or an affirmative act that causes injury.<sup>61</sup> Despite this reluctance, the courts have carved out exceptions to this general rule.<sup>62</sup> However, the Supreme Court of California has declared that no exception should be made to this fundamental principle, except if it is clearly supported by public policy.<sup>63</sup>

## B. Factors for Determining if an Exception is Supported by Public Policy

The Supreme Court of California recognized a duty as an “expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”<sup>64</sup> The court makes this determination on a case by

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Nonfeasance generally refers to a person’s failure to act to protect or assist others who are imperiled by the circumstances, by their own actions, or by the actions of a third party.”). See *Stout v. City of Porterville*, 196 Cal. Rptr. 301, 304 (1983) (“As a rule, one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to such a duty.”); RESTATEMENT (SECOND) OF TORTS § 314 (AM. L. INST. 1965) (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”).

<sup>59</sup> HECKMANN & ANAWALT, *supra* note 47, § 1.10.

<sup>60</sup> *E.g.*, *Nally v. Grace Cmty. Church*, 763 P.2d 948, 956 (Cal. 1988).

<sup>61</sup> See *Conti v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 186 Cal. Rptr. 3d 26, 37 (2015); *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 343 n.5 (Cal. 1976), *superseded by statute*, Cal. Civ. Code § 43.92 (Deering 2020) (attributing the reluctance to practical difficulties in setting a workable rule for situations of nonfeasance).

<sup>62</sup> *Stout*, 196 Cal. Rptr. at 304 (including exceptions when a person voluntarily undertakes aiding another, where a special relationship exists, and when a person has created a foreseeable peril). See, *e.g.*, HECKMANN & ANAWALT, *supra* note 47, § 1.11 (stating that one who voluntarily renders aid or protection to another is under a duty to exercise reasonable care); *Tarasoff*, 551 P.2d at 343 (finding that the relationship between a patient and his psychotherapist may result in affirmative duties for the benefits of third persons); *Johnson v. State*, 447 P.2d 352, 355 (Cal. 1968) (imposing a “duty upon those who create a foreseeable peril, not readily discoverable by endangered persons, to warn them of such potential peril”).

<sup>63</sup> See HECKMANN & ANAWALT, *supra* note 47, § 1.02; *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968), *superseded by statute*, Cal. Civ. Code § 847 (West 2020), *as recognized in* *Calvillo-Silva v. Home Grocery*, 968 P.2d 65 (Cal. 1998), (“Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy.”).

<sup>64</sup> See HECKMANN & ANAWALT, *supra* note 47, § 1.02; *Weirum v. RKO Gen., Inc.*, 539

case analysis.<sup>65</sup> In the landmark Supreme Court of California case *Rowland v. Christian*, the plaintiff sued the defendant for a severe injury to his hand sustained when the knob of the faucet on the bathroom basin broke.<sup>66</sup> The plaintiff argued that the defendant knew of the dangerous condition presented by the defective knob and owed him a duty to warn him of that danger.<sup>67</sup> The court moved away from the rigid common law duties a landowner owes to a trespasser, licensee, or invitee.<sup>68</sup> Instead, in determining the existence of a duty in that case, the court observed there was no “statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code.”<sup>69</sup> Consequently, an exception could only exist if it was supported by public policy, which is determined by an analysis of factors.<sup>70</sup>

To make this determination, the court balanced a number of considerations including:

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.<sup>71</sup>

The factors generally fall into two categories, and the courts often analyze the factors according to those groups.<sup>72</sup> The first group of factors involve foreseeability.<sup>73</sup> This group includes the foreseeability of harm to the plaintiff, and the similar concepts of certainty of injury and connection between the plaintiff’s injury and the defendant.<sup>74</sup> The second group of factors is concerned

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P.2d 36, 39 (Cal. 1975) (quoting WILLIAM L. PROSSER, *THE LAW OF TORTS* 325–26 (4th ed. 1971)); *Dillon v. Legg*, 441 P.2d 912, 916 (Cal. 1968).

<sup>65</sup> HECKMANN & ANAWALT, *supra* note 47, § 1.02.

<sup>66</sup> *Rowland*, 443 P.2d at 562. A separate analysis is discussed in this case involving whether the injured person was classified as a trespasser, licensee, or invitee. *Id.* at 565. However, this case’s relevance for the purpose of this paper only relates to the factors considered to determine whether an exception to the general duty to exercise ordinary care should be made.

<sup>67</sup> *Id.* at 562.

<sup>68</sup> *Id.* at 561.

<sup>69</sup> *Id.* at 564.

<sup>70</sup> *Id.*

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

<sup>72</sup> See *Kesner v. Superior Ct.*, 384 P.3d 283, 291 (2016); *Regents of Univ. of Cal. v. Superior Ct.*, 413 P.3d 656, 670 (Cal. 2018); *Univ. of S. Cal. v. Superior Ct.*, 241 Cal. Rptr. 3d 616, 633 (Ct. App. 2018).

<sup>73</sup> See *Kesner*, 384 P.3d at 291; *Regents*, 413 P.3d at 670; *Univ. of S. Cal.*, 241 Cal. Rptr. 3d at 633.

<sup>74</sup> See *Kesner*, 384 P.3d at 291; *Regents*, 413 P.3d at 670; *Univ. of S. Cal.*, 241 Cal.

with public policy.<sup>75</sup> This group includes concerns of moral blame,<sup>76</sup> preventing future harm, burden, and insurance availability.<sup>77</sup> This policy analysis looks at whether certain kinds of plaintiffs or certain kinds of injuries should be excluded from relief.<sup>78</sup>

The foreseeability of the injury is the most important factor “in determining whether to create an exception to the general duty to exercise ordinary care.”<sup>79</sup>

In examining foreseeability, “the court’s task . . . ‘is not to decide whether a particular plaintiff’s injury was reasonably foreseeable in light of a particular defendant’s conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed . . . .’”<sup>80</sup>

Importantly, all factors are evaluated at a broad level of generality—that is, “whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy.”<sup>81</sup> No factor by itself is determinative, so the courts must analyze each factor and weigh them against the other factors to determine when a duty exists.<sup>82</sup>

Rptr. 3d at 633; *cf.* *Bryant v. Glatetter*, 38 Cal. Rptr. 2d 291, 296–97 (Ct. App. 1995) (The court found there was “no logical cause and effect relationship between the negligence and the harm suffered by decedent except for the fact that it placed decedent in a position to be acted upon by the negligent third party.” Thus, the connection between the plaintiff’s injury and the defendant’s conduct weighed against finding the injury foreseeable, and therefore, against the existence of a duty).

<sup>75</sup> See *Kesner*, 384 P.3d at 291; *Regents*, 413 P.3d at 670; *Univ. of S. Cal.*, 241 Cal. Rptr. 3d at 633.

<sup>76</sup> Moral blame usually refers to “evidence that a defendant knew or reasonably should have known there was any danger or potential danger associated with that defendant’s act or failure to act.” See *Butcher v. Gay*, 34 Cal. Rptr. 2d 771, 780 (Ct. App. 1994) (imposing liability without some degree of moral blame on the defendant is like imposing liability without fault). Moreover, any moral blame that is ordinarily associated with negligence in general is not enough to tip the balance. See *Adams v. City of Fremont*, 80 Cal. Rptr. 2d 196, 212 (Ct. App. 1998) (requiring a higher degree of moral blame such as intent or planning the harm, actual or constructive knowledge of the danger, reckless indifference to consequences of one’s actions, or inherently harmful acts).

<sup>77</sup> See *Kesner*, 384 P.3d at 291; *Regents*, 413 P.3d at 670; *Univ. of S. Cal.*, 241 Cal. Rptr. 3d at 633.

<sup>78</sup> See *Kesner*, 384 P.3d at 291; *Regents*, 413 P.3d at 670; *Univ. of S. Cal.*, 241 Cal. Rptr. 3d at 633.

<sup>79</sup> *Regents*, 413 P.3d at 670–71 (quoting *Kesner*, 384 P.3d at 291); see *Tarasoff v. Regents of Univ. of Cal.* 551 P.2d 334, 342 (Cal. 1976). *But cf.* *Parsons v. Crown Disposal Co.*, 936 P.2d 70, 82 (Cal. 1997) (noting that the mere presence of foreseeability standing alone is not sufficient to impose a duty and that public policy may dictate nonliability despite how foreseeable the risk is); *Adams*, 80 Cal. Rptr. 2d at 211 (remarking that almost any result is foreseeable with the benefit of hindsight, so the low bar of foreseeability alone is insufficient to create a duty).

<sup>80</sup> *Regents*, 413 P.3d at 670 (emphasis in original omitted).

<sup>81</sup> *Cabral v. Ralphs Grocery Co.*, 248 P.3d 1170, 1175 (Cal. 2011).

<sup>82</sup> See, e.g., *Parsons*, 936 P.2d at 82 (holding that the factors of social utility of the

### C. The Special Relationship Exception to the General No Duty to Protect Rule

One such exception to the general rule of liability that has been developed through the common law is the special relationship exception.<sup>83</sup> This exception is stated in *Restatement (Second) of Torts* section 315:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.<sup>84</sup>

The existence of a special relationship may result in the imposition of an affirmative duty to protect an individual against harm or injury by a third person.<sup>85</sup> This affirmative duty can include a duty to warn, a duty to control, or both.<sup>86</sup> Specifically, a duty to control can result if a defendant is in a “special relationship with the foreseeably dangerous person,” and the defendant has an ability to control that person's conduct.<sup>87</sup> Similarly, a duty to warn or protect exists if “the defendant has a special relationship with the potential victim that gives the victim a right to expect protection.”<sup>88</sup> Deeming a relationship a special relationship has no independent significance, it merely signals that the court is recognizing an affirmative duty where no duty to act would generally exist.<sup>89</sup>

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conduct and the burden and consequences to the community outweighed the foreseeability factor in that case); *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 33–34 (Ct. App. 2000) (resulting in a duty owed, despite the absence of any moral blame weighing strongly as a factor against finding a duty).

<sup>83</sup> HECKMANN & ANAWALT, *supra* note 47, § 1.10 (“[A] person may in some instances be obligated to take certain affirmative steps to protect or aid another if that person stands in some ‘special relationship’ to either the person endangered or the person whose conduct may injure the person endangered.”); *id.* at §1.12 (“California courts have recognized that ‘special relationships’ may create special duties, including the duty to protect against the harmful acts of third persons.”); *see, e.g., Tarasoff*, 551 P.2d at 343 (finding a special relationship between a patient and a psychotherapist); *Marois v. Royal Investigation & Patrol, Inc.*, 208 Cal. Rptr. 384, 388 (Ct. App. 1984) (finding a special relationship between a business and its customers).

<sup>84</sup> RESTATEMENT (SECOND) OF TORTS § 315 (AM. L. INST. 1965).

<sup>85</sup> *See* HECKMANN & ANAWALT, *supra* note 47, § 1.12.

<sup>86</sup> *Id.*; *see Tarasoff*, 551 P.2d at 346; *Marois*, 208 Cal. Rptr. at 387–88.

<sup>87</sup> *Regents of Univ. of Cal. v. Superior Ct.*, 413 P.3d 656, 664 (Cal. 2018); *see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 41 (AM. L. INST. 2012).

<sup>88</sup> *Regents*, 413 P.3d at 664; *see Zelig v. County of Los Angeles*, 45 P.3d 1171, 1182–83 (Cal. 2002).

<sup>89</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. h (AM. L. INST. 2012).



The *Restatement (Third) of Torts* has recognized several special relationships that may support the imposition of a duty.<sup>90</sup> Under section 40, special relationships giving rise to a duty can include (1) common carriers with passengers, (2) innkeepers with guests, (3) business with those who are lawfully on the premises, (4) employers with employees under certain circumstances, (5) schools with students, (5) landlords with tenants, and (6) custodians with those in its custody under certain conditions.<sup>91</sup> Section 41 covers special relationships resulting in the imposition of a duty to a third person.<sup>92</sup> Special relationships, whether explicitly stated in the *Restatement (Third) of Torts* or otherwise, include common features.<sup>93</sup> These common features include dependency, defined boundaries, and benefit to the party charged with care.<sup>94</sup>

### 1. Dependency

Special relationships generally include some aspect of dependency.<sup>95</sup> Indeed, “the law appears to be heading toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.”<sup>96</sup> A relationship of dependency refers to one party relying to some degree on the other party for protection.<sup>97</sup> On the other side of dependency in a special relationship is control.<sup>98</sup> When one party is dependent on the other party, that other party has control over the mechanisms of protection.<sup>99</sup>

A classic dependency situation resulting in a special relationship exists between a jailer and a prisoner.<sup>100</sup> A special relationship has also been recognized between a common carrier and its passengers as passengers are confined in the moving

<sup>90</sup> *Regents*, 413 P.3d 656, 664; see RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §§ 40, 41 (AM. L. INST. 2012).

<sup>91</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 40 (AM. L. INST. 2012).

<sup>92</sup> *Id.* § 41 (including “(1) a parent with dependent children, (2) a custodian with those in its custody, (3) an employer with employees when the employment facilitates the employee’s causing harm to third parties, and (4) a mental-health professional with patients.”).

<sup>93</sup> *Regents*, 413 P.3d at 664.

<sup>94</sup> *Id.* at 664–65.

<sup>95</sup> *Id.* at 664; see *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 814 (Cal Ct. App. 1981), *overruled on other grounds by Regents*, 413 P.3d 656 (Cal. 2018).

<sup>96</sup> *Regents*, 413 P.3d at 664–65 (observing this shift began over fifty years ago); *Mann v. State*, 139 Cal. Rptr. 82, 86 (Ct. App. 1977); RESTATEMENT (SECOND) OF TORTS § 314A cmt. b (AM. L. INST. 1965).

<sup>97</sup> *Regents*, 413 P.3d at 664.

<sup>98</sup> *Id.* at 665.

<sup>99</sup> *Id.*; *Brown v. USA Taekwondo*, 253 Cal. Rptr. 3d 708, 723 (Ct. App. 2019).

<sup>100</sup> *Giraldo v. Cal. Dept. of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 386 (Ct. App. 2008).

vehicle and the driver has exclusive control over the entrances and exits of the vehicle.<sup>101</sup> The Supreme Court of California has recognized dependency and control relationships between business proprietors and their tenants or patrons, between innkeepers and their guests, and between mental health professionals and their patients.<sup>102</sup> Significantly, the cases point out a typical setting for a special relationship is where “the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff’s welfare.”<sup>103</sup>

## 2. Defined Boundaries

Special relationships are also defined by specific boundaries creating a duty of care “owed to a limited community, not the public at large.”<sup>104</sup> A special relationship may impose a duty owed to a specific person, or a specific group of persons.<sup>105</sup> The scope of the duty owed applies to dangers that are within the confines of the relationship.<sup>106</sup> It does not extend to risks or dangers that are not within the confines of the relationship.<sup>107</sup> As such, the scope of the duty is generally confined by geography and time.<sup>108</sup> Imposing any sort of affirmative duty on a party necessarily imposes a burden.<sup>109</sup> Nevertheless, the clearly defined boundaries of the special relationship lower the burden and incursion on the party’s autonomy, thus justifying the imposition of an affirmative duty.<sup>110</sup>

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<sup>101</sup> *Lopez v. S. Cal. Rapid Transit Dist.*, 710 P.2d 907, 912 (Cal. 1985) (reasoning passengers have no say or control over who can enter the vehicle and are entirely dependent upon the driver to provide help or escape when danger occurs).

<sup>102</sup> *Giraldo*, 85 Cal. Rptr. 3d at 382; *Delgado v. Trax Bar & Grill*, 113 P.3d 1159, 1165 (Cal. 2005).

<sup>103</sup> *Regents*, 413 P.3d at 665 (quoting *Giraldo*, 85 Cal. Rptr. 3d at 382); *Brown*, 253 Cal. Rptr. 3d at 723.

<sup>104</sup> *Regents*, 413 P.3d at 665.

<sup>105</sup> *See id.* at 667 (finding a special relationship “with students while they are engaged in activities that are part of the school’s curriculum or closely related to its delivery of educational services.”); *Buford v. State*, 164 Cal. Rptr. 264, 272 (Ct. App. 1980) (concluding a special relationship existed between the state and prisoner such that the state owed a duty to warn a foreseeable victim of the prisoner’s release), *overruled on other grounds by Quigley v. Garden Valley Fire Protection Dist.*, 444 P.3d 688 (Cal. 2019).

<sup>106</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §40 cmt. f (AM. L. INST. 2012).

<sup>107</sup> *Id.* §40 cmt. f.

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

<sup>109</sup> *See Regents*, 413 P.3d at 673 (recognizing measures to protect or warn may be burdensome, expensive, and impractical to implement); *Kesner v. Superior Ct.*, 384 P.3d 283, 296 (Cal. 2016) (highlighting the correct burden is cost to defendants in upholding the duty, not the cost to defendants of violating the duty).

<sup>110</sup> *Regents*, 413 P.3d 656, 665; RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §40 cmt. f (AM. L. INST. 2012).

Courts in California have consistently found schools are in a special relationship with students; even a college is in a special relationship with its students but only in the confines of school sponsored activities that the college has some control over.<sup>111</sup> However, the courts are mindful that it is unreasonable in some situations for students to rely on their school for protection, particularly with regard to college students partaking in off campus festivities.<sup>112</sup> The differing results reached in these situations demonstrates the court's detailed attention to the boundaries of the particular special relationship.

### 3. Benefit to the Party Charged with Care

Special relationships are usually characterized by the party charged with care experiencing a benefit or an advantage because of the relationship.<sup>113</sup> Even where both parties in the relationship experience a benefit, a special relationship can still be found.<sup>114</sup> A special relationship has been imposed between a college and its student-athletes in part because of the importance and benefits athletic competitions bring to the school.<sup>115</sup> In addition, retail stores and hotels may be deemed in a special relationship with their customers and guests, pointing to the advantage and even necessity of the customers and guests to the business's successful operation.<sup>116</sup> Many court opinions do not explicitly address this factor in their special relationship analyses.<sup>117</sup> However, the courts implicitly endorse the receipt of the benefit by the party charged with a duty as a justification for

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<sup>111</sup> See, e.g., *Regents*, 413 P.3d at 674 (holding the college owed a duty of reasonable care to protect students during curricular activities like attending class); *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 392–93 (Cal. 2006) (finding the college owed a duty of reasonable care during school-supervised athletic events); *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337, 344 (Ct. App. 2007) (concluding the school owed a duty of reasonable care during a school sponsored community service project).

<sup>112</sup> See *Univ. of S. Cal. v. Superior Ct.*, 241 Cal. Rptr. 3d 616, 629 (Ct. App. 2018); *Barenborg v. Sigma Alpha Epsilon Fraternity*, 244 Cal. Rptr. 3d 680, 691 (Ct. App. 2019).

<sup>113</sup> *Regents*, 413 P.3d at 665; RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §40 cmt. h (AM. L. INST. 2012).

<sup>114</sup> *Regents*, 413 P.3d at 665; *Brown v. USA Taekwondo*, 253 Cal. Rptr. 3d 708, 723 (Ct. App. 2019).

<sup>115</sup> See *Avila*, 131 P.3d at 392; James J. Hefferan, Jr., *Taking One for the Team: Davidson v. University of North Carolina and the Duty of Care Owed by Universities to Their Student-Athletes*, 37 WAKE FOREST L. REV. 589, 589–90, 605–06 (2002) (including enhanced recruitment of athletes, enhanced recruitment of other students, increased donations from alumni, and revenue).

<sup>116</sup> See *Regents*, 413 P.3d at 665; *Brown v. USA Taekwondo*, 253 Cal. Rptr. 3d 708, 723 (Ct. App. 2019); RESTATEMENT (THIRD) OF THE LAW, TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. j (AM. L. INST. 2012).

<sup>117</sup> See e.g., *Conti v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 186 Cal. Rptr. 3d 26, 41 (Ct. App. 2015) (assuming a religious institution receives a huge benefit from having its members perform field service and go out in to the world to spread its doctrines, even though the court never expressly states this).

the imposition of the burden of the affirmative duty on that party.<sup>118</sup>

### III. DIFFERENCES IN APPLICATION OF THE SPECIAL RELATIONSHIP FACTORS AND *ROWLAND* POLICY FACTORS

In the context of childhood sexual abuse cases, a plaintiff who is sexually abused as a minor child by a third party often will argue that while the defendant institution did not act affirmatively to cause the harm, the rule of nonliability should still be set aside due to the nature of the specific circumstances.<sup>119</sup> Specifically, the plaintiff will allege the specific circumstances created a special relationship, resulting in the defendant institution owing the minor child plaintiff a duty of care.<sup>120</sup> In response, the defendant institution will argue no special relationship existed between the institution and the minor child or between the institution and the third-party abuser.<sup>121</sup> Thus, the defendant institution maintains it owed no duty to plaintiff to control the conduct of a third-party sexual abuser, nor did it owe the plaintiff a duty to warn of the danger posed by the third-party sexual abuser.<sup>122</sup>

In these cases, the relevant inquiry is not simply whether there exists some special relationship; the inquiry also comprehends deliberation of the same policy considerations discussed in *Rowland*.<sup>123</sup> However, courts have not always been consistent in their interpretation of the special relationship factors and *Rowland* policy factors.<sup>124</sup> In some cases, courts analyzed the factors to determine the existence of a special relationship, and then analyzed the relevant policy considerations from *Rowland* to determine the existence of a duty.<sup>125</sup> In some cases, when the courts found a special relationship did not exist, they denied the existence of a duty before even considering the *Rowland* factors.<sup>126</sup> Yet in another

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<sup>118</sup> See *id.* at 43.

<sup>119</sup> See, e.g., *Brown*, 253 Cal. Rptr. 3d at 720.

<sup>120</sup> See, e.g., *id.*

<sup>121</sup> See, e.g., *id.* at 721.

<sup>122</sup> See, e.g., *id.* 720–21.

<sup>123</sup> See *Hansra v. Superior Ct. of Yuba Cnty.*, 9 Cal. Rptr. 2d 216, 226 (Ct. App. 1992); *Adams v. City of Fremont*, 80 Cal. Rptr. 2d 196, 222 (Ct. App. 1998) (“[R]esolution of the question whether a special relationship gives rise to a duty of protection requires consideration of the same *Rowland* factors underlying any duty of care analysis.”).

<sup>124</sup> See *Brown*, 253 Cal. Rptr. 3d at 723; *Regents of Univ. of Cal. v. Superior Ct. of L.A. Cnty.*, 413 P.3d 656, 669–70 (Cal. 2018); *Barenborg v. Sigma Alpha Epsilon Fraternity*, 244 Cal. Rptr. 3d 680, 686–87 (Ct. App. 2019); *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 36 (Ct. App. 2000).

<sup>125</sup> See *Brown*, 253 Cal. Rptr. 3d at 723; *Regents*, 413 P.3d at 669–70.

<sup>126</sup> See *Brown*, 253 Cal. Rptr. 3d at 733; *Barenborg*, 244 Cal. Rptr. 3d at 686–87.

case, the court found the *Rowland* factors were sufficient to impose a duty, though had it analyzed the special relationship factors, its decision would not have changed.<sup>127</sup> Clearly, the courts have been inconsistent and unpredictable in their application of these tests to determine the existence of an affirmative duty to act. Moreover, “the interrelationship between the traditional duty analysis and the ‘special relationship’ doctrine has never been clearly defined.”<sup>128</sup>

Notwithstanding this confusion, the recent trends indicate plaintiffs alleging a defendant institution had a duty to protect them must establish (1) that the special relationship exception to the general no duty to protect rule applies and (2) the balancing of the *Rowland* factors support the imposition of the duty.<sup>129</sup> The existence of the special relationship itself does not create the duty, rather the special relationship adds to the factors favoring imposition of a duty of care in particular circumstances, thereby outweighing the countervailing factors.<sup>130</sup> This incorporation of the *Rowland* policy factors into the question of duty resulting from a special relationship follows the trend of an overwhelming majority of American jurisdictions, and in particular, aligns with the key Supreme Court of California decisions on point.<sup>131</sup>

#### A. Key Supreme Court of California Decisions Demonstrating Varying Applications of the Two Tests

In its pending issues summary describing the question posed in *Brown*, the summary referenced several significant cases that have played a role in the development of the law.<sup>132</sup> While the list in the summary is not exhaustive and many cases have helped shape the current state of negligence law, this list provides a comprehensive starting point in order to accurately understand and predict the direction of negligence law in California.

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<sup>127</sup> See *Juarez*, 97 Cal. Rptr. 2d at 36.

<sup>128</sup> *Adams*, 80 Cal. Rptr. 2d at 210.

<sup>129</sup> See *id.* at 209; *cf.* *Conti v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 186 Cal. Rptr. 3d 26, 38 (Ct. App. 2015) (stating a number of cases find the absence of a special relationship dispositive and balancing the *Rowland* factors is not necessary).

<sup>130</sup> See *Hansra v. Superior Ct. of Yuba Cnty.*, 9 Cal. Rptr. 2d 216, 226 (Ct. App. 1992) (explaining that one factor weighing against the imposition of a duty is that the harm was caused by a third person, thus the connection between the plaintiff's injury and the defendant's conduct is attenuated—but the existence of a special relationship between the defendant and the plaintiff, or the defendant and the third party that caused the injury, counterbalances the weight of this factor.)

<sup>131</sup> See *Adams*, 80 Cal. Rptr. 2d at 223; Peter F. Lake, *Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of the Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations*, 34 SAN DIEGO L. REV. 1503, 1505 (1997).

<sup>132</sup> See *Pending Issues Summary*, *supra* note 46.

1. *Nally v. Grace Community Church* (1988)

In *Nally*, Kenneth Nally (“Nally”), a twenty-four year old man committed suicide and his parents sued Grace Community Church of the Valley (“Church”) for the wrongful death of their son.<sup>133</sup> The Church offered a pastoral counseling service that had approximately thirty non-therapist counselors who served a congregation of approximately 10,000 people.<sup>134</sup> Nally began forming relationships with and receiving counseling from some of the pastors and non-therapist counselors at the Church.<sup>135</sup> In its review, the Supreme Court of California agreed with the trial court’s grant of summary judgment.<sup>136</sup> The court found that no evidence presented, nor principles of tort law supported the imposition of a duty to refer in this case.<sup>137</sup>

Here, the court analyzed both the special relationship and *Rowland* factors to make its determination. The court first sought to determine if a duty existed under the special relationship exception.<sup>138</sup> The court relied on the non-therapist counselor’s lack of control over Nally to negate the finding of a special relationship resulting in a duty.<sup>139</sup> Next, the court examined the *Rowland* factors to determine if a duty may nonetheless be imposed.<sup>140</sup> While the court admitted it is foreseeable a suicidal individual who is not referred to a professional may commit suicide, the imposition of a duty to refer could “stifle all gratuitous or religious counseling.”<sup>141</sup> As to the closeness of the connection between the Church’s conduct and Nally’s suicide, the court found the connection was extremely tenuous.<sup>142</sup> Further, the imposition of a duty on non-therapist counselors could have a huge deterrent effect on encouraging private assistance efforts, which the legislature has sought to encourage.<sup>143</sup> In recognition of the lack of factors indicating the existence of a special relationship, the foreseeability and policy considerations involved, and the difficulty in precisely

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<sup>133</sup> See *Nally v. Grace Cmty. Church*, 763 P.2d 948, 949 (Cal. 1988).

<sup>134</sup> *Id.* at 950.

<sup>135</sup> See *id.*

<sup>136</sup> See *id.* at 955.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.* at 956.

<sup>139</sup> See *id.* at 958.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 959.

<sup>142</sup> See *id.* at 958–59 (finding Nally was examined by five physicians and a psychiatrist during the weeks before his suicide and Nally refused psychiatric commitment).

<sup>143</sup> See *id.* at 959.

determining whom the duty should apply to, the court found the Church did not have a duty to prevent Nally's suicide.<sup>144</sup>

## 2. *Juarez v. Boy Scouts of America* (2000)

In *Juarez*, the plaintiff sued the Boy Scouts of America ("Boy Scouts") asserting the Boy Scouts breached their duty of care to take reasonable protective measures to protect the plaintiff from the risk of sexual abuse by adult volunteers involved in the program.<sup>145</sup> In the 1980s, the Boy Scouts identified child sexual abuse as socially unacceptable and committed many of its resources to protect children from it.<sup>146</sup> The Boy Scouts developed a program to educate all participants in the program in detection and prevention of sexual molestation.<sup>147</sup> The Boy Scouts had developed a comprehensive video as an educational tool, however it was never shown to plaintiff's troop.<sup>148</sup> Despite the Boy Scout's purported efforts at prevention, the plaintiff was repeatedly sexually abused by his scoutmaster during officially sanctioned scouting events.<sup>149</sup>

The court held that the Boy Scouts owed a legal duty to the plaintiff to take reasonable measures to protect him from sexual abuse by one of the program's volunteers.<sup>150</sup> Here, the court solely analyzed the *Rowland* foreseeability and policy factors.<sup>151</sup> The court noted that foreseeability is a flexible concept:

In cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required.<sup>152</sup>

Since the Boy Scouts admitted that: (1) there was a possibility that pedophiles would be drawn to their programs (as the programs provided access to young boys), and (2) that they received, on average, more than one report of sexual abuse per week, it was "likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct."<sup>153</sup> The court took it a step further, concluding

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<sup>144</sup> *Id.* at 960.

<sup>145</sup> *See Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 17 (Ct. App. 2000).

<sup>146</sup> *Id.* at 26.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 27.

<sup>149</sup> *Id.* at 17.

<sup>150</sup> *See id.*

<sup>151</sup> *See id.* at 29–30.

<sup>152</sup> *Id.* at 30. (quoting *Issacs v. Huntington Mem'l Hosp.*, 695 P.2d 653, 658 (Cal. 1985)) (citations omitted).

<sup>153</sup> *Id.*

that even sexual abuse by a person with “no documented history of such proclivities” was reasonably foreseeable to the Boy Scouts.<sup>154</sup>

The court also examined the closeness of the connection between the suffered injury and the defendant’s conduct and found that, in touting the effectiveness of its youth program, the Boy Scouts admitted education was an effective tool to prevent sexual abuse.<sup>155</sup> By not providing these educational materials to plaintiff’s troop, the court found that there was a sufficient causal link between the Boy Scouts negligent acts and the harm suffered by the plaintiff.<sup>156</sup> As to policy considerations, the court found that society and the state overwhelmingly recognize an interest in protecting the welfare of children.<sup>157</sup> Moreover, the burden of imposing a duty on the Boy Scouts was minimal.<sup>158</sup> The Boy Scouts already had an effective system in place to ensure its program and educational materials were provided to the volunteers, parents, and children in its programs, notwithstanding the fact that it failed to provide these materials to plaintiff’s troop.<sup>159</sup> Significantly, the court pointed to the Boy Scout’s widespread organization, which is chartered under an act of Congress, and its purpose of developing a specific set of values in young boys; because of this, it was imperative that the organization understand the risks of sexual abuse, and work to combat it.<sup>160</sup> The court ultimately found that the benefits to the community in recognizing a duty would far outweigh any minimal burden imposed on the Boy Scouts.<sup>161</sup>

Interestingly, the court was reluctant to also conduct a special relationship analysis, as it found that balancing the *Rowland* factors was sufficient to impose a duty.<sup>162</sup> Despite its reluctance, the court noted it would have found that a special relationship existed between the Boy Scouts and the plaintiff, thereby giving rise to a duty to protect for a number of reasons:

The mission of youth organizations to educate children, the naivete of children, and the insidious tactics employed by child molesters dictate that the law recognize a special relationship between youth organizations and the members such that the youth organizations are

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<sup>154</sup> *Id.* at 31.

<sup>155</sup> *See id.* at 32.

<sup>156</sup> *See id.* at 33.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 34.

<sup>159</sup> *Id.*

<sup>160</sup> *See id.*

<sup>161</sup> *Id.*

<sup>162</sup> *See id.* at 36.



required to exercise reasonable care to protect their members from the foreseeable conduct of third persons.<sup>163</sup>

3. *Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015)

The court in *Conti* had to determine whether a religious institution owed a duty to one of its members who had been sexually abused by another member.<sup>164</sup> The plaintiff was molested by another member of the congregation, Johnathan Kendrick (“Kendrick”), from the time she was nine years old until she was around ten or eleven years old.<sup>165</sup> Kendrick had been accused of inappropriately touching his stepdaughter, also a member of the congregation, just four months earlier.<sup>166</sup> Despite this allegation, Kendrick was allowed to continue participating in field service.<sup>167</sup> Much of the sexual abuse of the plaintiff occurred while Kendrick and plaintiff were supposed to be performing field service, thus affording Kendrick unsupervised access to the minor plaintiff.<sup>168</sup> The plaintiff sued the religious institution alleging that they had a duty to warn her and a duty to supervise her participation in church activities.<sup>169</sup> The court held that, while defendant had no duty to warn, there was a duty to limit and supervise a church sponsored activity like field service.<sup>170</sup>

In this instance, the court analyzed both the special relationship and *Rowland* factors. The court found the religious institution was in a special relationship with the plaintiff and Kendrick when they were performing field service because the religious institution exercised control over the service.<sup>171</sup> The institution’s policy is what allowed child molesters to continue performing field service, and the institution controlled when, where, and with whom field service would be conducted.<sup>172</sup> Significantly, the court noted that the abuse happened *during* field service, a church-sponsored activity, since the abuse occurred while they were

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<sup>163</sup> *Id.* (quoting *Evans v. Ohio State Univ.*, 680 N.E.2d 161, 181 (Ohio Ct. App. 1996) (Lazarus, J., dissenting)).

<sup>164</sup> *Conti v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 186 Cal. Rptr. 3d 26, 30 (Ct. App. 2015).

<sup>165</sup> *Id.* at 30–31.

<sup>166</sup> *Id.* at 31.

<sup>167</sup> *Id.* at 30 (defining field service as “small groups, usually consisting of two or three people, go[ing] door to door in neighborhoods to spread the church’s spiritual teachings”). Moreover, an official of the religious institution testified that policy “allowed a known child molester to continue to perform field service, but not alone or with a child.” *Id.* at 31.

<sup>168</sup> *See id.* at 34 (occurring at the member’s home where he drove the plaintiff during field service).

<sup>169</sup> *See id.* at 30.

<sup>170</sup> *See id.*

<sup>171</sup> *Id.* at 43.

<sup>172</sup> *Id.*

*supposed to be performing* field service.<sup>173</sup> The court also found that the *Rowland* factors supported the imposition of a duty because “it is foreseeable that a child molester will reoffend, and the risk is heightened when the molester is put in a position . . . to be alone with a child[.] . . . imposition of this duty would [not] be unduly burdensome . . . [and it] furthers the policy of preventing future harm without affecting the confidentiality of penitential communications.”<sup>174</sup>

#### 4. *Doe v. United States Youth Soccer Ass’n, Inc.* (2017)

In *United States Youth Soccer Ass’n*, the plaintiff was sexually abused by her former soccer coach when she was only twelve years old.<sup>175</sup> “In 1994, US Youth acknowledged that pedophiles were drawn to its youth soccer program to gain access to children, and its program presented an unacceptable risk of harm to children unless appropriate preventative measures were taken.”<sup>176</sup> In recognition of this problem, US Youth developed a KidSafe program designed to educate on the risks and exclude persons who have been convicted of violence or crimes against another person.<sup>177</sup> US Youth possessed pamphlets and other educational tools which could be used to educate youth, parents, volunteers, and coaches about warning signs of abuse.<sup>178</sup> Despite this, no one involved in the affiliated league that the plaintiff participated in was educated or trained in the KidSafe program, no one was given any educational materials, and no discussions or meetings were held regarding the KidSafe program.<sup>179</sup> US Youth also required affiliate leagues to screen criminal conviction information from coaches, which could be accomplished through a criminal background check by an independent third party or a voluntary disclosure form.<sup>180</sup> The coach who sexually abused the plaintiff lied on his disclosure form, covering up a conviction for battery against his spouse.<sup>181</sup> No criminal background check for verification was ever conducted on the coach.<sup>182</sup>

The plaintiff sued US Youth alleging an action for negligence.<sup>183</sup> Again, the court analyzed both the special

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<sup>173</sup> *Id.* (finding it irrelevant that the abuse occurred at the member’s home and not out in the field).

<sup>174</sup> *Id.* at 44.

<sup>175</sup> *Doe v. U.S. Youth Soccer Ass’n, Inc.*, 214 Cal. Rptr. 3d 552, 559 (Ct. App. 2017).

<sup>176</sup> *Id.* at 560.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 561–562.

<sup>181</sup> *Id.* at 562.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 559.

relationship factors and the *Rowland* factors separately. In concluding that a special relationship existed between US Youth and the plaintiff, the court recognized that “a greater degree of care is owed to children because of their lack of capacity to appreciate risks and avoid danger.”<sup>184</sup> US Youth argued that parents were present at games and practices, but the court still found that—in this setting—US Youth was acting as a “quasi-parent” by assuming responsibility for the safety of the children in its program when their parents were not present.<sup>185</sup> Further, the court rejected the argument that the voluntary nature of participation precluded the finding of a special relationship.<sup>186</sup> Last, the court concluded that US Youth exercised physical custody and control over the plaintiff by establishing hiring standards for coaches, which in turn, determined who had custody and supervision of the children in US Youth’s programs.<sup>187</sup>

In examining the foreseeability of the conduct, the court took a “sliding-scale balancing formula” approach where “imposition of a high burden requires heightened foreseeability, but a minimal burden may be imposed upon a showing of a lesser degree of foreseeability.”<sup>188</sup> While US Youth was not specifically aware of the coach previously sexually abusing anyone or having a propensity to do so, US Youth was aware of incidents of sexual abuse by its coaches averaging between two and five instances per year.<sup>189</sup> More importantly, US Youth had developed its own program, thereby acknowledging and recognizing the risk of sexual abuse in its program.<sup>190</sup> Additionally, the burden on US Youth to conduct background checks was minimal as US Youth had already demonstrated an administrative ability to ensure compliance with performing background checks.<sup>191</sup> The only factor weighing in favor of US Youth was moral blame because, although their procedure of using voluntary disclosure forms proved ineffective, they made an attempt to identify potential

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<sup>184</sup> *Id.* at 564 (quoting *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 35 (Ct. App. 2000)).

<sup>185</sup> *See id.* at 564.

<sup>186</sup> *Id.* at 565 (reasoning that even though participation was voluntary, “parents entrusted their children to defendants with the expectation that they would be kept physically safe and protected from sexual predators while they participated in soccer activities”).

<sup>187</sup> *Id.* at 566.

<sup>188</sup> *Id.* (quoting *Delgado v. Trax Bar & Grill*, 113 P.3d 1159, 1172 (Cal. 2005)) (noting the requirement of heightened foreseeability can be met by showing “evidence of prior similar criminal incidents or ‘other indications of a reasonably foreseeable risk of violent criminal assaults’”).

<sup>189</sup> *Id.* at 567.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 569.

predators.<sup>192</sup> “[B]alancing the degree of foreseeability of harm to children in [US Youth’s] soccer programs against their minimal burden, [the court] conclude[d] that [US Youth] had a duty to require and conduct criminal background checks of [their] employees and volunteers who had contact with children in their programs.”<sup>193</sup>

5. *Regents of University of California v. Superior Court* (2018)

In *Regents*, a student enrolled at the University of California, Los Angeles (“UCLA”) began experiencing auditory hallucinations.<sup>194</sup> The student believed other students at UCLA were criticizing him and mistreating him.<sup>195</sup> Eventually the student met with a psychologist at an outpatient treatment center.<sup>196</sup> The student’s mental health continued to decline, and eventually the student stabbed a fellow classmate in the chest and neck with a knife.<sup>197</sup> The classmate sued the Regents of University of California (“Regents”) alleging they had a special relationship with her as an enrolled student and thus had a duty to take reasonable protective measures to ensure her safety, to warn her of reasonably foreseeable dangerous conduct on the campus, and to control the reasonably foreseeable acts of other students.<sup>198</sup>

The court first analyzed the ever-evolving college environment under the special relationship exception.<sup>199</sup> Importantly, the court recognized this as a situation not involving alcohol-related injuries, and thus a broader view of duties owed should be applied.<sup>200</sup> In analyzing the relationship, the court found students are very dependent on their college

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<sup>192</sup> *Id.* at 570.

<sup>193</sup> *Id.* at 571. However, the court refused to impose a duty to educate about the risks of sexual abuse because there are no uniform standards for effective education, and many parents would consider education about risks of sexual abuse the responsibility of the parent and not the sports organization. *Id.* at 572.

<sup>194</sup> *Regents of Univ. of Cal. v. Superior Ct. of L.A. Cnty.*, 413 P.3d 656, 659 (Cal. 2018).

<sup>195</sup> *See id.* at 660.

<sup>196</sup> *Id.* at 661.

<sup>197</sup> *Id.* at 662. The student who was stabbed, Katherine Rosen, was frequently referred to by the student as one of his harassers, suggesting the student had identified a foreseeable victim. *See id.* at 661–62.

<sup>198</sup> *Id.* at 662.

<sup>199</sup> *See id.* at 665.

<sup>200</sup> *Id.* at 666. *See* *Crow v. State*, 271 Cal. Rptr. 349, 359–60 (Ct. App. 1990) (finding no special relationship when a college student voluntarily participates and is injured at a dorm keg party); *Tanja H. v. Regents of Univ. of Cal.*, 278 Cal. Rptr. 918, 921 (Ct. App. 1991) (stressing the duty to prevent alcohol related crimes would require colleges to “impose onerous conditions on the freedom and privacy of resident students,” contrary to the modern view that adult students are generally responsible for their own welfare”).

community.<sup>201</sup> Colleges have the correlating control over the ability and means used to protect students on its campus.<sup>202</sup> Further, the special relationship is limited by a person's enrollment as a student at the school and by the person's involvement in a school sponsored activity.<sup>203</sup> The court concluded postsecondary schools do have a special relationship with students, but only "while they are engaged in activities that are part of the school's curriculum or closely related to its delivery of educational services."<sup>204</sup>

Finding a special relationship, the court then turned to analysis of the *Rowland* factors.<sup>205</sup> Looking at foreseeability generally, the court found even though they are rare, violent classroom attacks are foreseeable occurrences.<sup>206</sup> The court reasoned colleges were alert to the possibility of violent third party attacks on students after the focused national attention on the Virginia Tech shootings.<sup>207</sup> Significantly, the court stated that case-specific foreseeability questions, such as any prior acts of violence by the person who committed the harm, "do not . . . inform our threshold determination that a duty exists."<sup>208</sup> In addition, the fact that harm was caused by an intervening act does not necessarily attenuate the defendant's negligent conduct.<sup>209</sup> These factors relating to foreseeability all support the imposition of a duty.<sup>210</sup>

Focusing on the policy implications, while moral blame has been assigned in situations where the plaintiffs are "particularly powerless or unsophisticated compared to the defendants," college students are not so powerless and unsophisticated.<sup>211</sup> However, the greater access to information regarding potential threats possessed by the university creates a disparity in knowledge that favors the imposition of a duty.<sup>212</sup> Additionally, while imposition of a duty and

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<sup>201</sup> *Regents of Univ. of Cal. v. Superior Ct. of L.A. Cnty.*, 413 P.3d 656, 668 (Cal. 2018) (providing students with structure, guidance, and a safe learning environment).

<sup>202</sup> *Id.* (imposing rules and restriction, employing advisers, counselors, and campus police, and monitoring student discipline). Case law from other jurisdictions also recognizes that schools are in the best position to implement safety measures. *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 667.

<sup>205</sup> *See id.* at 669–70.

<sup>206</sup> *See id.* at 671. The court pointed out that in the wake of the Virginia Tech shooting, "[c]olleges across the country, including the public universities of California, created threat assessment protocols and multidisciplinary teams to identify and prevent campus violence." *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 672. "Although a criminal act is always shocking to some degree, it is not completely unpredictable if a defendant is aware of the risk." *Id.* *See also* *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 589 (Cal. 1997).

<sup>210</sup> *Regents of Univ. of Cal. v. Superior Ct. of L.A. Cnty.*, 413 P.3d 656, 672 (Cal. 2018).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

thus liability may discourage colleges from offering certain mental health and crisis services— and may incentivize colleges to simply expel anyone who poses a threat—these concerns are negated because colleges are restricted from arbitrary decisions on admission and expulsions by certain laws and are regulated by market forces.<sup>213</sup> Last, the court examined the burden recognizing a duty would impose on Regents and found Regents had already developed strategies for handling potential threats.<sup>214</sup> The court, however, took its analysis of the burden one step further. Recognizing that Regents, specifically UCLA, marketed itself as “one of the safest campuses in the country” and that the University of California system raised its registration fee, the court reasoned the imposition of a burden would not be unmanageable since the university had the available funds.<sup>215</sup> Recognizing that a college is in a special relationship with its students and that both the foreseeability factors and policy factors support the imposition of a duty, the court held “colleges have a duty to use reasonable care to protect their students from foreseeable violence during curricular activities.”<sup>216</sup>

#### B. *Brown v. USA Taekwondo* (2019)

In *Brown*, plaintiffs were minor athletes coached by Marc Gitelman (“Gitelman”) and were participating in USAT’s youth programs.<sup>217</sup> USAT is one of forty-nine NGB’s that were certified by USOC.<sup>218</sup> USAT requires athletes to be USAT members, requires athletes to train under USAT registered coaches, and requires members comply with USAT rules and policies.<sup>219</sup> The plaintiffs and Gitelman were members of USAT and would attend and participate at taekwondo competitions sanctioned and sponsored by USAT and USOC.<sup>220</sup> Since the 1980s, USOC has had actual knowledge, via direct reports and complaints, that numerous female athletes suffered sexual abuse at its facilities.<sup>221</sup> Additionally, a USOC employee was specifically aware of at least one occurrence: the rape of a young female

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<sup>213</sup> *See id.* at 673 (restricting a college’s decision to expel a student under the Americans with Disabilities Act and regulating services offered by colleges through competitive market forces favoring schools that adopt sophisticated violence prevention practices).

<sup>214</sup> *See id.* (countering the argument that implementation of a duty would be expensive and impractical).

<sup>215</sup> *See id.*

<sup>216</sup> *Id.* at 674.

<sup>217</sup> *Brown v. USA Taekwondo*, 253 Cal. Rptr. 3d 708, 715–17 (Ct. App. 2019).

<sup>218</sup> *Id.* at 717.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

taekwondo athlete at a USOC training center.<sup>222</sup> Moreover, by the early 2000s, the prevalence of allegations of sexual misconduct in institutions was a widely known risk.<sup>223</sup> Despite general recognition of this risk and reports by athletes of inappropriate sexual behavior, USAT and USOC did little to protect athletes from the abuse.<sup>224</sup>

Gitelman sexually abused and molested the plaintiffs while attending USOC and USAT sanctioned events.<sup>225</sup> He also sexually abused plaintiffs at USOC's Olympic training center.<sup>226</sup> Gitelman did not hide his relationships and inappropriate behavior with the plaintiffs, and the relationships were common knowledge throughout the taekwondo community.<sup>227</sup> Finally, in 2013, Gitelman's abuse allegations were brought before the USAT ethics committee, who recommended his termination.<sup>228</sup> Despite this recommendation, USAT did not fire Gitelman.<sup>229</sup> USOC's director of ethics and safe sport and USAT's chief executive officer and USAT's ethics committee chair, were aware of the hearing and recommended termination, but allowed Gitelman to continue as a member in good standing at USAT and continue to attend USAT and USOC sanctioned events.<sup>230</sup> Eventually, Gitelman was convicted of felonies for his sexual misconduct with the plaintiffs.<sup>231</sup> The plaintiffs sued USAT and USOC, alleging USAT and USOC owed a duty to protect plaintiffs from Gitelman's sexual abuse.<sup>232</sup> The trial court dismissed plaintiff's claims, and the plaintiff's appealed.<sup>233</sup>

Regarding the USAT, the appellate court found USAT had a special relationship with Gitelman.<sup>234</sup> USAT required Gitelman to be a USAT member and comply with USAT policies and procedures. Eventually, USAT terminated Gitelman for his noncompliance.<sup>235</sup> Therefore, USAT was "in the best position to protect against the risk of harm and meaningfully reduce the risk of harm that actually occurred."<sup>236</sup> The court distinguished the

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *See id.*

<sup>225</sup> *Id.* at 718.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 719.

<sup>228</sup> *Id.*

<sup>229</sup> *See id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 715.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 725.

<sup>235</sup> *Id.* (reasoning "USAT can, and did, enforce its policies and procedures by temporarily suspending Gitelman pending the ethics committee hearing").

<sup>236</sup> *Id.*

facts from *Barenborg v. Sigma Alpha Epsilon Fraternity*, where the fraternity could only implement control, after the fact.<sup>237</sup> The *Rowland* factors also supported the imposition of a duty against USAT.<sup>238</sup> Based on the widespread allegations across NGB's and within USAT, it was foreseeable a coach could sexually abuse a minor athlete attending a competition.<sup>239</sup> Actual knowledge of Gitelman's dangerous propensities was not required to determine a duty.<sup>240</sup> In addition, USAT's failure to take preventative steps to prevent sexual assault was closely connected to plaintiff's injuries.<sup>241</sup> This same failure to take preventative measures constituted moral blame on USAT.<sup>242</sup> Furthermore, the policy of preventing future harm weighed in favor of imposing a duty because society has a common goal of safeguarding children.<sup>243</sup> Last, the court concluded the burden from imposing a duty would not be substantial because USAT had already enacted a code of ethics, had disciplinary procedures, and could ban any sexually abusive person from coaching.<sup>244</sup>

Regarding USOC, the court found USOC was not in a special relationship with either the plaintiffs or Gitelman.<sup>245</sup> The court found USOC could regulate USAT's conduct, but not Gitelman's.<sup>246</sup> They also found USOC was not in the best position to protect plaintiffs from their coach's sexual abuse.<sup>247</sup> USOC's control over Gitelman was too remote, meaning USOC could not control Gitelman directly, nor was USOC able to prevent him from coaching at competitions.<sup>248</sup> Since the court found USOC had no special relationship with either Gitelman or the plaintiffs, the court did not analyze the *Rowland* factors.<sup>249</sup> The plaintiffs appealed to the Supreme Court of California based on the finding that USOC had no special relationship with the plaintiffs and therefore did not owe a duty of care.

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<sup>237</sup> *See id.* at 725–26; *Barenborg v. Sigma Phi Epsilon Fraternity*, 244 Cal. Rptr. 3d 680, 688 (Ct. App. 2019).

<sup>238</sup> *Brown*, 253 Cal. Rptr. 3d at 726.

<sup>239</sup> *Id.* at 728.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 729.

<sup>242</sup> *Id.* at 730.

<sup>243</sup> *Id.*

<sup>244</sup> *See id.* at 731.

<sup>245</sup> *See id.*

<sup>246</sup> *See id.* at 732.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 733. The courts in *Barenborg* and *University of Southern California* also refused to perform the analysis of the *Rowland* factors once they concluded the institution was not in a special relationship with the plaintiff or the third-party perpetrator. *See Barenborg v. Sigma Phi Epsilon Fraternity*, 244 Cal. Rptr. 3d 680, 687 (Ct. App. 2019); *Univ. of S. Cal. v. Superior Ct. of L.A. Cnty.*, 241 Cal. Rptr. 3d 616, 629 (Ct. App. 2018).



#### IV. CRITIQUE OF THE SUPREME COURT OF CALIFORNIA'S DECISION IN BROWN

In its decision, the Supreme Court of California determined whether to recognize a duty to protect minor children in institutions is a two-step inquiry.<sup>250</sup> First, the court must determine if a special relationship existed.<sup>251</sup> Second, and only if a special relationship existed, the court must analyze the policy factors established in *Rowland* to determine if the duty should be limited.<sup>252</sup>

In its discussion, the court articulates that “[t]he multifactor test set forth in *Rowland* was not designed as a freestanding means of establishing a duty, but instead as a means for deciding whether to limit a duty derived from other sources.”<sup>253</sup> Thus, the *Rowland* factors alone cannot create the duty. The court cites much precedent for its inability and unwillingness to use the *Rowland* factors as a stand alone test for creation of a new duty, while seemingly discounting others.<sup>254</sup> But the court still sees a role for the *Rowland* factors.<sup>255</sup> It acknowledged the overlap between the special relationship factors and the *Rowland* factors, but distinguished them based on how the factors operate.<sup>256</sup> The special relationship factors apply to the particular facts of that case, whereas the *Rowland* factors consider the policy of imposing a duty at a relatively broad level.<sup>257</sup>

But this interpretation is too simple. Both the particular facts of the case and the broad policy considerations should play a role in deciding to impose a duty. It is clear that sexual abuse within institutions that care for children is happening far too often with very few consequences on the institutions. Shouldn't this foreseeability (one of the *Rowland* factors) play a role in deciding to impose a duty, even when the level of dependence or control appear more attenuated? This highlights the importance of using both the special relationship and *Rowland* factors, especially when the outcome of this determination affects the willingness of an institution to protect the minor children in its care. When the court is more likely to impose a duty, the institutions will conform their behavior in anticipation of that

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<sup>250</sup> *Brown v. USA Taekwondo*, 11 Cal. 5th 204,209 (2021).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 217.

<sup>254</sup> *See id.* at 217–19 (minimizing the weight and discussions in *Nally* and *Adams*).

<sup>255</sup> *Id.* at 221.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

duty, taking greater steps to supervise, monitor, and protect the children within their care.

As is discussed more fully *infra*, the special relationship factors and *Rowland* factors should be analyzed together to fully contemplate both the specific factual circumstances and the broad level considerations of childhood sexual abuse within institutions, before deciding whether or not a duty should be imposed.

## V. WHEN THE COURT *SHOULD* FIND A DUTY AND THE POTENTIAL IMPACTS OF A SIMPLIFIED TEST FOR IMPOSITION OF A DUTY

### A. Proposed Test Based on California's Case Law

As can be seen in the cases previously described, the analysis for a special relationship's existence and the foreseeability and policy analyses of the *Rowland* factors are intertwined. Both analyses seek to answer the same question: when do the circumstances justify imposing a duty? While the tests themselves appear to analyze different factors,<sup>258</sup> I propose they do no such thing. In fact, the analyses in all of the cases described above rely on the same policy considerations and factual situations to reach a conclusion. More importantly, California courts have already recognized how the existence of a special relationship plays into the *Rowland* analysis. The existence of the special relationship itself does not create the duty, but tips the scales of the factor test in favor of imposing a duty.<sup>259</sup> In its most basic sense, the court stated that the existence of a special relationship is another factor to weigh in determining if a duty should exist.

As such, the appropriate test to determine when an institution owes a duty to protect a child from sexual abuse by a

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<sup>258</sup> The special relationship analysis looks at dependence, boundaries, and benefit on the party charged with a duty. *See Regents of Univ. of Cal. v. Superior Ct. of L.A. Cnty.*, 413 P.3d 656, 664 (Cal. 2018). The *Rowland* analysis considers "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." *See Rowland, Jr. v. Christian*, 443 P.2d 561, 564 (Cal. 1968).

<sup>259</sup> *See Hansra v. Superior Ct. of Yuba Cnty.*, 9 Cal. Rptr. 2d 216, 226 (Ct. App. 1992) (arguing that one factor weighing against the imposition of a duty is that the harm was caused by a third person, thus the connection between the plaintiff's injury and the defendant's conduct is attenuated—but the existence of a special relationship between the defendant and the plaintiff, or the defendant and the third party that caused the injury, counterbalances the weight of this factor).

third party should be a combination of the special relationship factors and *Rowland* factors. Based on the case law in California, I propose the courts should analyze only the factors of (1) the dependence of the child on the institution for protection, (2) the control the institution has over the means of protection, (3) and the burden on the institution and consequences to the community of imposing a duty, with the rest of the factors automatically weighing in favor of imposing a duty. This test encompasses the remaining factors originally detailed in the special relationship analysis and the *Rowland* factors analysis, and a court can automatically deem that the remaining factors weigh in favor of the imposition of a duty. In its most basic sense, this test would act as a presumption of a duty that can be rebutted by the institution. This proposed test simplifies the number of factors the court must consider in making a determination to impose a duty, while also ensuring the court considers all relevant details and facts.

#### 1. Factors Automatically Weighing in Favor of Imposing a Duty, Thereby Creating a Strong Presumption that a Duty Exists

Due to the policy considerations surrounding childhood sexual abuse, a court can automatically deem certain factors to weigh in favor of imposing a duty, because those factors will only ever point to one result.

First, and most important to the determination of the existence of a duty, is foreseeability.<sup>260</sup> For the analysis on whether or not to impose a duty, acts of sexual abuse perpetrated on a child within institutions who design programs for children can be deemed generally foreseeable. The Supreme Court of California has stated that case-specific foreseeability questions, such as any prior acts of violence by the person who committed the harm, “do not . . . inform our threshold determination that a duty exists.”<sup>261</sup> Thus a court need not consider actual knowledge on the part of an institution to impose a duty, but instead whether an act of sexual abuse was generally foreseeable.<sup>262</sup> The court in *Juarez* found foreseeability could be met if the abuse was “likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical

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<sup>260</sup> See *Regents*, 413 P.3d at 670–71 (quoting *Kesner v. Superior Ct. of Alameda Cnty.*, 384 P.3d 283, 291 (Cal. 2016)); *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976).

<sup>261</sup> *Regents*, 413 P.3d at 671.

<sup>262</sup> Actual knowledge, however, may be informative for the analysis of breach of a duty.

conduct.”<sup>263</sup> The risk of sexual abuse to a child in an institution’s care is foreseeable due to the number of cases brought to the institutions attention through both the media and their own inter-disciplinary processes. Any reasonably thoughtful person in society would take account of that risk in guiding practical conduct. Thus, the general foreseeability of incidents of sexual abuse in institutions weighs heavily in favor of imposing a duty.

Additionally, the certainty that the plaintiff suffered injury will always weigh in favor of the imposition of a duty. There is no rational argument that children do not suffer harm when they are sexually abused at a young age. Moreover, as previously discussed, the child’s harm is drastic and can result in damaging lifelong effects.<sup>264</sup>

Next, the policy of preventing future harm can also be deemed as favoring the imposition of a duty. The court has held protecting children from sexual abuse, in order to safeguard the physical and psychological well-being of its minor children, is a compelling state interest.<sup>265</sup> Moreover, the legislature through its recent enactments, has so clearly announced there is a huge importance and need to safeguard children against acts of sexual abuse.<sup>266</sup> “Public policy against the victimization of children is most evident in our criminal laws, which exact a heavy toll from those who endanger our most precious asset. So, too, it must be in our civil law.”<sup>267</sup> Last, society as a whole has indicated its awareness and desire to combat instances of sexual abuse and sexual violence, especially with regard to children.<sup>268</sup> Thus, this factor will always weigh in favor of imposing a duty.

Another factor that weighs in favor of imposing a duty is the availability and cost of insurance. While insurance costs may at first seem prohibitive, especially to poorly funded child-centered institutions, the availability of insurance for incidents of sexual abuse is more prevalent than ever, and institutions have many options when it comes to deciding what insurance to use.<sup>269</sup>

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<sup>263</sup> *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 30 (Ct. App. 2000).

<sup>264</sup> *See supra* notes 28–31 and accompanying text.

<sup>265</sup> *See Burt v. County of Orange*, 15 Cal. Rptr. 3d 373, 382 (Ct. App. 2004).

<sup>266</sup> *See supra* notes 32–37 and accompanying text.

<sup>267</sup> *Juarez*, 97 Cal. Rptr. 2d at 33 (citations omitted).

<sup>268</sup> *See, e.g., Statistics: Age, ME TOO*, <http://metoomvmt.org/learn-more/statistics/> [<http://perma.cc/Y5E5-BMWN>] (last visited Oct. 7, 2020) (detailing statistics of sexual abuse by age from a multitude of studies); *Safety Support for Parents*, RAINN, <http://www.rainn.org/safety-parents> [<http://perma.cc/RB7H-HHCF>] (last visited Oct. 7, 2020) (providing information to parents for discussing sexual abuse with children).

<sup>269</sup> *See Marshall Gilinsky, Standard Insurance Policy Coverage for Sexual Abuse, Harassment, and Assault Claims*, RISK MANAGEMENT (Sept. 12, 2019), <http://www.rmmagazine.com/2019/09/12/standard-insurance-policy-coverage-for-sexual-abuse-harassment-and-assault-claims/> [<http://perma.cc/9K63-G3YM>].

Moreover, compared to the costs and time spent defending claims of sexual abuse, the cost of insurance coverage for claims of sexual abuse is relatively low.<sup>270</sup> Due to the low cost of insurance compared to the alternative of litigation, and the availability and prevalence of insurance, the *Rowland* factor will always weigh in favor of imposing a duty in today's society.

Finally, the factor of moral blame will always weigh in favor of imposing a duty. Moral blame usually refers to "evidence that a defendant knew or reasonably should have known there was any danger or potential danger associated with that defendant's act or failure to act."<sup>271</sup> Moral blame has been assigned in situations where the plaintiffs are "particularly powerless or unsophisticated compared to the defendants."<sup>272</sup> In this context, the minors in childcare institutions will constantly be powerless or unsophisticated compared to the defendants. Moreover, the institution has more knowledge regarding the danger posed to the minor plaintiff.<sup>273</sup> Furthermore, even in cases in which the court found moral blame to be placed on the institution, a duty was still imposed on the institution.<sup>274</sup> Thus the existence of moral blame on the institution's behavior weigh in favor of imposing a duty, while the absence of moral blame does not weigh against imposing a duty.

## 2. Encompassed Factors in the Test Which Further Supports Use of a Simplified Test

In considering the *Rowland* factor of effects of the burden to the defendant and consequences to the community of imposing a duty, the boundaries of the special relationship are also necessarily considered. The burden on the institution will be too large if the scope of the duty cannot be limited in a meaningful way, and the scope of the duty is determined by the boundaries of the special relationship. These concepts are clearly interrelated and would require an analysis of the same underlying facts to make a determination. Additionally, the facts considered for whether the person charged with a duty benefits from the special

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<sup>270</sup> See *Abuse and Molestation Insurance Coverage*, WEST BEND, <http://cultureofsafety.thesilverlining.com/childcare/insurance/abuse-and-molestation-coverage/> [<http://perma.cc/2PSD-J5X4>] (last visited June 19, 2020) (acknowledging the annual cost for a one million dollar abuse policy costs between five to ten dollars per child).

<sup>271</sup> *Butcher v. Gay*, 34 Cal. Rptr. 2d 771, 780 (Ct. App. 1994).

<sup>272</sup> See *Regents of Univ. of Cal. v. Superior Ct. of L.A. Cnty.*, 413 P.3d 656, 672 (Cal. 2018) (quoting *Kesner v. Superior Ct.*, 384 P.3d 283, 295 (Cal. 2016)).

<sup>273</sup> See *id.*

<sup>274</sup> See *Doe v. U.S. Youth Soccer Ass'n, Inc.*, 214 Cal. Rptr. 3d 552, 570–71 (Ct. App. 2017); *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 33 (Ct. App. 2000).

relationship also plays into the *Rowland* burden analysis. If the person charged with a duty is receiving significant benefits as a result of the relationship, it may outweigh any burden placed on them by the imposition of that duty. Therefore, analysis of the burden to the defendant and consequences to the community will necessarily encompass consideration of the boundaries of the special relationship and any benefits to the party charged with the duty.

Further, the analysis of the dependence of the child on the institution and the control the institution has over the means of the protection necessarily encompasses the *Rowland* factor of closeness in the connection between the defendant's conduct and the injury suffered. An institution's failure to protect a child will be most clear when the child was dependent on the institution for protection, and the institution had a clear means of protection. Thus, there is a direct relationship between the dependence and control factors and the closeness of the connection factor. As the child's dependence on the institution for protection and the institution's control over the means of protection increases, the closeness of the connection between the defendant's conduct and the injury suffered also increases. Conversely, as dependence and control decrease, so does the closeness of connection. Accordingly, the consideration of dependence and control will encompass the *Rowland* factor closeness of connection between the defendant's conduct and injury suffered.

### 3. Remaining Factors that Must be Weighed to Determine if the Institution has Overcome the Presumption that a Duty Exists

After identifying the encompassed factors and those factors that will always weigh in favor of imposing a duty, the court is left to test and weigh the factors of (1) the dependence of the child on the institution for protection, (2) the control the institution has over the means of protection, (3) and the burden on the institution and consequences to the community of imposing a duty.

When analyzing the factor of the dependence of the child on the institution for protection, the court should consider the degree of reliance of the minor children on the institution for protection, the vulnerability and sophistication of the children in the program, the purpose of the institution, and whether the institution presents itself as safe for children involved in its programs. In *United States Youth Soccer Ass'n, Inc.*, this factor played a key role in the imposition of a duty on the institution. In that case, the court found that the defendant institution assumed

a “quasi-parent” responsibility for the safety of the players when the parents were not present.<sup>275</sup> As children greatly depend on their parents for safety, the children involved in the institution’s activities also greatly depend on the institution for safety. The court extended this concept even further in *Regents*, where it found college students are sufficiently dependent on their college communities to support an imposition of a duty.<sup>276</sup>

In the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime.<sup>277</sup>

To analyze the factor of control that an institution has over the means of protection, the court should consider the institution’s ability to control both directly and indirectly the child’s or third party’s behavior, the connection between the institutions control and the injury suffered, and the disparity in knowledge between the child and the institution regarding the risks involved. This factor of control was vital to the decision in *Nally* not to impose a duty. There, the court relied heavily on the fact that non-therapist counselors from the church had no control over the environment of the injured person.<sup>278</sup> Conversely, in *Conti*, the court found the institution exercised considerable control over the means of protection since the institution determined who remained eligible to perform field service, determined when, where, and with whom field service would be conducted, and determined the perpetrator’s access to children while performing field service.<sup>279</sup> While the control in *Conti* appeared to be direct control over the means of protection, the court has also recognized methods of indirect control. The court found that a disparity in knowledge can also weigh in favor of imposing a duty because the party with more knowledge of the potential danger is in a better position and has more control to prevent or warn of the danger.<sup>280</sup>

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<sup>275</sup> *United States Youth Soccer Ass’n, Inc.*, 214 Cal. Rptr. 3d at 565.

<sup>276</sup> *Regents*, 413 P.3d at 668 (finding dependence on “structure, guidance, and a safe learning environment”).

<sup>277</sup> *Id.* (quoting *Peterson v. S.F. Cmty. Coll. Dist.*, 685 P.2d 1193, 1201 (Cal. 1984).

<sup>278</sup> *Nally v. Grace Cmty. Church*, 763 P.2d 948, 956–57 (Cal. 1988).

<sup>279</sup> *Conti v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 186 Cal. Rptr. 3d 26, 42–43 (Ct. App. 2015).

<sup>280</sup> *Regents*, 413 P.3d at 672. The court also found, more generally, that the institution had “the power to influence [students’] values, their consciousness, their relationships, and their behaviors.” *Id.* at 668.

Lastly, to analyze the burden on the institution and consequences to the community of imposing a duty, the court should consider the connection between the institution's protective measures (or lack thereof) and the injury suffered by the child, the scope or boundaries of the duty being imposed, the existence of policies and practices already in place within the institution, and the benefits received by the institution from its involvement in the program. A recurring fact in cases where a duty was imposed is the existence of a program or educational materials designed to combat childhood sexual abuse within the organization. In *Juarez*, the court found the burden on the institution was minimal since it already had an effective system in place to ensure its program and educational materials were provided to the volunteers, parents, and children in its programs.<sup>281</sup> Similarly, in *United States Youth Soccer Ass'n, Inc.*, the burden on the institution was minimal because it developed its own child safety educational program and already demonstrated an administrative ability to ensure compliance with performing background checks.<sup>282</sup> Likewise, when an institution touts its educational materials and uses its safety to advertise and encourage minor children to join its programs, any burden imposed on the institution is minimal and can be justified.<sup>283</sup>

As was demonstrated in the discussion *supra*, the simplified three-factor test with the strong presumption of imposing a duty can account for and reconcile with prior decisions by the court. Many, if not all of the decisions, can be explained using these three factors.<sup>284</sup> Importantly, duties are not immutable facts of nature.<sup>285</sup> Any time the court imposes a duty, they are simply responding to a policy determination that a person should have a duty to warn or protect in that scenario. “[L]egal duties are . . . merely conclusory expressions that [sic], in cases of a particular type, liability should be imposed for damage done.”<sup>286</sup> Duty is a “shorthand statement of a conclusion . . . [and] an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to [legal] protection.”<sup>287</sup>

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281 See *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 34 (Ct. App. 2000).

282 See *Doe v. U.S. Youth Soccer Ass'n, Inc.*, 214 Cal. Rptr. 3d 552, 567 (Ct. App. 2017).

283 See *Juarez*, 97 Cal. Rptr. 2d at 32 (finding the institution was essentially admitting education was an effective safety tool in its possession); *Regents*, 413 P.3d at 673–74 (marketing itself as one of the safest campuses raised revenue which lowered the burden as these funds could be used to ensure a safe environment).

284 See *supra* notes 275–283 and accompanying text.

285 See *Adams v. City of Fremont*, 80 Cal. Rptr. 2d 196, 210 (Ct. App. 1998).

286 *Tarasoff v. Regents of Univ. of Cal.*, 561 P.2d 334, 342 (Cal. 1976).

287 *Dillon v. Legg*, 441 P.2d 912, 916 (Cal. 1968).



## B. Justification for the Proposed Test and Impact on the Future

This three-factor test presents a logical combination of policy considerations and factual considerations that the courts are already considering in their analyses. The test simplifies the court's analysis by removing discretion from factors that can only be rationally decided in one way. Additionally, this test is easier to apply than the prior separate analyses for the existence of a special relationship and *Rowland* factors. The cases demonstrate that the court will sometimes apply both tests,<sup>288</sup> or will stop analyzing if one test was not met,<sup>289</sup> and at other times, will decide one test was sufficient even when had the court applied both tests, its decision would not have changed.<sup>290</sup> Having a single test to use in these situations will lead to greater judicial efficiency. This test will also allow for clear and straight forward analysis, allowing for equal application, greater consistency, and predictability in the courts. Consistency and predictability in judgments, as well as uniformity, is essential to our judicial system founded on precedent.

Another justification for this test is that the imposition of a duty does not guarantee that an institution will be found liable for its actions or inactions. While this test at first appears to overtly expose institutions to liability, it is important to remember that this is just the first step in determining liability.<sup>291</sup> Even with the imposition of a duty, an institution must be found to have breached that duty, which is a question for the jury to examine and determine.<sup>292</sup> Thus, imposing a lower standard to find a duty that exists in childhood sexual abuse cases within institutions is justified. More importantly, the application of this test will help proactively shape the behavior of institutions. In recognizing the presumption that a duty will be imposed under this test, the institutions will do everything they can to act reasonably instead of doing everything they can to avoid liability. In this way, the test itself helps safeguard children in institutions before the abuse has even occurred.

Additionally, as organizations begin to implement better policies, practices, and procedures that demonstrate limited

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<sup>288</sup> See *Brown v. USA Taekwondo*, 253 Cal. Rptr. 3d 708 (Ct. App. 2019); *Regents*, 413 P.3d 656.

<sup>289</sup> See *Brown*, 253 Cal. Rptr. 3d 708; *Barenborg v. Sigma Alpha Epsilon Fraternity*, 244 Cal. Rptr. 3d 680 (Ct. App. 2019).

<sup>290</sup> See *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12 (Ct. App. 2000).

<sup>291</sup> See *Adams v. City of Fremont*, 80 Cal. Rptr. 2d 196, 208 (Ct. App. 1998) (“Examining whether a legal duty exists and whether a particular defendant was negligent are not coterminous exercises.”).

<sup>292</sup> See *Cabral v. Ralphs Grocery Co.*, 248 P.3d 1170, 1175 (Cal. 2011).

exposure to claims of sexual abuse, the result will be favorable insurance premiums. With clear standards and more predictable liability, the costs of insurance will likely decrease for these institutions. This also benefits the families and the children involved in these institutions. With less money spent on insurance and defending claims of sexual abuse, more funds will be available for institutions to spend on materials, items, and opportunities that further their ultimate mission and purpose. With more resources, care, and education for children, these funds will lead to better opportunities for children and further enrich their lives.

Finally, this test provides the message that we, as a society, desire our judicial system to effectively and consistently communicate to our children: that children are valued and deserve protection. By using tests that make it easier for institutions to escape liability, we essentially communicate to our children that we want them to participate in institutions meant to help them grow and develop—but accept the risk that they may be sexually abused. Even worse, we are setting an example for children that those who commit evil will not have to suffer the consequences of their actions. This proposed test will change that narrative. It will demonstrate to children that we, as a society, care for our children and recognize their importance in the future. It will demonstrate accountability and a willingness to hold people responsible for their actions. Changing this narrative is imperative for us to ensure that our children grow into their full potential and can, in time, take our places in society.

#### CONCLUSION

“The general feeling of the public that this problem does exist in a threatening way lead[s] to the conclusion that people charged with the care of children should guard against it[.]”<sup>293</sup> The court in *Brown* was tasked with answering an incredibly significant question. The Supreme Court of California’s decision will have lasting impacts on both survivors of sexual abuse and the institutions that have consistently failed the children they were supposed to be protecting. Recent legislative and judicial decisions demonstrate a recognition of the magnitude of the problem and a willingness to take steps to correct it. Based on the law of negligence and the cases interpreting it in California, to determine whether or not to impose a duty, the court *should* analyze only the factors of (1) the dependence of the child on the institution for protection, (2) the control the institution has over

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<sup>293</sup> *Juarez*, 97 Cal. Rptr. 2d at 31.

the means of protection, and (3) the burden on the institution and consequences to the community of imposing a duty, with the rest of the policy factors automatically weighing in favor of imposing a duty.

This test is easier for courts to apply, thereby improving judicial efficiency and more predictable results. Most importantly, the application of this test will shape the behavior of institutions. In recognizing the higher likelihood that a duty will be imposed under this test, the institutions will do everything they can to act reasonably instead of everything they can to avoid liability. In this way, the test itself helps safeguard children in institutions. Time and again, our lawmakers, and society as a whole, have stated the importance of safeguarding children from abuse. This test recognizes the importance of giving both meaning and real action to those words. The court's decision in *Brown* to stop the analysis when the special relationship factors are not met, without taking into account the *Rowland* policy considerations, is a major setback to the goal of protecting children within institutions. Instead of fully considering all the policy reasons why institutions should be responsible for the children they invite to participate and benefit from, the court refuses to impose a duty based on a limited and incomplete set of factors. As has happened too often, the court's words were rendered meaningless by its actions.