NOTE

Entering Uncharted Waters: The Abandonment of the Control Standard in *Pacheco v. United States*

Amy Baghramian[*]

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[*] Staff Editor, U.C. Davis Law Review. J.D. Candidate, U.C. Davis School of Law, 2002. B.A. Political Science and History, Duke University, 1997. I would like to thank Brandon McKelvey, Scott Nelson, Dave Gross, and Sue Painter-Thorne for their thoughtful edits and assistance. I would also like to thank my family for their love and understanding, and my fiance, Shane, for his constant support and willingness to endure mini-lessons on tort law.

INTRODUCTION

California has hundreds of miles of coastline that range in terrain from sheer, towering cliffs to wide, sandy beaches.[1] These shores are the destination of many out-of-state visitors, as well as a playground for residents.[2] Accompanying this natural beauty are a host of dangers responsible for many ocean injuries every year.[3] Unfortunately, beachgoers often overlook these lurking dangers until it is too late and tragedy strikes.[4]

Such was the case for the Pacheco family when they visited Pfeiffer Beach near Big Sur in April of 1997.[5] While on vacation from their home in Kansas, eleven-year-old Ivy Pacheco was playing in the surf when a riptide knocked her over and dragged her out to sea.[6] She had been playing at the water's edge with a beach bucket a parking attendant gave her when her family arrived at the beach.[7] Her mother, Mary, and grandmother, Judith, observed her struggle and attempted to save her.[8] Tragically, all three drowned.[9]

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[1] *See* THE WORLD ALMANAC AND BOOK OF FACTS 2001, 617 (2001). California has approximately 840 miles of coastline and 3,427 miles of shoreline. *Id.*

[2] Cal Ocean, *California Ocean and Environmental Access Network, Category: Tourism and Recreation, available at* http://ceres.ca.gov/ocean/theme/tourism_background.html (last modified Aug. 1, 2000). According to Cal Ocean, the Department of Tourism estimates that there were thirty-two million resident trips and seven million non-resident trips (excluding international visitors) to California in 1994. *Id.* Coastal cities are among the strongest attractions for out of state visitors. *Id.* The Department of Tourism also found that in 1991, almost seventy percent of Californians participated in beach activities for an average of twenty-one days out of the year. *Id.*

[3] *See* Lupash v. City of Seal Beach, 75 Cal. App. 4th 1428, 1433-34, 89 Cal. Rptr. 2d 920, 924 (1999) (surveying multitude of cases in which power of surf permanently injured beachgoers).

[4] *See, e.g.*, Pacheco v. United States, 220 F.3d 1126, 1127 (9th Cir. 2000) (describing drowning of three beachgoers caught in riptides just offshore); *Lupash*, 75 Cal. App. 4th at 1431, 89 Cal. Rptr. 2d at 922 (stating thirteen year old junior lifeguard became quadriplegic after tripping in hole while doing dolphin wave in surf); Swann v. Olivier, 22 Cal. App. 4th 1324, 1326-27, 28 Cal. Rptr. 2d 23, 24 (1994) (explaining that friend of guest at beach party sustained serious injuries in ocean surf).

[5] *See Pacheco*, 220 F.3d at 1127-28.

[6] *Id.* at 1128.

[7] *Id.* A beach attendant gave Ivy and her brother plastic beach buckets when her parents paid the fee to enter the beach facility. *Id.*

[8] *Id.* The opinion does not indicate the swimming capability of Ivy, her mother, or grandmother.

[9] *Id.* (emphasizing that members of Pacheco family, who were from Midwest, were not familiar with awesome force of riptides). The Court described how riptides can "suck the sand out from underfoot, cause you to lose your balance and then swiftly sweep you out to sea." *Id.*

The surviving members of the Pacheco family sued the U.S. government under the Federal Tort Claims Act ("FTCA").[10] They claimed that the United States breached a duty of care by failing to warn beachgoers of the riptides.[11] Using this theory, the Pachecos also sued the operator of the beach, the Parks Management Company (PMC), on a diversity basis.[12]

In *Pacheco*, the Ninth Circuit held that, under California law, a triable issue of fact existed as to whether the United States and PMC owed a duty of care to the decedents.[13] The court found that defendant PMC created the harm by giving children toy buckets to play with upon their arrival at the beach.[14] The court reasoned that, by offering the buckets, PMC was suggesting it was safe for children to swim in the water, and thus owed a duty to warn of the ocean's hazards.[15] The court also indicated that defendants may have had a duty because they exercised control over the portion of ocean Ivy was playing in.[16]

The *Pacheco* court extended the liability of owners and operators of land adjacent to the ocean in California to an unprecedented level.[17] The court accomplished this by ignoring established California case law which holds that landowners do not owe a duty to warn of hazardous ocean conditions.[18] Indeed, California case law has consistently held that

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[10] *Id.* at 1129. Under the FTCA, the United States is liable in the same manner and to the same degree as a private individual would be under similar circumstances. *See* 28 U.S.C. § 2674 (1994). Additionally, the extent of the federal government's duty of care is determined by reference to the law of the state where the injury occurred. *See* Hines v. United States, 60 F.3d 1442, 1448 (9th Cir. 1995); *see also* Cameron v. Janssen Bros. Nurseries, Ltd., 7 F.3d 821, 825 (9th Cir. 1993) (stating that state law determines extent of government's duty of care in FTCA cases).

[11] *Pacheco*, 220 F.3d at 1128.

[12] *Id.* at 1129 (explaining plaintiffs based their claims against non-governmental defendants on diversity of citizenship and pursuant to § 1332).

[13] *Id.* at 1132-3 (reversing decision of lower court and remanding case for further proceedings consistent with opinion of court).

[14] *Id.* at 1131-32.

[15] *Id.* at 1131 (stating that when looking at facts in common sense manner, conduct of inducing children to play in ocean has elements of civil entrapment).

[16] *Id.* at 1132.

[17] *See id.* at 1133-34 (Graber, J., dissenting) (stating majority impermissibly departs from established bright-line rule).

[18] *See, e.g.*, Princess Hotels Int'l, Inc. v. Superior Court, 33 Cal. App. 4th 645, 652, 39 Cal. Rptr. 2d 457, 461 (1995) (indicating hotels have no duty to warn guests of dangerous conditions on adjacent property over which they have no control such as ocean currents); *see also* Swann v. Olivier, 22 Cal. App. 4th 1324, 1326, 28 Cal. Rptr. 2d 23, 24 (1994) (establishing that when injury occurs in ocean adjacent to property owned or possessed by defendant no liability exists because landowners cannot control ocean). For a brief discussion of the *Swann* and *Princess Hotels* holdings, see HARRY D. MILLER & MARVIN

landowners are not liable for injuries occurring on premises adjacent to theirs, unless they possess or control those premises.[19] When the adjacent premise is the ocean, California courts have typically found no basis for landowner liability because the ocean is inherently uncontrollable.[20]

This Note criticizes the *Pacheco* court's departure from settled California law.[21] Part I surveys the legal standard for determining whether landowners owe a duty of care to individuals injured on premises adjacent to theirs. Part II explains the facts, holding, and rationale of the *Pacheco* decision. Part III demonstrates how the Ninth Circuit erred in its ruling in *Pacheco*. This section also uses *Pacheco* as a springboard to discuss a more just approach, based on the foreseeability of injury, which California should consider adopting.

I. BACKGROUND

Premises liability law examines whether landowners owe a duty of care to individuals on their property.[22] In California, premises liability has evolved from a strict, categorical scheme based on the status of the entrant to a general negligence standard.[23] Premises liability law also

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STARR, 9 CURRENT LAW OF CALIFORNIA REAL ESTATE § 29:32 (2d ed. 2000).

[19] *See, e.g.*, Isaacs v. Huntington Mem'l Hosp., 38 Cal. 3d 112, 134, 695 P.2d 653, 664 (1985) (acknowledging general rule that property owners are not liable for defective or dangerous conditions unless they own, possess or control property in question); *see also* Seaber v. Hotel Del Coronado, 1 Cal. App. 4th 481, 487, 2 Cal. Rptr. 2d 405, 408 (1991) (stating landowners are not liable for dangerous or defective conditions on property that they do not own, possess, or control). To control means to exercise restraint or direction over, dominate, regulate, or command. WEBSTER'S UNIVERSAL COLLEGE DICTIONARY 177 (1st ed. 1997).

[20] *See, e.g., Swann*, 22 Cal. App. 4th at 1326, 28 Cal. Rptr. 2d at 24 (stating owners of private beach do not own or control ocean, and are therefore not responsible for injuries taking place in it).

[21] *See Pacheco*, 220 F.3d at 1133-34 (Graber, J., dissenting) (criticizing majority's departure from bright-line approach established in prior California case law).

[22] *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 57 (5th ed. 1984) (explaining foundation and historical background of premises liability law); MICHAEL PAUL THOMAS ET AL., CALIFORNIA PREMISES LIABILITY: LAW AND PRACTICE § 1:1 (1996) (explaining that premises liability deals with liability for injuries and damage to persons arising from ownership, possession, or control of real property); BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW § 891 (9th ed. 1988) (explaining affirmative duties landowners owe to persons who come onto their land).

[23] *See, e.g.*, Peterson v. S.F. Cmty. Coll., 36 Cal. 3d 799, 808, 685 P.2d 1193, 1197-98 (1984) (following general negligence approach developed by court in *Rowland v. Christian*); Rowland v. Christian, 69 Cal. 2d 108, 113-14, 443 P.2d 561, 564-65 (1968) (holding status classifications are against public policy and adopting general negligence standard for field of premises liability); THOMAS ET AL., *supra* note 22, § 1:1 (describing shift in California

addresses what duty, if any, landowners owe to individuals injured on premises adjacent to theirs.[24] California law generally exempts landowners from liability for injuries occurring on adjacent premises, unless the landowner exercises control over those premises.[25] In contrast, other states, such as Hawaii, follow a standard based on the foreseeability of the injury.[26] Under such a standard, landowners are required to warn of hazards known to them, but not obvious to an average person.[27]

A. Premises Liability

Under early common law, whether landowners owed a duty to individuals on their premises depended upon which of three categories the individual fell into.[28] These categories were invitees, licensees, and trespassers.[29] An invitee was a "business visitor" who entered land with permission for a purpose related to the conducting of business.[30] A

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standard in *Rowland*); WITKIN, *supra* note 22, §§ 894-95 (describing traditional status classifications, how they were rejected, and that new rule was adopted in *Rowland*).

[24] *See, e.g.*, Alcaraz v. Vece, 14 Cal. 4th 1149, 1153, 929 P.2d 1239, 1241 (1997) (reviewing cases that discuss standard for liability for injuries occurring on premises adjacent to defendant's); MILLER & STARR, *supra* note 18, § 29:32 (describing liability standard for adjacent property owners). Adjacent premises are any premises that are next to the property of a landowner. *See generally* THOMAS ET AL., *supra* note 22, § 1:39 (discussing liability of landowners for injuries occurring on premises adjacent to their land).

[25] *See* MILLER & STARR, *supra* note 18, § 29:32; *see also* THOMAS ET AL., *supra* note 22, §§ 1:39, 2.29 (Supp. 2000) (explaining that generally, duties of landowners or possessors do not extend to persons on adjacent property, but that this did not automatically bar recovery).

[26] *See, e.g.*, Tarshis v. Lahaina Inv. Corp., 480 F.2d 1019, 1020 (9th Cir. 1973) (indicating duty to warn of dangerous conditions exists if conditions are not known or obvious to person of ordinary intelligence and are knowable to landowner); *see also* Rygg v. County of Maui, 98 F. Supp. 2d 1129, 1135 (D. Haw. 1999) (stating relevant question for determining liability was not whether defendant controlled beach, but whether defendant owed duty to warn of knowable dangers on beach).

[27] *Rygg*, 98 F. Supp. 2d at 1135.

[28] *See Rowland*, 69 Cal. 2d at 113-14, 443 P.2d at 564-65; *see also* KEETON ET AL., *supra* note 22, §§ 57-61 (providing definitions and examples for each of three different categories); MARSHALL S. SHAPO, BASIC PRINCIPLES OF TORT LAW § 20.01 (1999) (defining unique characteristics of each traditional category); WITKIN, *supra* note 22, § 894 (explaining traditional status classifications). Liability based on status is thought to be a product of "the high place which land held in early English and American thought." *Rowland*, 69 Cal. 2d at 113, 443 P.2d at 564-65. Commentators believe that the dominance of the landowning classes at the time the rules governing landowner liability were developed is especially responsible for the importance placed on an entrant's relationship to the landowner. *Id.*

[29] *See* KEETON ET AL., *supra* note 22, §§ 57-61 (reviewing development of these categories and explaining defining characteristics of each category).

[30] *Rowland*, 69 Cal. 2d at 113-14, 443 P.2d at 565; *see also* SHAPO, *supra* note 28, § 20.01(A) (explaining that invitees were most privileged visitors to land); WITKIN, *supra* note

licensee was someone who entered land "by virtue of the possessor's consent", such as a social guest.[31] Finally, a trespasser was a person who entered another's land without permission.[32]

At common law, landowners only owed invitees a duty of care.[33] Trespassers and licensees had to accept the premises as they were.[34] As such, landowners were only liable to a trespasser or licensee if the landowner engaged in "willful or wanton" misconduct.[35] Commentators often criticized this classification structure as being arbitrary and overly rigid.[36]

The California Supreme Court flatly rejected the common law, categorical approach in the case of *Rowland v. Christian*.[37] In *Rowland*, defendant Nancy Christian invited plaintiff Rowland to her apartment.[38] Rowland severely injured his hand when the faucet handle in Christian's

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22, § 918 (describing characteristic of invitee class as being that they had mutual business interests with landowner or occupant).

[31] *See Rowland*, 69 Cal. 2d. at 113, 443 P.2d at 565; *see also* SHAPO, *supra* note 28, § 20.01(B) (explaining that licensees were only allowed on land by virtue of possessor's consent); WITKIN, *supra* note 22, § 909 (stating that licensees came on land by consent or permission, but typically for own purpose and explaining that social guests fall into this category).

[32] *Rowland*, 69 Cal. 2d at 113, 443 P.2d at 565; *see also* SHAPO, *supra* note 28, § 20.01(C) (stating trespassers were least favored category of visitors for liability purposes); WITKIN, *supra* note 22, § 904 (explaining that trespassers came onto land without privilege or consent of property owner).

[33] *See Rowland*, 69 Cal. 2d at 114, 443 P.2d at 565.

[34] *Id.* (explaining general rule that landowners only owed duty of care to invitees, not to licensees or trespassers).

[35] *Id.* (stating general rule that trespassers and licensees were obliged to take premises as they found them insofar as alleged defective condition thereon may exist).

[36] *See, e.g.*, SHAPO, *supra* note 28, §§ 20.02, 20.03 (explaining debate over categorical distinctions and justifications offered for differing positions); *see also* WITKIN, *supra* note 22, § 894 (quoting California court opinions and various commentators who bemoaned difficulty of distinctions which had confused field of premises liability). Commentators especially felt that assessing liability was unnecessarily complicated by first having to determine the status of the entrant, a determination often very difficult to make. *Id.*

[37] *Rowland*, 69 Cal. 2d at 119-20, 443 P.2d at 568-69. For a brief description of the significance of the *Rowland* case, see WITKIN, supra note 22, § 895 (discussing impact decision had in field of premises liability). *See also* THOMAS ET AL., *supra* note 22, § 1:13 (explaining that *Rowland* eliminated standard that landowner's duty depended on person's status as invitee, licensee, or trespasser). It is important to note that the issue of status is not irrelevant despite its abrogation as the mode for determining liability. *Id.* The status of the entrant is no longer dispositive, but it may have bearing on the outcome of a particular case. *Id.* When determining whether landowners have acted reasonably in view of the probability of injury to others, courts examine a number of factors related to the plaintiff's status. *Id.*

[38] *Rowland*, 69 Cal. 2d at 111, 443 P.2d at 563 (stating Mr. Rowland was social guest or licensee of Ms. Christian's at time of incident causing his injury).

bathroom sink broke as he turned the water off.[39] Before Rowland's injury, Christian was aware of a crack in the faucet, and had informed her landlord of its need for repair.[40]

Rowland sued Christian, claiming that Christian knew of the dangerous condition and negligently failed to warn him of the potential hazard.[41] Christian moved for summary judgment, alleging that she did not owe a duty to Rowland because he was only a social guest.[42] The trial court granted Christian's motion for summary judgment based on the common law rule that landowners do not owe a duty of care to licensees.[43] Thereafter, Rowland appealed the decision to the California Supreme Court.[44]

The California Supreme Court overruled the trial court's decision and rejected the common law categorical approach, concluding the approach was contrary to contemporary social values.[45] The court reasoned that an individual's life was not "less worthy of protection" simply because that individual lacked permission to be on certain premises.[46] Moreover, compensation should depend on the circumstances giving rise to the injury rather than the status of the individual.[47]

Based on this reasoning, the court announced that ordinary principles of negligence, as codified in California Civil Code Section 1714, should apply.[48] Section 1714 states that individuals are liable for injuries to

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[39] *Id.* at 110-11, 443 P.2d at 563.

[40] *Id.* at 111, 443 P.2d at 563. The complaint alleged that on November 1, 1963, the defendant advised her landlord that the knob on her sink was cracked and needed repair. *Id.* at 110, 443 P.2d at 562. The defendant, however, failed to follow up on the repair request. *See id.* It was almost a month later, on November 30, 1963, when plaintiff was injured. *Id.*

[41] *Id.* at 110-11, 443 P.2d at 562-63.

[42] *Id.* at 110, 443 P.2d at 562-63.

[43] *See id.* (describing allegation defendant put forth in her motion for summary judgment and supporting affidavit). Christian alleged in her pleadings that Rowland was contributorily negligent because he had failed to observe the obviously defective condition of the faucet. *Id.* Christian specifically stated that if plaintiff had simply used his eyesight, then the accident, and his injuries, may not have happened. *Id.*

[44] *Id.* at 110, 443 P.2d at 562. An appellate court did not make a ruling in the *Rowland* case. *See id.*

[45] *Id.* at 119, 443 P.2d at 568 (announcing court will not perpetuate such rigid classifications and that proper test to apply in future should be in accordance with California Civil Code section 1714).

[46] *Id.* at 118, 443 P.2d at 568; *see also* WITKIN, *supra* note 22, § 79 (explaining that belief that person was not less worthy of compensation if that person entered land without permission contributed to change in rule).

[47] *Rowland*, 69 Cal. 2d at 118, 443 P.2d at 568.

[48] *Id.* at 119, 443 P.2d at 568. California Civil Code section 1714 codifies the standard for ordinary negligence. *Id.* The statute states that everyone is responsible, not only for the

others that result from their lack of due care.[49] Thus, *Rowland* expanded the application of Section 1714 to the realm of premises liability.[50]

Although *Rowland* eliminated the common law categories of invitee, licensee, and trespasser, California has retained certain features of common law landowner liability.[51] In particular, California retained the common law rule that landowners can owe a duty of care because of their possession or control of premises alone.[52] The California Supreme Court had adopted this standard over twenty years before *Rowland* in the case of *Johnston v. De la Guerra Properties.*[53]

In *Johnston*, plaintiff Laura Johnston broke her hip when she stepped off the retaining wall of a parking lot onto a walkway below.[54] The walkway led to a building containing the El Paseo restaurant where she had planned to dine.[55] The parking lot was on land adjacent to the building.[56] The restaurant encouraged patrons to park in the nearby lot, but neither the lot nor the walkway was well-lit.[57]

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results of their willful acts, but also for injuries occasioned to another by want of ordinary care in the management of their property. *See* CAL. CIV. CODE § 1714 (West 1998).

[49] CAL. CIV. CODE § 1714; *see also Rowland*, 69 Cal. 2d at 111-12, 443 P.2d at 563-64.

[50] *Rowland*, 69 Cal. 2d at 119, 443 P.2d at 568; *see also* WITKIN, *supra* note 22, § 894 (discussing new standard adopted by California Supreme Court in *Rowland*).

[51] *See, e.g.*, Johnston v. De La Guerra Prop., 28 Cal. 2d 394, 401, 170 P.2d 5, 9 (1946) (establishing that tenants can be liable for injuries occurring on property that they do not lease, but over which they have exercised limited control).

[52] *See id.* At common law, California courts recognized that possession of land, rather than mere ownership, determined the party responsible for maintaining the premises in a safe condition. *See, e.g.*, Low v. City of Sacramento, 7 Cal. App. 3d 826, 831-32, 87 Cal. Rptr. 173, 175-76 (1970) (stating that possession equals occupancy plus control and therefore, control dominates over title when determining liability of party).

[53] *Johnston*, 28 Cal. 2d at 401, 170 P.2d at 9.

[54] *Id.* at 398, 170 P.2d at 7 (indicating plaintiff said she went to step down with her right foot six or seven inches, but instead, she "stepped right down into space").

[55] *Id.* at 396-97, 170 P.2d at 6 (stating private walkway was located on northerly ten feet of defendant's property and ran full length of building).

[56] *Id.*

[57] *Id.* at 397, 170 P.2d at 6-7 (indicating defendants were aware that many patrons parked on adjacent property). Formal arrangements between the owner of the lot and the owner of the De La Guerra building had ended, but this did not cause the practice of parking there to cease. *Id.* The court also noted that there were no guardrails or similar devices which could have offered protection to a patron who fell along the walkway. *Id.* at 398, 170 P.2d at 7. Although plaintiff had entered the restaurant by the same route before, she was unaware of the height differential between the wall and walkway. *Id.* at 398, 170 P.2d at 7. When plaintiff had been to the restaurant on the previous occasion, she happened to walk across the parking lot and step onto the path at a point where there was only a six or seven inch differential. *Id.* The wall was approximately eighteen inches above the walkway at the point where plaintiff attempted to step down from the pathway on the night of her accident. *Id.* As a result, she fell when she stepped down from the wall onto the path below.

Ms. Johnston sued both the owner of the building and the restaurant for her injuries.[58] The trial court granted a judgment of nonsuit, concluding there was no basis for liability.[59] The California Supreme Court reversed, however, finding that the restaurant was liable even though it did not lease or own the passageway where the injury occurred.[60]

The Court reached this conclusion on the theory that the restaurant exercised limited control over the walkway leading to the restaurant.[61] Traditionally, California courts had declined to hold tenants liable for injuries occurring on common passageways beyond their leased premises.[62] This principle derived from the belief that tenants did not have any right to control common areas outside their property.[63] Instead, courts had concluded that the actual property owners were responsible because they alone controlled the premises and had a duty to keep them safe.[64] Based on this reasoning, the *Johnston* court determined that tenants could acquire a duty of reasonable care when they took action evincing control.[65]

The critical element in finding a basis for liability was the control that the restaurant exercised over the passageway.[66] The court found the restaurant had exercised control because it illuminated this common passageway to guide patrons to its doors.[67] Moreover, the restaurant had encouraged its customers to park in the nearby lot and to use the pathway for ingress and egress.[68] This exercise of control gave rise to a

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[58] *Id.* at 396, 170 P.2d at 6.

[59] *Id.*

[60] *Id.* at 401, 170 P.2d at 9 (determining that ownership was not sole basis for imposing liability).

[61] *Id.*

[62] *Id.* (explaining that ordinarily tenants are not liable for injuries to their invitees that occur outside leased premises and on common passageways that tenants do not control).

[63] *Id.* (citing considerable supporting authority from various jurisdictions to bolster this proposition). The California Supreme Court heard this case prior to *Rowland v. Christian*. As a result, in the actual opinion, the court discusses the duty to maintain the premises in a safe condition with respect to invitees only. *Id.* at 399, 170 P.2d at 8. As patrons of the restaurant, plaintiff and her companions were invitees of the establishment. *Id.* at 400, 120 P.2d at 8-9.

[64] *Id.* at 398-99, 170 P.2d at 7-8. Actual owners are the individuals who hold title to the premises. *See* BLACK'S LAW DICTIONARY 1130 (7th ed. 1999).

[65] *Johnston*, at 401, 170 P.2d at 9.

[66] *Id.*

[67] *Id.* The defendant leasee had erected a neon sign indicating the name of the restaurant. *Id.* The sign and a light installed when the building was constructed were operated by the same switch, which was in turn controlled by the defendant. *Id.*

[68] *Id.* Although the defendant had discontinued these practices, the past exercise of

duty to warn Ms. Johnston about the height discrepancy of the wall.[69]

B. Landowner Liability for Injuries Sustained on Premises Adjacent to the Ocean

Johnston stands for the well-settled principle that landowners are not liable for injuries on adjacent property, unless the landowner exercises control of that adjacent land.[70] California courts have applied this principle in many contexts, including those where the adjacent premises comprise the ocean.[71] However, California courts continue to grapple with what exactly constitutes control, particularly when dealing with ocean injuries.[72]

California's approach to adjacent landowner liability is not universal.[73] Other jurisdictions, such as Hawaii, have developed a different approach.[74] Hawaii has adopted a standard based more on the traditional negligence analysis of foreseeability of the injury.[75]

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control gave rise to a duty to warn of potential hazards. *See id.*

[69] *Id.* (stating that this limited right of control gave rise to duty to warn plaintiff of danger involved in using this approach at night).

[70] *See, e.g.*, Isaacs v. Huntington Mem'l Hosp., 38 Cal. 3d 112, 134, 695 P.2d 653, 664 (1985) (explaining general rule that property owners are not liable for dangerous conditions unless they own, possess, or control premises); Seaber v. Hotel Del Coronado, 1 Cal. App. 4th 481, 487, 2 Cal. Rptr. 2d 405, 408 (1991) (stating landowners are liable for dangerous or defective conditions on land in their ownership, possession, or control); Gray v. Am. W. Airlines, Inc., 209 Cal. App. 3d 76, 81, 256 Cal. Rptr. 877, 879 (1989) (stating summary judgment was proper where defendant unequivocally established lack of ownership, possession, or control of premises containing hazard).

[71] *See, e.g.*, Princess Hotels Int'l, Inc. v. Superior Court, 33 Cal. App. 4th 645, 651-52, 39 Cal. Rptr. 2d 457, 461 (1995) (finding hotel not liable to guests injured in ocean because hotel could not control ocean currents); Swann v. Olivier, 22 Cal. App. 4th 1324, 1333, 28 Cal. Rptr. 2d 23, 28 (1994) (finding landowners not liable to plaintiff injured in surf off their private beach because they could not control ocean).

[72] *See, e.g.*, Alcaraz v. Vece, 14 Cal. 4th 1149, 1170, 929 P.2d 1239, 1253 (1997) (finding maintenance of strip of grass plus construction of fence may suffice to constitute control). *But see* Contreras v. Anderson, 59 Cal. App. 4th 188, 197-200, 69 Cal. Rptr. 2d 69, 74-77 (finding gardening and general upkeep not enough to establish control, thus distinguishing facts from those in *Alcaraz*). The contrary results of these two cases are pointed out in THOMAS ET AL., *supra* note 22, § 1:56 (Supp. 2000).

[73] For a discussion of the approach of another jurisdiction, *see generally* George B. Apter & James Kreuger, *Ocean Injury Law in Hawaii*, HAW. B.J. 6 (July 1993) (describing standard Hawaiian courts apply in determining liability in ocean injury cases).

[74] *See, e.g.*, Rygg v. County of Maui, 98 F. Supp. 2d 1129, 1135-36 (D. Haw. 1999) (determining liability based on whether ocean hazard was obvious to hotel guest of reasonable intelligence, and whether it was known or knowable to hotel).

[75] *Id.* at 1138-39 (denying defendants' motion for summary judgment because question of fact remained whether condition of surf was known to defendant or knowable to guests).

1. The California Approach to Ocean Injuries

In *Swann v. Olivier*, a California appellate court determined whether a private, adjacent landowner was liable for an ocean injury.[76] In *Swann*, defendants Paul and Madeline Olivier allowed an acquaintance of theirs, Julie Beauchat, to throw a party at their private beach.[77] A local community association actually owned the beach, but permitted nearby residents, such as the Oliviers, to use the beach facilities.[78]

Beauchat did not invite Swann to her party; however, he came with a friend whom Beauchat had invited.[79] At the party, Swann went swimming in the ocean off the private beach and sustained serious injuries.[80] Swann sued the Oliviers and the community association, alleging they had failed to warn him of the numerous hazards of the surf, such as riptides.[81] Defendants moved for summary judgment, and the trial court granted their motion.[82] The California appellate court affirmed, finding that the defendants were not liable because they did not control the precise area where the injury occurred, namely the ocean.[83] Implicit in this finding was the court's definition of the ocean as

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[76] *See generally Swann*, 22 Cal App. 4th 1324, 28 Cal. Rptr. 2d 23 (determining liability of adjacent landowners for injuries occurring in ocean).

[77] *Id.* at 1326-27, 28 Cal. Rptr. 2d at 24.

[78] *Id.* at 1326, 28 Cal. Rptr. 2d at 24. The Oliviers lived in a community called Cyprus Pointe. *Id.* The actual owner of the beach where plaintiff suffered his injuries was the Cyprus Shore Community Association. *Id.* This Association allowed residents of certain nearby communities, including Cyprus Pointe, to use its private beach. *Id.*

[79] *Id.*

[80] *Id.* at 1327, 28 Cal. Rptr. at 24. The opinion does not indicate what ocean condition caused plaintiff's injury, only that he sustained injuries in water seaward of the mean high-tide line. *Id.* at 1327, 28 Cal. Rptr. 2d at 24.

[81] *Id.* at 1326, 28 Cal. Rptr. at 23-24. There were actually six large signs on four by four posts along the beach providing warnings to beachgoers. *Id.* at 1326 n.1, 28 Cal. Rptr. 2d at 24 n.1. The warnings provided that there was no lifeguard on duty and that swimmers should enter the water at their own risk because there were hazards in the ocean. *Id.* The signs stated these hazards included riptides, submerged rocks, and a drop-off in the water. *Id.* The plaintiff claimed not to have seen any of the signs. *Id.* This case came to the court on appeal of a grant of summary judgment. *Id.* As a result, for purposes of review, the court had to assume that there were no such signs. *Id.*

[82] *See id.* at 1326, 28 Cal. Rptr. 2d at 24.

[83] *Id.* The court, waxing poetic, actually said that "[t]he idea that anyone could control the 'sledge hammering seas' and 'inscrutable tides of God'" was ludicrous. *Id.* at 1333, 28 Cal. Rptr. 2d at 28. A separate line of cases, culminating in *Lupash v. City of Seal Beach*, 75 Cal. App. 4th 1428, 89 Cal. Rptr. 2d 920 (1999), reaches the same result but in the context of the liability of public entities for injuries which occur on adjacent premises. *Id.* at 1431, 89 Cal. Rptr. 2d at 922. These cases have effectively held that public entities are not responsible for dangerous, natural conditions and as a result do not owe a duty to warn beachgoers of the potential for harm. *Id.* at 1434, 89 Cal. Rptr. 2d at 924. This line of cases

the water seaward of the mean high-tide line.[84] This is the land on the ocean side of the average high-tide mark.[85]

The *Swann* court stated that, under California law, a duty of care only existed where a defendant had control of the adjacent premises.[86] However, the court indicated there were exceptions to this general rule.[87] The most important exception is that landowners can be liable if they impose or create a hazard on adjacent land that injures someone.[88] Where the adjacent premises is the ocean, such creation of a hazard can only occur if a landowner changes the ocean's character.[89] The court indicated that dredging the ocean floor or making a jetty would constitute such a change in the ocean's character that created a hazard.[90] The court found this exception inapplicable in *Swann* because defendants had not created the hazardous natural conditions in the water that injured the plaintiff.[91]

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is inapplicable in the context of a Federal Tort Claims Act case. The government has consented to be sued only to the extent a private citizen would be liable in the state where the tortious conduct occurred. *See* 28 U.S.C. § 2674 (1994). Although these cases do not have direct bearing on the *Pacheco* case, the public policy goals that motivate these decisions are relevant and merit consideration.

[84] *Swann*, 22 Cal. App. 4th at 1327, 28 Cal. Rptr. 2d at 24 (describing that plaintiff admitted he suffered his injury in public ocean, which forms border of defendants' property and which was seaward of mean high-tide line). The court defined the ocean pursuant to California Civil Code section 830 which states property bordering on tidewater extends only to the ordinary high-water mark. *Id.*

[85] *See* CAL. CIV. CODE § 830 (West 1982).

[86] *Swann*, 22 Cal. App. 4th at 1333, 28 Cal. Rptr. 2d at 28.

[87] *Id.* at 1330, 28 Cal. Rptr. 2d at 26.

[88] *See id.* at 1330, 28 Cal. Rptr. 2d at 26 (describing exception of imposing or creating some "palpable external effect" on area where plaintiff sustained injuries).

[89] *See id.* at 1334, 28 Cal. Rptr. 2d at 29 (discussing two California cases in which plaintiffs successfully raised possibility of recovery for ocean injuries because of creation of hazard). In *Buchanan v. City of Newport Beach*, 50 Cal. App. 3d 221, 123 Cal. Rptr. 338 (1975), a body surfer struck the ocean bottom as a result of a plunging wave. *Id.* at 225-26, 123 Cal. Rptr. at 340. The plunging of the waves was caused by the combination of the wave against a man-made jetty. *Id.* In *Gonzales v. City of San Diego*, 130 Cal. App. 3d 882, 182 Cal. Rptr. 73 (1982), a swimmer drowned after being caught in a riptide. *Id.* at 884-85, 182 Cal. Rptr. at 74-75. The court found the combination of the natural dangers and the negligent provision of lifeguard services created a dangerous condition that prevented application of the governmental immunity statute. *Id.* at 885-86, 182 Cal. Rptr. at 75-76.

[90] Dredging means to remove material (e.g., sand, silt, etc.) from the bottom of a river or other body of water. WEBSTER'S UNIVERSAL COLLEGE DICTIONARY 245 (1st ed. 1997). A jetty is a barrier projecting into the sea or other body of water to protect a harbor, deflect a current, etc. *Id.* at 440.

[91] *Swann*, 22 Cal. App. 4th at 1335, 28 Cal. Rptr. 2d at 30. The court noted a second, more limited exception to the rule that landowners are only liable for injuries on adjacent premises when they control those premises. *Id.* at 1330, 28 Cal. Rptr. 2d at 26. This exception occurred when a landowner obtained a "special commercial benefit" from being

Subsequent court decisions have followed the analysis employed in the *Swann* case.[92] For example, in *Princess Hotels International v. Superior Court*, Linda Pearson and her husband were vacationing at a hotel in Acapulco that fronted a beach.[93] On the second day of their trip, the Pearsons went for a swim after having a few drinks.[94] When walking to the water in their swimsuits, they passed through the lobby of the hotel.[95] The hotel staff did not warn them that the ocean in front of the hotel was known to have a dangerous undertow and riptides.[96] While swimming in the waters in front of the hotel, the strong currents overpowered the Pearsons and dragged them out to sea.[97] Consequently, Mr. Pearson drowned and Linda Pearson suffered severe injuries.[98]

Mrs. Pearson sued the hotel, alleging it failed to warn her and her husband about the dangerous conditions in the ocean adjacent to its premises.[99] The hotel moved for summary judgment, arguing that a hotel did not have a duty to warn guests about hazardous ocean conditions.[100] The trial court denied the motion because the hotel derived

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located adjacent to the premises. *See id.* at 1330-31, 28 Cal. Rptr. 2d at 26-28 (reviewing several cases that have examined this issue of commercial benefit). The court indicated that this exception only applied if the requisite control had already been established. *See id.* at 1333, 28 Cal. Rptr. 2d at 28. This exception also did not apply in *Swann* because defendants did not obtain a commercial benefit from their access or use of the private beach. *Id.* at 1330, 28 Cal. Rptr. 2d at 26.

[92] *See, e.g.*, Princess Hotels Int'l, Inc. v. Superior Court, 33 Cal. App. 4th 645, 650-51, 39 Cal. Rptr. 2d 457, 460 (1995) (explaining that exceptions established in *Swann* are applicable in instant case although they do not provide basis for liability on facts alleged).

[93] *Id.* at 647, 39 Cal. Rptr. 2d at 458 (stating that Pearsons stayed at Pierres Marques Hotel which shared 480 acre oceanfront parcel with defendant Acapulco Princess Hotel).

[94] *Id.* at 648, 39 Cal. Rptr. 2d at 458 (indicating that this swim was plaintiff and husband's second foray into ocean since their arrival).

[95] *Id.*

[96] *Id.* As in the *Swann* case, there were actually two warning signs along the pathway to the beach. *Id.* at 647-48, 39 Cal. Rptr. 2d at 458. The first sign had a red pennant that indicated that it was high tide. *Id.* at 647, 39 Cal. Rptr. 2d at 458. The second sign declared that the ocean could be dangerous and that the hotel was not responsible for injuries which occurred therein. *Id.* at 648, 39 Cal. Rptr. 2d at 458. Ms. Pearson claimed that she had not seen either sign. *Id.* Presumably because this was a review of a motion for summary judgment, the court accepted the allegations of Ms. Pearson, the non-moving party, as true. *See id.*

[97] *Id.*

[98] *Id.*

[99] *Id.* at 646, 39 Cal. Rptr. 2d at 457 (stating plaintiff brought action against Princess Hotels for personal injuries and for wrongful death of her husband). Ms. Pearson's complaint alleged that as the operator of hotel, the defendant had an affirmative duty to warn guests of the known hazards of swimming in the ocean. *Id.* at 648, 39 Cal. Rptr. 2d at 458-59.

[100] *Id.* at 648, 39 Cal. Rptr. 2d at 459.

a commercial benefit from its proximity to the ocean.[101]

The hotel then appealed to the California Court of Appeal, which reversed this decision.[102] The court found the critical issue for liability was whether the landowner controlled the adjacent premises.[103] As the *Swann* court recognized, an adjacent landowner could not control the ocean.[104] The court concluded that the Pearsons were responsible for their fate because they were careless when engaging in an activity "fraught with risk."[105]

Despite the clear holding of *Swann* and *Princess Hotels*, the California Supreme Court recently sought to clarify the standard for adjacent premises liability.[106] In *Alcaraz v. Vece*, the California Supreme Court redefined the legal test for determining whether landowners are liable for incidents occurring on adjacent premises.[107] Although in *Alcaraz* the adjacent premise was not the ocean, this decision impacted ocean injury cases.[108]

In *Alcaraz*, the plaintiff Gilardo Alcaraz rented property that defendant Vece owned.[109] On the lawn of this property was a water meter box with a broken cover.[110] While crossing the lawn, Alcaraz stepped into the box and sustained injuries.[111] Alcaraz sued Vece, his landlord, for these injuries.[112]

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[101] *Id.* (stating trial court denied motion based on determination that ruling in *Swann* was distinguishable from instant case because Hotel commercially benefited from adjacent beach).

[102] *Id.* at 647, 39 Cal. Rptr. 2d at 458 (explaining appellate court granted Hotel's request for writ of mandate compelling lower court to grant motion).

[103] *Id.* at 649, 39 Cal. Rptr. 2d at 459.

[104] *Id.* at 649-50, 39 Cal. Rptr. 2d at 459-60.

[105] *Id.* at 652, 39 Cal. Rptr. 2d at 461.

[106] *See* Alcaraz v. Vece, 14 Cal. 4th 1149, 929 P.2d 1239 (1997) (discussing approach courts should take when trying to determine if landowners are liable for injuries occurring on premises adjacent to their property).

[107] *Id.* at 1156, 929 P.2d at 1243-44 (explaining that defendants owed duty to warn if they created dangerous condition on land in their possession or control).

[108] *Id.* at 1152, 929 P.2d at 1240. The court rejected the commercial benefit exception to the general rule promulgated in *Swann*. *Id.* at 1165, 929 P.2d at 1249. The *Alcaraz* court indicated that the *Swann* court's determination that there was no liability because defendants could not control the ocean was otherwise correct. *Id.*

[109] *Id.* at 1152, 929 P.2d at 1240-41.

[110] *Id.* at 1153, 929 P.2d at 1241. It was unclear whether the cover of the water meter box was actually broken or missing. *Id.*

[111] *Id.* The opinion does not reveal the extent of plaintiff's injuries.

[112] *Id.*

Vece moved for summary judgment after discovering the water meter was on a strip of city-owned land adjacent to his property.[113] Vece argued he could not be liable for an injury resulting from a defective condition on land that he did not own.[114] The trial court agreed, and granted the motion.[115] The appellate court reversed, however, finding there was a triable issue of fact regarding whether Vece controlled the strip of land where the meter box was located.[116] Vece subsequently appealed to the California Supreme Court, maintaining that he did not owe a duty to individuals on property he did not own.[117]

The California Supreme Court affirmed the appellate court's holding.[118] The court concluded that if Vece in fact controlled the premises in question, he had a duty to protect individuals on those premises from danger.[119] This duty included an obligation to warn of hazards such as a broken water meter box.[120]

The court found evidence in the record that Vece controlled the strip of land.[121] First, as landlord, he had maintained the lawn at the front of his property, including the portion containing the water meter box.[122] Additionally, after Alcaraz's injury had occurred, Vece constructed a

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[113] *Id.* The water meter box was located in a ten foot wide strip of land that the city owned. *Id.* The strip extended from the street curb to defendant Vece's property line. *Id.* The strip encompassed the sidewalk as well as a two foot wide strip of lawn area adjacent to defendant's property line. *Id.*

[114] *Id.*

[115] *Id.* at 1152, 929 P.2d at 1241.

[116] *Id.* at 1152-53, 929 P.2d at 1241 (stating appellate court found trial court erred in granting summary judgment for defendant where triable issue of fact existed).

[117] *Id.* at 1153, 929 P.2d at 1241.

[118] *Id.* at 1152-53, 929 P.2d at 1241. The court found the issue of whether the trial court erred in granting summary judgment was resolved by the issue of whether defendant exercised control of the premises. *Id.* at 1153, 929 P.2d at 1241. The court went on to say that in resolving this issue it had no occasion to address any additional questions. *Id.* These questions included under what circumstances landowners owe a duty to warn if they do not own, possess, or control the property. *Id.*

[119] *Id.* In stating this, the court affirmed that the determinative issue was whether the landowner exercised control over the adjacent premises. *Id.* The court simply took the analysis one step further. *Id.* This discussion revealed that whether a defendant controlled the subject premises was a fact-specific inquiry, and that courts would determine liability on a case-by-case basis. THOMAS ET AL., *supra* note 22, § 1:24 (Feb. Supp. 2000) (discussing holding of *Alcaraz* case and its potential implications for practitioners).

[120] THOMAS ET AL., *supra* note 22, § 1:24 (Feb. Supp. 2000) (indicating that if presence of meter box made premises dangerous and those premises were under defendant's control, then defendant owed duty to protect persons on premises from hazards).

[121] *Id.* at 1170, 929 P.2d at 1253.

[122] *Id.* at 1167, 929 P.2d at 1250-51.

fence that closed off the entire lawn.[123] The court suggested that Vece's maintenance of the land was sufficient to establish the requisite control.[124] This exercise of control, in turn, could give rise to a duty to protect those on the premises from harm.[125] Whether sufficient control had in fact been established, however, remained a question for the jury on remand.[126]

After *Alcaraz*, whether landowners owe a duty to warn of hazardous conditions on adjacent premises requires a two step analysis.[127] The first inquiry is whether the landowner has demonstrably exercised control over the adjacent premises.[128] The second inquiry is whether the

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[123] *See id.* (finding that defendant's maintenance of lawn and construction of fence could support finding that defendant took possession of strip of land and exercised control over it). Although the court indicated the facts which could support a finding of liability, it refused to express any opinion on the evidence. *Id.* at 1170-71, 929 P.2d at 1253.

[124] *Id.* at 1167-68, 929 P.2d at 1250-51. Defendant argued that it was impermissible to use the subsequent remedial measure of constructing a fence when considering whether he exercised control of the property. *Id.* at 1167-68, 929 P.2d at 1151. The court agreed that the circumstances under which the fence was constructed lessened the probative value of the evidence. *Id.* The court stressed, however, that this did not make this measure irrelevant. *Id.* Rather, this action was circumstantial evidence of defendant's control of the strip of land. *Id.*

[125] *Id.* In determining that the dispositive issue was control, the California Supreme Court disapproved of the exception recognized in *Swann* that control plus a commercial benefit gave rise to a duty. *Id.* at 1164-65, 929 P.2d at 1249. The Court accepted the principle that landowners could not control the ocean, but said the inquiry should end there. *Id.* at 1165, 929 P.2d at 1249. The court expressed that inability to control the ocean, alone, negated a landowner's duty to warn. *Id.* (explaining that discussion of commercial benefit was unnecessary to *Swann* decision). The court concluded that the liability in *Swann* followed directly from the defendants' lack of control over the property that caused the injury. *Id.* The *Alcaraz* case appears to narrow the scope of a landowner's duty of care. *See, e.g.*, Thomas D. Jex, Alcaraz v. Vece, *If You Mow or Water Your Next-Door-Neighbor's Yard, You might Be Liable to Anyone Injured There*, 13 BYU J. PUB. L. 127, 144 (1998) (criticizing holding in *Alcaraz*, particularly court's abrogation of exceptions recognized in *Swann*). It is important to note, however, that the court seemed willing to accept a rather minimal demonstration of control, although exactly what is required remains somewhat unclear. *See Alcaraz*, 14 Cal. 4th at 1186, 929 P.2d at 1264 (Kennard, J., dissenting) (stating that majority was unduly expanding both scope and uncertainty of this area of negligence law); *see also* Jex, *supra*, (arguing *Alcaraz* decision greatly expands both scope and uncertainty of premises liability); Terri Schallenkamp, *A Triable Issue of Fact Exists Regarding Whether a Landowner Can Be Liable for Failure to Warn of a Potential Hazard When a Party is Injured on Property Adjacent To and Controlled By the Landowner, But Which the Landowner Does Not Possess:* Alcaraz v. Vece, 25 PEPP. L. REV. 338, 348-49 (1997) (discussing impact of *Alcaraz* as creating uncertainty for claims of this nature).

[126] *Alcaraz*, 14 Cal. 4th at 1170-71, 929 P.2d at 1253 (expressing that plaintiff raised triable issue of fact as to whether defendant exercised control over strip of land in question).

[127] *Id.* at 1156-57, 929 P.2d at 1243-44.

[128] *Id/.* at 1156, 929 P.2d at 1243.

landowner has maintained those premises in a reasonably safe condition.[129] Courts will only reach the second prong of this analysis if the landowner has exercised the requisite level of control.[130]

Under *Swann* and *Alcaraz*, the fact the ocean is untamed and landowners are incapable of controlling it will, therefore, end the analysis in most circumstances.[131] In other words, in cases involving ocean injuries, California courts will never reach the second prong.[132] Although *Alcaraz* modified *Swann* in part, *Alcaraz* affirmed *Swann's* underlying principle that the ocean is uncontrollable.[133] California's method is not the only approach for resolving whether landowners have a duty to individuals injured on adjacent premises.[134] Other states have employed a different approach to similar situations.[135]

2. The Hawaii Approach to Ocean Injuries

Hawaii, like California, has hundreds of miles of coastline that draws visitors from the world over.[136] Despite this similarity, Hawaiian courts have developed a distinct approach to deal with the consequences of injuries occurring in the waters off its shores.[137] In Hawaii, courts base

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[129] *Id.*; *see also* Schallenkamp, *supra* note 125, at 339-40 (explaining that in *Alcaraz*, court found duty existed to keep property under one's control in reasonably safe condition). Schallenkamp also points out that the duty covers situations in which the landowner controls the property, but not the cause of the potential harm. *Id.*

[130] Schallenkamp, *supra* note 125, at 339-40. The crucial element is control. THOMAS ET AL., *supra* note 22, § 1:24. There is no duty to prevent injury on adjacent premises in the absence of control by the defendant of those premises on which the injury occurs. *See, e.g.*, Seaber v. Hotel Del Coronado, 1 Cal. App. 4th 481, 487, 2 Cal. Rptr. 2d 405, 408 (1991) (stating landowners are liable for dangerous or defective conditions on land only in their ownership, possession, or control); Gray v. Am. W. Airlines, Inc., 209 Cal. App. 3d 76, 81, 256 Cal. Rptr. 877, 879 (1989) (stating summary judgment was proper where defendant unequivocally establishes lack of ownership, possession, or control of premises containing hazard).

[131] *See* Princess Hotels Int'l, Inc. v. Superior Court, 33 Cal. App. 4th 645, 649-50, 39 Cal. Rptr. 2d 457, 459-61 (1995); Swann v. Oliver, 22 Cal. App. 4th 1324, 1326, 28 Cal. Rptr. 2d 23, 24 (1994).

[132] *Alcaraz*, 14 Cal. 4th at 1156, 929 P.2d at 1243 (explaining that landowners only owe duty to keep premises in safe condition if they control those premises).

[133] *Id.* at 1165, 929 P.2d at 1249; *see also supra* note 125 and accompanying text.

[134] *See, e.g.*, Rygg v. County of Maui, 98 F. Supp. 2d 1129, 1135 (D. Haw. 1999) (indicating defendant's liability should be based on whether injury was foreseeable).

[135] *Id.*

[136] *See* Apter & Krueger, *supra* note 73 (explaining that popularity of recreational activities in waters off Hawaiian islands leads to numerous serious, or even fatal, injuries every year).

[137] *See id.* (articulating three factors that courts use to determine when ocean injury cases result in liability on part of private beach owner or adjacent landholder). The

liability for ocean injuries on whether the injury was foreseeable, which is more in keeping with traditional theories of negligence law.[138]

Hawaiian courts extend liability when adjacent landowners fail to warn beachgoers of dangerous conditions that are known to the landowner, but unknown to an average visitor.[139] This principle evolved in case law, but has been codified with respect to hotelkeepers in Hawaii Revised Statute 486K-5.5.[140] In the recent case of *Rygg v. County of Maui*, a district court discussed this recent development in Hawaiian law in light of the general principles that traditionally have governed this field.[141]

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distinction between the approaches can perhaps be explained, in part, by the fact that Hawaii owns the vast majority of the shoreline up to the high-water mark. *See id.* Additionally, the importance of the tourism industry to the Hawaiian economy has likely impacted the development of this area of the law. *Id.* Specific legislation has been passed to shield hotelkeepers from liability under certain circumstances. *See* HAW. REV. STAT. § 486K-5.5 (1994). While this is only speculation, it is hardly debatable that these have been contributing factors to the shaping of the law as it currently exists.

[138] *See* Apter & Kreuger, *supra* note 73; *see also* Kaczmarczyk v. City of Honolulu, 656 P.2d 89, 91 (1982) (finding City owed duty to warn visitors of known or knowable hazards in waters off beach because it invited public to use beach adjoining public park); *see also Rygg*, 98 F. Supp. 2d at 1132 (quoting HAW. REV. STAT. § 486K-5.5).

[139] *See Rygg*, 98 F. Supp. 2d at 1136; *see also* Tarshis v. Lahaina Inv. Corp., 480 F.2d 1019, 1020 (9th Cir. 1973) (finding that defendant owed duty to warn of hazardous ocean conditions that were known to defendant, but not known or obvious to person of average intelligence). The foreseeability of the injury is not the only factor from which liability can follow in Hawaii. *See* Apter & Kreuger, *supra* note 73. The court may also look at whether or not the injured person was invited onto the premises by the landowner. *See id.* Additionally, the court may examine whether the injury resulted from a natural condition, such as riptides, or from an unnatural one, such as debris. *See id.* However, both of these are related to whether an injury is foreseeable to a landowner.

[140] *See Rygg*, 98 F. Supp. 2d at 1132 (quoting language of Hawaii Revised Statute section 486K-5.5 and assessing its application to facts of case at issue).

[141] *See id.* This case was heard by the U.S. District Court in Hawaii on the defendant's motion for summary judgment. *Id.* The plaintiffs also filed suit against the County of Maui. *Id.* at 1131. This case proceeded to trial after the defendant's summary judgment motion was denied. *Id.* There are two additional opinions related to this case as a result. Rygg v. County of Maui, 122 F. Supp. 2d 1140, Civ. No. 98-00874, ACK, 2000 U.S. Dist. LEXIS 16559 (D. Haw. Sept. 15, 2000) [hereinafter *Rygg II*]; Rygg v. County of Maui, 122 F. Supp. 2d 1140, Civ. No. 98-00874 ACK, 2000 U.S. Dist. LEXIS 16560 (D. Haw. Aug. 3, 2000) [hereinafter *Rygg III*]. *Rygg II* constitutes the Decision and Findings of Fact and Conclusions of Law made by the judge after a bench trial. *Rygg II*, *supra*. This opinion sheds light on some of the specific events leading up to the injuries sustained by Philip Rygg. *See id.* It does not bear heavily on the issue of importance to this article, that is, the standard for assessing liability for injuries occurring in waters adjacent to a landowner's property. *See id. Rygg III* is an order denying the plaintiffs' Motion to Amend or Make Additional Findings of Fact and/or Conclusions of Law, and/or to Amend Judgment and/or for a New Trial. *See Rygg III*, *supra*. This order dissects some of the testimony from the bench trial, but again does not contribute to the issue examined by this article.

In 1998, Charlene and Philip Rygg, and their children, were vacationing in Hawaii and were guests at Aston Hotel in Maui.[142] Across the street from the hotel was the county-owned Kamaole II Beach Park.[143] While bodysurfing in the ocean off this beach, a wave broke over Mr. Rygg, causing him to strike his head on the ocean floor.[144] Mr. Rygg's injuries rendered him a quadriplegic and ultimately caused his death.[145]

Charlene Rygg and her children sued both Aston Hotels and the county of Maui for failing to warn Philip of the hazardous conditions at Kamaole Beach.[146] The defendant hotel moved for summary judgment, arguing that Hawaii Revised Statute section 486K-5.5 limited their liability to guests.[147] The federal district court for the district of Hawaii held that summary judgment was improper, however, because under common law, the hotel owed a duty to warn guests of known ocean hazards.[148]

The court found that section 486K-5.5 limits hotelkeepers' liability for certain beach and ocean activities.[149] Nevertheless, the court concluded

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[142] *See Rygg*, 98 F. Supp. 2d at 1131.

[143] *Id.*

[144] *See Rygg II*, *supra* note 141, at 1152-54 (describing events immediately preceding plaintiff's injury, actual causes of injury, as well as medical attention he received on scene in aftermath of injury.)

[145] *See Rygg*, 98 F. Supp. 2d at 1131 (discussing extent of plaintiff's husband's injury and his eventual death).

[146] *Id.* In *Rygg II*, the findings of fact include a detailed discussion of the signs at the beach notifying visitors of the shorebreak. *See Rygg II*, *supra* note 141, at 1143-47. The court examined this in an effort to determine if defendants provided sufficient warning of the dangerous conditions in the water. *Id.* The specific challenges were to the adequacy of the signs as well as their placement along the beach. *Id.* There were only five signs whereas there were nine modes of ingress/egress. *Id.* at 1144. The court also inquired whether the actual pictogram and language on the signs complied with state law requirements. *See id.* at 1143-47.

[147] *Rygg*, 98 F. Supp. 2d at 1132. The language of the statute specifically states that a hotelkeeper's liability is limited for certain beach activities. *Id.* The statute goes on to say that in a claim alleging injury on account of a hazardous condition in the ocean, a hotelkeeper shall be liable to its guest for damages resulting from the hotel guest's going into the ocean for a recreational purpose. *Id.* Liability will only extend when the loss results from the hotelkeeper's failure to warn against a hazardous condition that is known, or which should have been known to a reasonably prudent hotelkeeper. *Id.* The hazardous condition also must be unknown to the guest or unknowable to a reasonably prudent guest. *Id.* A hotelkeeper owes no duty to a person who is not a guest of the hotel. *Id.* Moreover, a hotelkeeper is not liable for conditions that were not created by the hotel, but which result in an injury or damage relating from beach or ocean activity. *Id.*

[148] *Rygg*, 98 F. Supp. 2d at 1139 (denying defendant's motion for summary judgment).

[149] *See* HAW. REV. STAT. § 486K-5.5 (1994). The statute describes the circumstances under which hotelkeepers are liable to guests injured in the ocean or on the beach adjacent to the hotel's premises. *Id.* The statute states that hotelkeepers "shall be liable" for failure

that the statute essentially codified the common law duties that hotels owed their patrons.[150] Under the common law standard, hotels owed a duty to warn if a hotel guest's injury was reasonably foreseeable.[151] More specifically, the guest's injury had to result from a known, dangerous ocean condition of which the guest was unaware.[152]

The court acknowledged that the legislative intent of the statute was to prevent a single tort claim from destroying a hotel's economic standing.[153] This, however, did not abrogate their responsibility to their guests.[154] The principle change the statute brought about was that hotels were no longer responsible for injuries to "casual passersby. . . who have no nexus [to] the hotel."[155]

The court disregarded the hotel's argument that its duty to warn extended only to premises directly adjacent to their property.[156] The hotel asserted that because the beach was across the street, it could not foresee that a guest would venture onto the beach and be exposed to ocean dangers.[157] The court disagreed with this position.[158] The court

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to warn only when the hazardous condition is not known to the guest and should have been to a prudent hotelkeeper. *Id.* The statute goes on to establish that hotelkeepers do not owe a duty to people who are not guests of the hotel, but who are injured as a result of a beach or ocean activity. *Id.* This statute was enacted in 1994, but according to the court, *Rygg* was the first case to make a decision involving the statute. *See Rygg*, 98 F. Supp. 2d at 1133 n.1.

[150] *Rygg*, 98 F. Supp. 2d at 1136 (recognizing that hotelkeepers are no longer liable for injuries incurred by casual passersby). The court stated that in all other respects, the general duty to warn guests under the statute was the same as under common law. *Id.*

[151] *Id.* (explaining that hotels are liable when they fail to warn against hazardous conditions which are known or knowable to prudent hotelkeepers, but which are not known to guests).

[152] *Id.* The court found the only limitation placed on liability by Hawaii Revised Statute § 486K-5.5 was that beachfront hotels were not liable for injuries incurred by passersby with no connection to the hotel. *See id.* The court declared that in all other respects, the general duty to warn guests incorporated in Hawaii Revised Statute § 486K-5.5 reflects the standard laid out in *Tarshis*. *Id.*

[153] *Id.*

[154] *Id.* (finding legislative history reinforces court's conclusion that statute did not immunize hotels from all liability arising from beach and ocean-related injuries).

[155] *Id.*

[156] *See id.* at 1137 (stating defendants' assertion that common law duty to warn contained geographical restriction that was not met on facts of case).

[157] *Id.* at 1131-32. The beach where plaintiff's husband sustained injuries was not directly in front of the defendant hotel. *Id.* at 1131. Rather, it was across the street. *Id.* The court recognized this and found that, for purposes of the statute, the defendant hotel did not front the beach. *Id.* at 1133. This finding did not preclude plaintiff's recovery however. *Id.* at 1134.

[158] The court concluded that geographical distance did not eliminate defendant's common law duties. *See id.* at 1137. Rather the court found that the defendant's duty to

held that the hotel's duty extended everywhere on or about its premises guests were reasonably likely to go.[159] The court further found that plaintiffs had offered evidence from which a jury might conclude that guests would venture onto this beach.[160]

The outcome in the *Rygg* case would have differed greatly had it been tried under California law.[161] Specifically, a California court would likely have granted defendants' motion for summary judgment.[162] A California court would have probably concluded the hotel did not owe a duty to warn because it did not control the ocean where Rygg was swimming when injured.[163] Despite the distinctions in Hawaii's and California's approaches, the *Pacheco* court reached a result consistent with Hawaii's approach to ocean injury cases.[164] That is, the Ninth Circuit ruled that dismissal was improper, and that the case should proceed to trial.[165]

II. *PACHECO V. UNITED STATES*

Although the Ninth Circuit's interpretation of California law is not binding on the courts of the state, its decision has significant implications.[166] Until the California Supreme Court specifically resolves the issue of liability for ocean injuries, *Pacheco* provides precedent for cases brought in federal court.[167] This creates a discrepancy in the

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warn was not "geographically circumscribed." *Id.*

[159] *Id.* at 1137.

[160] *Id.* at 1138. Plaintiffs specifically pointed to hotel's brochure which advertised its close proximity to "the golden sands of the Kamaole Beach Park II." *Id.* The court concluded it could not find as matter of law that it was unforeseeable that defendant's guests might suffer injuries at the beach in question. *Id.*

[161] *See, e.g.*, Princess Hotels Int'l, Inc. v. Superior Court, 33 Cal. App. 4th 645, 652, 39 Cal. Rptr. 2d 457, 461 (1995) (ordering trial court to set aside order denying motion for summary judgment); Swann v. Oliver, 22 Cal. App. 4th 1324, 1326, 28 Cal. Rptr. 2d 23, 24 (1994) (affirming lower court's grant of defendants' motion for summary judgment).

[162] *See, e.g., Princess Hotels*, 33 Cal. App. 4th at 652, 39 Cal. Rptr. 2d at 461; *Swann*, 22 Cal. App. 4th at 1326, 28 Cal. Rptr. 2d at 24.

[163] *See, e.g., Princess Hotels*, 33 Cal. App. 4th at 652, 39 Cal. Rptr. 2d at 461 (concluding defendant was not liable because ocean was not within human control); *Swann*, 22 Cal. App. 4th at 1326, 28 Cal. Rptr. 2d at 24 (finding defendants not liable because they did not control precise area where plaintiff suffered injuries).

[164] *See* Pacheco v. United States, 220 F.3d 1126, 1133 (9th Cir. 2000) (finding plaintiffs plead sufficient facts to survive dismissal and remanding case for further proceedings).

[165] *See id.*

[166] *Id.* at 1131; *see also* People v. Bradford, 15 Cal. 4th 1229, 1292, 939 P.2d 259, 291 (1997); 16 CAL. JUR. 3D Courts § 201 (Supp. 2001) (explaining decisions of federal courts are not binding on state courts).

[167] *See, e.g.*, Sun v. Governmental Auths. on Tawain, No. C 94-2769 SI, 2001 WL 114443, at *11 (N.D. Cal.) (relying on *Pacheco* for proposition that Ninth Circuit held there was duty

exposure to liability of defendant landowners in the federal and state court systems.

Furthermore, although California courts are not obligated to apply the reasoning adopted by the Ninth Circuit, federal interpretation of state law can be "highly persuasive."[168] The result reached by the Ninth Circuit in *Pacheco* suggests discomfort with California's existing approach to adjacent premises liability when the adjacent premises comprise the ocean.[169] Although the Ninth Circuit's alteration of California law was inappropriate, the *Pacheco* decision suggests that California needs to reassess its current standard for resolving ocean injury cases.

A. The Factual and Procedural Background of Pacheco

Pfeiffer Beach is a federally-owned recreational area open to the public in the Big Sur region of the Pacific Coast.[170] The Parks Management Company (PMC) maintains the beach under a United States government Special Use Permit.[171] This Special Use Permit places PMC in charge of daily operations and requires it to adopt rules governing use of the beach by visitors.[172]

Pfeiffer beach is open throughout the year and remains in its natural condition for the most part.[173] The only structures on the premises, besides visitor parking lots, are an information booth and a restroom.[174] There are a few bulletin boards containing the rules and regulations of the beach area along the path from the parking lot to the beach.[175] There is also an admission fee for access to the beach that patrons pay upon entry.[176]

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to warn of "particularly hazardous surf with strong riptides and undercurrents").

[168] *See Bradford*, 15 Cal. 4th at 1292, 939 P.2d at 291; 16 CAL. JUR. 3D *Courts* § 201 (Supp. 2001).

[169] *Pacheco*, 220 F. 3d at 1127.

[170] *Id.* The beach is part of the Los Padres National Forest and is therefore under the federal government's ownership and control. *Id.* at 1127-28.

[171] *Id.* (stating United States owns, manages, and controls beach, but that it granted Special Use Permit to Parks Management Company). The court described how under the Special Use Permit, the Parks Management Company was responsible for adopting, promulgating, and implementing rules governing visitors use of beach. *Id.* at 1132.

[172] *Id.*

[173] *Id.* at 1128.

[174] *Id.*

[175] *See id.* The rules on the bulletin board covered such diverse topics as water pollution, fireworks, gambling, liquor fines, propane use, and refuse disposal. *Id.* at 1132.

[176] *Id.* at 1128. The fee for an automobile was $5.00, for a tour bus $25.00, for bikes and

In April of 1997, the Pacheco family drove to Pfeiffer Beach while on vacation from their home in Kansas.[177] When the Pachecos arrived at the beach, they paid the required $5 fee.[178] At that time, the attendant gave the Pacheco children two toy buckets to play with on the beach.[179] One of these buckets had a perforated bottom, so that if brought into the surf, water could drain out.[180]

Eleven-year-old Ivy Pacheco took her bucket and went to play in the shallow waters at the edge of the dry sand.[181] She was playing in the water between the high- and low-water mark.[182] She was in this calmer portion of the ocean when a wave rolled onto the beach.[183] The force of the wave, and presumably a riptide current, knocked her off her feet and pulled her into the ocean.[184] Ivy's mother and grandmother saw Ivy being swept out to sea and attempted to rescue her.[185] Sadly, all three drowned.[186]

The surviving members of the Pacheco family, father David and son Trevor (collectively, the plaintiffs), sued the United States, PMC, and its general manager (collectively, the defendants).[187] The complaint alleged that defendants breached a duty of care to the decedents by failing to warn of the hazardous ocean conditions.[188] To support their argument, plaintiffs alleged there had been previous incidents at the beach where

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hikers $2.00, and an annual pass was available for $15.00. *Id.*

[177] *See id.* at 1127. The court explained that Pfeiffer Beach was touted as being "the first of Big Sur's truly great beaches." *Id.* Advertisements also emphasized that the beach's white sand drew thousands of visitors every year. *Id.*

[178] *Id.* at 1128.

[179] *Id.*

[180] *Id.* (describing bucket with perforated bottom).

[181] *See id.* at 1127-28 (describing how Ivy played with bucket in calm portion of water adjacent to dry sand beach).

[182] *See id.* at 1128. The water between the high and low water mark is the ocean between where the average high tide and average low tide reach. *See* BLACK'S LAW DICTIONARY 1491 (7th ed. 1999). Water covers this area of the beach depending on the tides. *Id.* The general public owns the water of the ocean below the mean high-water mark. *See* CAL. CIV. CODE § 830 (West 1982).

[183] *Pacheco*, 220 F.3d at 1128 (describing how Ivy played and waded, but did not swim, in calmer, shallow portion of water).

[184] *Id.*

[185] *Id.*

[186] *See id.* (stating that mother and grandmother were unable to overcome strength of riptide and drowned).

[187] *Id.* at 1129. The suit against the government was based on the Federal Tort Claims Act. *Id.* The court exercised jurisdiction over the non-governmental defendants on the basis of diversity of citizenship. *Id.*

[188] *See id.* at 1128-29 (stating that complaint alleged defendants failed to protect decedents from danger which was unknown to plaintiffs, but well-known to defendants).

visitors almost drowned because of rip currents.[189] The defendants moved to dismiss the complaint on the ground that plaintiffs failed to establish that the defendants had a duty to warn.[190] The district court agreed and dismissed the case, finding there was no duty to warn under California law because "adjacent landowners cannot control the ocean."[191]

B. The Result and Reasoning of Pacheco

The Ninth Circuit reversed the district court based on its interpretation of California case law.[192] Specifically, the Ninth Circuit distinguished the facts of its case from those in *Swann* to find grounds for liability.[193] The Ninth Circuit expanded both the *Swann* court's standard for determining what constitutes a hazard as well as *Swann's* definition of control.[194]

The *Pacheco* court first distinguished the facts of its case from those in *Swann* to determine defendants created the hazard that caused the harm.[195] The court emphasized that the *Swann* court found the defendants in that case had not created the hazard, which was the natural condition of the surf.[196] In contrast, the *Pacheco* defendants had engaged in conduct that exposed Ivy to harm.[197] Specifically, the defendants gave toy buckets, including one with a perforated bottom, to the Pacheco children upon their arrival at the beach, thereby causing the harm.[198] The Ninth Circuit reasoned that supplying these buckets was an implied representation that it was safe to swim in the water.[199] This suggestion of safety gave rise to a duty to protect beachgoers from an

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[189] *Id.* at 1128. The pleadings described an incident months before the drowning deaths of Ivy, her mother, and grandmother in which a man was rescued by helicopter. *Id.* The pleadings made reference to other incidents, but did not specify what occurred. *Id.*

[190] *See id.* at 1129 (stating defendants moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)).

[191] *Id.*

[192] *See id.* at 1132-33 (stating none of cited cases were exactly on point, thus court was forced to predict what California Supreme Court would do).

[193] *Id.* at 1131.

[194] *See id.* at 1131-32.

[195] *Id.* at 1131 (explaining that landowners created danger by instructing beachgoers on things they should not do, but omitting any instructions about children playing in water).

[196] *See id.* The actual hazard responsible for plaintiff's injuries was the natural ocean conditions. *See* Swann v. Olivier, 22 Cal. App. 4th 1324, 1327, 28 Cal Rptr. 2d 23, 24 (1994).

[197] *Pacheco*, 220 F.3d at 1131. The court specifically stated that defendants' conduct suggested it was safe for children to swim in the ocean. *Id.* The court also felt that the situation had elements similar to those of civil, but not criminal, entrapment. *Id.*

[198] *See id.* at 1131-32.

[199] *Id.*

unreasonable risk of harm.[200] Thus, the court found the hazard could be an event in the chain of causation rather than the actual injury-producing force.[201]

The Ninth Circuit also distinguished *Pacheco* from *Swann* when determining whether defendants had control of the adjacent ocean.[202] The *Swann* court had held that in the absence of control, a landowner was not liable for injuries occurring on adjacent premises.[203] *Swann* specifically stated that the ocean, beginning at the high-water mark, was uncontrollable, and therefore, landowners were not liable for injuries occurring therein.[204]

Despite the well-established holding in *Swann*, the *Pacheco* court carved out an exception to the rule that the ocean is uncontrollable.[205] The court stated that a jury could find the defendants controlled the portion of the beach Ivy was in when she was swept out to sea.[206] This portion of the beach was between the high- and low-water marks, so the ocean did not always cover it.[207] The court suggested defendants' visible display of control over the general beach area might lead a jury to find they also controlled this portion of the beach.[208]

Defendants had displayed their control over the general beach area by creating, posting, and enforcing rules related to the visitor's use of the beach.[209] The court determined that a jury could find defendants' control

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[200] *Id.* at 1132 n.2 (explaining that under *Alcaraz*, defendants had duty to avoid exposing persons to risks, such as refraining from suggesting it was safe for children to swim in ocean).

[201] *See id.* at 1131-32 (suggesting that handing out toys ultimately created danger to children like Ivy).

[202] *Id.* at 1132 (stating that, in addition to implied encouragement to enter water, facts alleged in complaint demonstrate defendants exercised control over what visitors did at beach).

[203] Swann v. Oliver, 22 Cal. App. 4th 1324, 1326, 28 Cal. Rptr. 2d 23, 24 (1994).

[204] *See id.* at 1326-27, 28 Cal. Rptr 2d at 24.

[205] *See Pacheco*, 220 F.3d at 1132-33. Although *Alcaraz* disapproved of an exception to the rule promulgated by *Swann*, its basic holding remains the legal standard. *See* Alcaraz v. Vece, 14 Cal. 4th 1149, 1165, 929 P.2d 1239, 1249 (1997). The California Supreme Court stated that the holding in *Swann* was "unremarkable." *Id.* at 1164, 929 P.2d at 1249. The court pointed out that the *Swann* opinion used language consistent with *Pacheco* holding. *Id.* This language stated that the owners of a private beach were not liable for injuries sustained by a plaintiff while in the ocean adjacent to their property because private beach owners did not own or control the ocean. *Id.*

[206] *Pacheco*, 220 F.3d at 1132-33 (finding that it was triable issue whether defendants controlled portion of water immediately adjacent to dry part of beach).

[207] *See id.* at 1132; *see also supra* note 182 and accompanying text (explaining high- and low-water marks).

[208] *See Pacheco*, 220 F.3d at 1132.

[209] *Id.* The rules were detailed and covered topics ranging from water pollution to

over the general beach area constituted control over the shallow waters between high and low tide.[210] Furthermore, nothing indicated the defendants' control concluded at the high-water mark.[211] Based on this, the court held the case presented triable issues of fact warranting a reversal of the lower court's dismissal.[212]

III. ANALYSIS

The Ninth Circuit's decision in the *Pacheco* case is flawed for two principle reasons.[213] First, the opinion is based on a misapplication of California case law.[214] Second, the court's decision is result-oriented, and consequently ignores California's judgment about the public policy goals that should motivate this area of law.[215] The *Pacheco* court's ruling suggests dissatisfaction with the current state of the law in California. Rather than substitute its judgment for that of the courts of California, however, the *Pacheco* court should have advocated the adoption of a foreseeability standard to determine the liability of adjacent landowners.[216] Under a foreseeability standard, plaintiffs recover when the ocean hazard is known or knowable to the landowner, but not to a visitor to the premises.[217]

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refuse disposal. *See supra* note 175.

[210] *See Pacheco*, 220 F.3d at 1132-33 (stating there was no way for public to get to water without paying access fee at beach entry and information booth which were under defendants' control).

[211] *Id.* at 1132.

[212] *Id.* at 1132-33 (indicating that opinion was not intended to decide issues of control or liability, but only to illustrate that trial court had more work to do).

[213] *Id.* at 1133-34 (Graber, J., dissenting) (identifying flaws in majority's opinion and explaining what result should be under current California law).

[214] *See id.* (Graber, J., dissenting) (arguing that *Swann* controls state-law question of whether defendants owed duty to warn plaintiff and his family of conditions in ocean at Pfeiffer Beach).

[215] *Id.* (Graber, J., dissenting) (acknowledging that gravity of case did not transform nature of court's duty).

[216] *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 19 FEDERAL PRACTICE & PROCEDURE § 4507 (2001); *see, e.g.*, Tarshis v. Lahaina Inv. Corp., 480 F.2d 1019, 1020 (9th Cir. 1973) (stating hotels have duty to warn of hazardous ocean conditions not obvious to persons of ordinary intelligence); *see also* Rygg v. County of Maui, 98 F. Supp. 2d 1129, 1137-38 (D. Haw. 1999) (finding that despite enactment of recent statute, hotelkeepers have common law duty to their guests to warn of known dangerous ocean conditions).

[217] *See Rygg*, 98 F. Supp. 2d at 1138.

A. Pacheco *Misapplied the Governing Case Law*

Under the FTCA and in diversity cases, a federal court must apply the substantive law of the state as it reasonably believes the state court system would.[218] This mandate includes following the decisions of appellate courts where the state's highest court has not made a definitive pronouncement on the matter at hand.[219] Despite this requirement, the *Pacheco* court incorrectly applied California case law when making its decision.[220] In California, the relevant inquiry when determining liability is whether the landowner controlled the adjacent premises or created the hazard that caused the harm.[221] The *Pacheco* court failed to properly apply these standards to the facts of its case, and as a result the court erred in its conclusion.[222]

Under *Swann* and *Alcaraz*, to be liable, a landowner must have engaged in conduct that manifested actual control of the adjacent premises.[223] As such, landowners' control of their own premises and the authority exhibited thereon is irrelevant.[224] In *Swann*, the court found that there was no duty to warn of the potential hazards of the ocean because it was uncontrollable.[225] The *Alcaraz* case confirmed that the

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[218] *See* WRIGHT & MILLER, *supra* note 216, § 4507.

[219] *Id.*

[220] *See Pacheco*, 220 F.3d at 1133-34 (Graber, J., dissenting) (commenting that majority impermissibly departed from established, bright-line rule approach).

[221] *See id.* at 1133 (Graber, J., dissenting); *see, e.g.*, Swann v. Oliver, 22 Cal. 4th 1324, 1326, 1330, 28 Cal. Rptr. 2d 23, 24, 28 (1994) (explaining standard for determining liability in cases where plaintiff suffers injuries on premises adjacent to defendant's).

[222] *Pacheco*, 220 F.3d at 1134 (Graber, J., dissenting).

[223] *See* Alcaraz v. Vece, 14 Cal. 4th 1149, 1157, 929 P.2d 1239, 1244 (1997) (emphasizing that inquiry to determine liability was based on whether defendants exercised control of specific strip of land where meter box was located); *Swann*, 22 Cal. App. 4th at 1333, 28 Cal. Rptr. 2d at 28 (stating that there was no duty to warn because there was no control by defendants of hazards in *precise* area where injury occurred); *see also* MILLER & STARR, *supra* note 18, § 29:32 (2d ed. Supp. 2000) (stating that liability was based on actual ownership, possession, or control, and not mere possibility of affecting condition of property owned or possessed by others).

[224] *See Pacheco*, 220 F.3d at 1134 (Graber, J., dissenting) (explaining that sole issue for determining liability should be where injury took place and whether defendants had any duty to warn of hazards there); *cf.* MILLER & STARR, *supra* note 18, § 29:32 (2d ed. Supp. 2000) (citing Isaacs v. Huntington Mem'l Hosp., 38 Cal. 3d 112, 695 P.2d 653 (1985), for proposition that landowners are not liable for defective or dangerous conditions on property they do not own, possess, or control).

[225] *See Pacheco*, 220 F.3d at 1134 (Graber, J., dissenting) (relying on *Swann* for rule that defendants do not owe duty to warn of hazards if place of injury was seaward of mean high-tide line). The *Swann* court cited California Civil Code Section 830 for standard that property bordering on tidewater only extends to the ordinary high-water mark. *See Swann*, 22 Cal. App. 4th at 1327, 28 Cal. Rptr. 2d at 24. The court explained that Swann was injured

significant inquiry was whether the defendant exercised control of the premises where the injury occurred.[226] *Alcaraz* simply took the control analysis one step further, concluding that when landowners do exercise control, they have a duty to keep the premises in a safe condition.[227]

Together, *Swann* and *Alcaraz* establish that adjacent premises liability depends on where the injury took place and whether that place is under the adjacent landowner's control.[228] They also show that whether the landowner has exercised sufficient control to give rise to a duty depends on the specific circumstances of the case.[229] Additionally, these cases establish that with ocean injuries, a duty will never exist because the ocean is inherently uncontrollable.[230]

The *Pacheco* court deviated from *Swann's* bright-line rule, asserting that the defendants' control of the general beach area extended their duty beyond the water's edge.[231] According to the court, the defendants controlled the general beach area because they implemented and enforced the beach area's rules, and charged admission for entry.[232] These endeavors, however, did not demonstrate dominion over the ocean.[233] Rather, the defendants' efforts only showed authority over the beach and surrounding man-made facilities — areas the defendants actually owned.[234]

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in the public surf below the mean high-tide line, and that this area was beyond defendants' control. *Id.* The court also explained that it was ludicrous to think that humans could control the waters of the ocean. *Id.* at 1333, 28 Cal. Rptr. 2d at 28 (quoting Ohio case for proposition that even 'fabled King Canute with all of his power could not control water by fiat').

[226] *See Alcaraz*, 14 Cal. 4th at 1156-57, 929 P.2d at 1243-44.

[227] *Id.* (holding that if hazard was on land in defendant's possession or control, defendants owed duty to take reasonable measures to protect persons on land from danger); *see also* THOMAS ET AL., *supra* note 22, § 1:56 (Supp. 2000) (explaining holding of *Alcaraz* case and its significance for area of premises liability law); WITKIN, supra note 22, § 902 (Supp. 2000) (discussing implications of *Alcaraz* case).

[228] *See Pacheco*, 220 F.3d at 1134 (Graber, J., dissenting) (stating key issue was where injury took place); *cf.* THOMAS ET AL., *supra* note 22, § 1:56 (stating landowners can not be subjected to liability for hazards on adjacent property absent control or creation of dangerous condition).

[229] *See* THOMAS ET AL., *supra* note 22, § 2.29 (indicating that whether landowner had exercised requisite control was question of fact based on specific details of case).

[230] *See Alcaraz*, 14 Cal. 4th at 1165, 929 P.2d at 1249; *Swann*, 22 Cal. App. 4th at 1333, 28 Cal. Rptr. 2d at 28.

[231] *Pacheco*, 220 F.3d at 1132-33 (stating that defendants intended to extend their control beyond beach area).

[232] *Id.* at 1132 (emphasizing that defendants controlled access to beach facilities).

[233] *Id.* at 1133 (Graber, J., dissenting) (explaining defendants were not liable because they did not control riptides that caused deaths of plaintiff's family members).

[234] *Id.* (Graber, J., dissenting).

Under *Swann*, authority over one's own premises should have no bearing on the question of whether a landowner controlled the adjacent waters.[235] Nevertheless, the *Pacheco* court held that without indication that defendants' control ended at the high-water mark, their duty of care should not end there either.[236] The court concluded this despite the fact that no preceding case had based its decision on whether defendants failed to indicate exactly where their control ended.[237] Only actual control of the adjacent premises where the injury occurred was of importance.[238]

The *Pacheco* court further departed from established precedent by carving out an exception to the general rule that the ocean is uncontrollable.[239] Specifically, the court argued there was a difference between the expansive ocean and the water that covers the beach between high and low tides.[240] The *Pacheco* court concluded that a jury could find the defendants controlled this limited portion of the water.[241] The court reasoned that because defendants controlled access to these waters, they controlled the portion of the surf between the high- and low-water mark as well.[242]

The court again ignored a principle established in *Swann* that the water below the mean high-tide line is uncontrollable.[243] The court instead concluded that it was a triable issue of fact whether defendants controlled the limited area the ocean covered depending on the tides.[244]

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[235] *See id.* at 1133-34 (Graber, J., dissenting) (quoting specific language in *Swann* that there was no duty if place of injury was below high water mark).

[236] *Id.* at 1132 (asserting that there was nothing to signal that defendants' control ended at high-water mark).

[237] *See, e.g., Alcaraz*, 14 Cal. 4th at 1156, 929 P.2d at 452 (seeking to determine if hazard was on land that was in defendant's possession or control); Swann v. Olivier, 28 Cal. App. 4th 1324, 1329, 28 Cal. Rptr. 2d 23, 25 (1994) (explaining that case should be resolved along "relatively straightforward" lines of site of injury and whether defendants owed duty to warn of hazards there).

[238] *See supra* notes 223-225 and accompanying text.

[239] *Pacheco*, 220 F. 3d at 1132-33.

[240] *Id.* (creating distinction between portion of water immediately adjacent to dry part of beach from ocean at large).

[241] *Id.*

[242] *Id.* at 1132 (emphasizing that terrain limited access to ocean at this point on coast, making ingress and egress possible only by way of designated beach area).

[243] *Id.* at 1134 (Graber, J., dissenting) (arguing that instant case was not distinguishable from *Swann* because there was no allegation that defendants altered physical character of ocean floor).

[244] *Compare id.* at 1133, *with* Swann v. Oliver, 22 Cal. App. 4th 1324, 1326-27, 28 Cal. Rptr. 2d 23, 24 (1994) (explaining that plaintiff was in surf seaward of mean high-tide line when injured and that landowners were not responsible for injuries that occurred there).

The court insisted this was "not the same as control of the ocean," although they failed to explain why.[245] Although Ivy was in shallow water when she was swept out to sea, she was still below the mean high-tide line.[246] Thus, per *Swann* and *Alcaraz*, the *Pacheco* court should have ended the inquiry as soon as they learned where Ivy was when the surf overwhelmed her.[247] However, the *Pacheco* court failed to abide by this rule.[248]

Under *Swann*, a second basis for adjacent premises liability exists when the landowner creates a hazard on the adjacent premises that causes injury to another.[249] In *Swann*, the court concluded the defendants had not created the hazard because they were not responsible for the natural characteristics of the ocean that caused plaintiff's injuries.[250] *Swann* recognized that in some instances, landowners adjacent to the ocean could create a hazard in the ocean.[251] However, *Swann* clearly explained that this only occurred when the landowner intentionally physically altered the natural features of the land.[252] This included actions that affected the tides and conditions of the water, such as creation of man-made jetties and dredging along the shore.[253]

The *Pacheco* court inappropriately expanded this principle to find that a remote event in the chain of causation could amount to creation of the hazard.[254] This event was the beach attendant's provision of toy buckets to Ivy and her brother upon their entry to the beach.[255] The court

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[245] *Pacheco*, 220 F.3d at 1133.

[246] *Id.* (Graber, J., dissenting) (stating Ivy was in shallow water at edge of beach when she was caught by surf, but that this still constitutes ocean).

[247] *Id.* (Graber, J., dissenting) (emphasizing, under *Swann*, sole inquiry was where injury took place, which here was in ocean).

[248] *Id.* (Graber, J., dissenting).

[249] *See Swann*, 22 Cal. App. 4th at 1330, 28 Cal. Rptr. 2d at 26-27 (stating exception to general rule of nonliability when defendant imposed or created physical hazard where injury occurred).

[250] *See id.* at 1333, 28 Cal. Rptr. 2d at 28 (finding no creation of hazards by defendants in precise area where injury occurred).

[251] *Id.* at 1334, 28 Cal. Rptr. 2d at 29 (providing examples of when defendants were found to have created hazard).

[252] *Id.* at 1334-35, 28 Cal. Rptr. 2d at 29-30 (discussing two California cases in which plaintiffs successfully raised possibility of recovery for injuries suffered in surf because of defendants' creation of hazard).

[253] *Id.* For a definition of these terms, see *supra* note 90 and accompanying text.

[254] Pacheco v. United States, 220 F.3d 1126, 1131 (9th Cir. 2000) (suggesting that Ivy would not have played in water if not for provision of buckets because giving them out to children implied safety of activity).

[255] *Id.* at 1131-32 (reasoning that giving beach buckets with perforated bottoms could be understood as encouragement to children to play in water).

stressed that providing the buckets indicated to parents that it was safe for children to play in the ocean.[256] The court interpreted this to be the creation of a hazard because Ivy would probably not have entered the water unless she had been given this assurance of safety.[257]

However, past opinions did not define the hazard based on the representations of defendants.[258] California case law says only that, for liability to extend, the defendant must be responsible for the physical hazard that caused the injury.[259] This was not the case in *Pacheco.*[260] The defendants did not create the deadly riptides that killed Ivy, her mother, and grandmother.[261] Nor did they alter the beach in a manner that gave rise to the riptide's existence.[262] As such, there is no foundation for liability under the exception for creation of the hazard.[263]

B. The Pacheco *Opinion Ignores the Guiding Public Policy*

By departing from established precedent, the *Pacheco* court rejected what California has deemed the guiding public policy in ocean injury cases: promoting coastal access.[264] The *Pacheco* decision ignored this

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[256] *Id.*

[257] *See id.* This can be inferred from the reasoning of the majority in its opinion. The *Swann* opinion stated that when assessing whether a duty exists, an invitation to swim was irrelevant. *See id.* at 1133 (Graber, J., dissenting) (expressing that under *Swann*, invitation to swim, without more, did not establish duty to warn of ocean hazards). The only relevant inquiry was whether the landowner created the actual hazard. *See Swann*, 22 Cal. App. 4th at 1329-30, 28 Cal. Rptr. 2d at 26 (enumerating instances when liability may extend for injuries on adjacent premises absent requisite control). As the above discussion demonstrates, the defendants in *Pacheco* did no such thing. *Pacheco*, 220 F.3d at 1133-34 (Graber, J., dissenting). The majority, however, overlooked this fact. *Id.*

[258] *See, e.g.*, Princess Hotels Int'l, Inc. v. Superior Court, 33 Cal. App. 4th 645, 652, 39 Cal. Rptr. 2d 457, 461 (finding defendant did not owe duty to warn despite fact that its staff represented it was safe to swim by not telling plaintiff that ocean could be dangerous).

[259] *See Pacheco*, 220 F.3d at 1134 (Graber, J., dissenting) (explaining that defendants should not be found liable because there was no allegation that they altered ocean floor or pattern of currents by dredging); *see also Swann*, 22 Cal. App. 4th at 1333, 28 Cal. Rptr. 2d at 28 (concluding that defendants could not be held liable for plaintiff's injuries because they did not create hazard in precise area where injury occurred).

[260] *See Pacheco*, 220 F.3d at 1134 (Graber, J., dissenting) (explaining that defendants should not be found liable because there was no allegation that they altered ocean floor or pattern of currents by dredging).

[261] *Id.* at 1133 (Graber, J., dissenting).

[262] *Id.* at 1134 (Graber., J., dissenting) (emphasizing that there was no allegation by plaintiffs that defendants altered ocean floor in manner that created riptides).

[263] *Id.*

[264] *See, e.g.*, CAL. CONST. art. XV, § 2 (establishing that no individual, partnership, or corporation fronting navigable water in state may exclude public right of way to water). Public use of shoreline recreational areas is a long-standing and important policy in the

policy by rendering the threshold for establishing control so low that it now punishes innocent conduct, such as permitting beachgoers onto one's property.[265] After *Pacheco*, a federal court can interpret such an innocent act as an implied representation of safety that gives rise to a duty of care.[266] As a result, landowners will be forced to discern the possible consequences of their every action.[267]

The standard established in *Pacheco* may have several deleterious effects. First, this new standard may discourage owners of private beachfront property from allowing others onto their land.[268] Landowners may fear that allowing beachgoers onto their property will be interpreted as a suggestion that it is safe to engage in certain activities.[269] This perception of safety will, in turn, create a duty of care that exposes landowners to liability.[270] Accordingly, landowners may refrain from opening their property to public use, which will ultimately restrict the public's access to the coast.[271] Landowners may also hesitate to make neighborly gestures, such as occurred in *Swann* when defendants allowed their friend to throw a party at their private beach.[272] The risk of

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state of California. *Id.*; *see also* Gion v. City of Santa Cruz, 2 Cal. 3d 29, 42, 465 P.2d 50, 58-59 (explaining that clearly enunciated public policy in California Constitution favors public access to shoreline areas); Lupash v. City of Seal Beach, 75 Cal. App. 4th 1428, 1434, 89 Cal. Rptr. 2d 920, 924 (stating public policy in California promotes coastal access). As mentioned, *Lupash* involved a case against a local public entity, and therefore is not relevant precedent for *Pacheco* under the FTCA. *Id.* Nevertheless, the policy goals of the state would not change from one context to another.

[265] *See, e.g.*, Jex, *supra* note 125, at 144 (concluding *Alcaraz* decision was bad public policy and that it made determining liability of adjacent landowners uncertain and unpredictable). Jex's article specifically critiques the *Alcaraz* decision. *See id.* Nevertheless, many of his criticisms are relevant to the conclusion of the Ninth Circuit in *Pacheco*.

[266] *See* Alcaraz v. Vece, 14 Cal. 4th 1149, 1186, 929 P.2d 1239, 1264 (1997) (Kennard, J., dissenting) (stating that person's innocent, neighborly acts on another's land can now make that person liable to anyone coming on that land).

[267] *Id.*

[268] This will, in turn, limit the public's access to the coast, which is of increasing concern as beaches become more of a scarce resource. *See, e.g.*, Daniel Summerlin, *Improving Public Access to Coastal Beaches: The Effect of Statutory Management and the Public Trust Doctrine*, 20 WM & MARY ENVTL. L. & POL'Y REV. 425, 425 (1996) (explaining that as desire to own coastal land increased, available access areas for public decreased).

[269] *See* Pacheco v. United States, 220 F.3d 1126, 1131 (9th Cir. 2000)(finding provision of toy buckets to children for beach play constituted implied representation that it was safe to swim).

[270] *Id.*

[271] *See* Summerlin, *supra* note 268, at 425 (describing that growing number of public beachgoers must use diminishing number of public access ways). Private beachfront property owners' reticence to open their beaches to the public will only exacerbate this problem. *Id.*

[272] *See Alcaraz*, 14 Cal. 4th at 1186, 929 P.2d at 1264 (Kennard, J., dissenting) (stating that

economic loss will not be worth the extension of a friendly favor.[273]

Second, the minimal standard for control established in *Pacheco* may cause landowners to neglect the upkeep of their oceanside property.[274] Landowners will neglect their premises because *Pacheco* reduces the incentive to maintain them by suggesting upkeep of one's own property can give rise to a duty of care.[275] Property holders will therefore be less likely to keep the shoreline clean because they will fear incurring liability for exercising control over the premises.[276] As such, owners of beachfront property may allow waste to accumulate at the water's edge and along the beach rather than tending to it.[277] Landowners will prefer this blight over the exposure to liability that maintenance will create.[278]

Critics have argued that the possibility of incurring liability will actually promote the responsibility of beachfront landowners.[279] The potential for liability, they argue, will serve as a deterrent, causing landowners to use greater care in the upkeep of their land.[280] This,

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under majority rule, defendant would have been better off had he not made neighborly gesture of maintaining adjacent property); *see also* Swann v. Oliver, 22 Cal. App. 4th 1324, 1326, 28 Cal. Rptr. 2d 23, 24 (1994) (detailing circumstances and events leading up to plaintiff's injury); Jex, *supra* note 125, at 144 (describing comparable impact of lowering standard for control in *Alcaraz* case on upkeep of property and community activity).

[273] *Cf. Alcaraz*, 14 Cal. 4th at 1186, 929 P.2d at 1264 (Kennard, J., dissenting) (criticizing majority's decision as making it better for landowners to neglect neighboring land than attend to it so they can avoid liability).

[274] *Cf.* Jex, *supra* note 125, at 144 (discussing implications of *Alcaraz* decision for landowners). The observations are not made with specific reference to landowners whose property abuts the ocean. Nevertheless, the arguments Jex makes are easily adopted into this circumstance.

[275] *Id.* (explaining how stricter standards eliminate incentive to maintain premises adjacent to one's own property).

[276] *See Alcaraz*, 14 Cal. 4th at 1186, 929 P.2d at 1264 (Kennard, J., dissenting) (explaining that landowner would have avoided legal responsibility leaving lawn in its natural state, even if was blight on neighborhood); *see also* Jex, *supra* note 125, at 144 (arguing that landowners now have incentive to let strips of grass next to their property that they do not own, grow wild). As the title of Jex's article suggests, mere maintenance of adjacent property may suffice to establish the control necessary to create a duty. *Id.* at 127. Jex explains that landowners will refrain from maintenance if they think they will be exposed to liability for doing so. *Id.* at 144.

[277] *Id.*

[278] *See Alcaraz*, 14 Cal. 4th at 1186, 929 P.2d at 1264 (Kennard, J., dissenting) (stating that it makes better sense from standpoint of landowner to neglect adjacent property than to engage in neighborly gesture of maintenance); *see also* Jex, *supra* note 125, at 144 (elaborating on why *Alcaraz* case is bad public policy).

[279] *See* KEETON ET AL., *supra* note 22, § 4 (indicating that prophylactic factor of preventing future harm is also quite important in field of torts).

[280] *Id.* The possibility of having to pay damages is a strong incentive for preventing the occurrence of such harm in the future. *Id.*

however, seems unlikely because, after *Pacheco*, it remains unclear what exactly the law requires of landowners to avoid adjacent premises liability.[281] Warnings alone may not suffice.[282] The *Alcaraz* court indicated that erecting barriers, in addition to providing warnings, may be necessary to protect those on the premises.[283] The opinion does not clarify if both are necessary, however.[284]

The uncertainty is even greater for owners of property adjacent to the ocean.[285] Landowners will be in the exceedingly difficult position of having to anticipate the capabilities of swimmers or the hazards of the ocean on a given day.[286] Beachfront landowners will seek to avoid the risk rather than try to decipher their obligations.[287] As a result, landowners will hesitate to take any action evincing control rather than expose themselves to liability.[288]

Critics have also argued that the policy of coastal access is secondary to the tort goal of compensating victims.[289] Commentators generally consider compensation for personal loss as the primary function of tort law.[290] While recouping damages is one of tort law's main purposes, it is

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[281] *See Alcaraz*, 14 Cal. 4th at 1186, 929 P.2d at 1264 (Kennard, J., dissenting) (arguing that majority's decision made subject of adjacent landowner liability uncertain); Jex, *supra* note 125, at 129 (asserting that *Alcaraz* leaves landowners with uncertainty as to what factors will determine adjacent premises liability); Schallenkamp, *supra* note 125, at 348-49 (finding that *Alcaraz* case creates uncertainty for adjacent landowners); *see also* THOMAS ET AL., *supra* note 22, § 1:56 (explaining that current law is in very confused state). The authors also indicate that it is unclear if landowners should "hear no evil and see no evil," and do nothing about a dangerous condition on adjacent property or if landowners should erect barriers and create evidence that makes control of the adjacent premises clear. *Id.* The authors, therefore, demonstrate the dilemma that faces landowners. *Id.*

[282] *See Alcaraz*, 14 Cal. 4th at 1155-57, 929 P.2d at 1243-44 (explaining that defendants could satisfy duty of care by posting warnings or erecting barricades, but not specifying if only either or both were required).

[283] *Id.*

[284] *Id.* (failing to articulate exactly what law requires landowners to do to make premises sufficiently safe).

[285] *See* Swann v. Oliver, 22 Cal. App. 4th 1324, 1333, 28 Cal. Rptr. 2d 23, 28 (1994) (emphasizing uncontrollable nature of ocean).

[286] *See generally* THOMAS ET AL., *supra* note 22, § 1:56 (explaining that what law requires of adjacent landowners is unclear and difficult to determine).

[287] *See, e.g.*, Lupash v. City of Seal Beach, 75 Cal. App. 4th 1428, 1431, 89 Cal. Rptr. 2d 920, 922 (1999) (explaining that public entities are not expected to hold back power of sea); *see also Swann*, 22 Cal. App. 4th at 1333, 28 Cal. Rptr. 2d at 28 (describing powerful character of ocean).

[288] *See, e.g.*, THOMAS ET AL., *supra* note 22, § 1:56 (stating that confused state of law may cause landowners to shy away from any exercise of control).

[289] *See* KEETON ET AL., *supra* note 22, § 4 (explaining that primary function of tort law is compensation for losses).

[290] *See id.* The authors indicate that it is more appropriate to say that determining what

not of such overriding importance that it should always control the outcome of a case.[291] Tort law ultimately seeks to balance the interests of the parties involved in the litigation.[292] However, the interests of the public at large are also a factor.[293] As described above, a low threshold for adjacent landowner liability for ocean injuries makes property owners wary of opening their beachfront property to the public.[294] The importance of the ability to recover for an individual loss does not outweigh the restriction of public access to the ocean that would occur as a result.[295]

The tragic nature of the *Pacheco* case makes this seem like a harsh result. However, the specific facts of a case should not alter the doctrine and policy the court applies.[296] Nevertheless, it does indicate that the manner in which cases of this nature are handled in California is ripe for reexamination.

C. California Should Adopt a Standard Based on the Foreseeability of Injury

Under Hawaii's foreseeability approach, whether an ocean hazard is known or knowable to the landowner is the pivotal inquiry when assessing liability.[297] In contrast to California's control standard, the

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compensation is required is the primary purpose of this field of law. *Id.* This suggests that there are circumstances when the factors weigh in favor of denying compensation.

[291] *Id.* (stressing that no one factor is of such supervening importance that it will control decision in every case).

[292] *Id.* § 3 (explaining that administration of tort law is process of weighing interests). The courts look to the plaintiffs' interests that merit protection and the defendants' right to uninhibited freedom. *Id.*

[293] *Id.* (stating that interest of public is often thrown in, which can swing scales in one direction).

[294] *See supra* notes 272-276 and accompanying text.

[295] *See generally* KEETON ET AL., *supra* note 22, § 3 (describing how tort law seeks to balance all interests at stake).

[296] Pacheco v. United States, 220 F.3d 1126, 1133 (9th Cir. 2000) (Graber, J., dissenting) (indicating that no judge comes lightly to tragic case such as this, but that gravity of case did not change nature of court's duty).

[297] *See, e.g.*, Apter & Krueger, *supra* note 73 (explaining one of major factors in determining liability for ocean injury cases in Hawaii is whether landholder knew or had reason to know of danger). Generally, foreseeability is thought to grow out of knowledge or the possibility of knowledge. *See* SHAPO, *supra* note 28, § 19.02(C). Courts hesitate to impose liability for injuries that are not foreseeable, meaning that they result from risks that are not predictable to the ordinary observer. *Id.* Under such reasoning, the ability to predict the likelihood of an event has an obvious relation to fairness. *Id.*; *see also* KEETON ET AL., *supra* note 22, § 31 (explaining that idea of risk in negligence context involves recognizable dangers that are based on some knowledge of existing fact and reasonable belief that harm may follow).

foreseeability approach requires landowners to warn of hazards that are known or knowable to them, but not obvious to beach visitors.[298] This standard permits recovery in a broader range of circumstances than does California's approach.[299] For instance, application of the foreseeability approach in *Pacheco* would make recovery more likely because defendants were allegedly aware of the dangerous currents at Pfeiffer Beach.[300]

The Hawaii approach requires landowners to warn beachgoers of ocean hazards if two conditions exist.[301] First, the hazard must be known or knowable to the landowner.[302] Second, the hazard can not be known or obvious to a person of average intelligence.[303] As such, landowners can only be liable if they fail to apprise the beachgoer of an unapparent danger.[304]

An approach based on foreseeability, like the approach used in *Rygg*, may better balance the competing policy goals relevant to this area of law.[305] Such a standard would provide for compensation to victims where a landowner knew the waters were dangerous, but did not acquaint beachgoers with this fact.[306] Moreover, it would not expose landowners to unreasonable liability, which might cause them to restrict

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[298] *See, e.g.*, Tarshis v. Lahaina Inv. Corp., 480 F.2d 1019, 1020 (9th Cir. 1973) (finding hotel has duty to warn of dangerous conditions in ocean not obvious to guests, but which ought to have been known to defendant); Rygg v. County of Maui, 98 F. Supp. 2d 1129, 1136-38 (D. Haw. 1999) (stating that Hawaii Revised Statute 486K-5.5 incorporated common law duty to warn guests of extremely dangerous ocean conditions).

[299] *Compare Tarshis*, 480 F.2d. at 1021 (concluding summary judgment not proper because determination of whether ocean dangers were known or obvious to person of ordinary intelligence was question of fact), *with* Princess Hotels Int'l, Inc. v. Superior Court, 33 Cal. App. 4th 645, 652, 39 Cal. Rptr. 2d 457, 461 (1995) (denying recovery because ocean is simply not within control of humankind), *and* Swann v. Olivier, 22 Cal. App. 4th 1324, 1326, 28 Cal. Rptr. 2d 23, 24 (1994) (affirming summary judgment against beachgoer badly injured in surf because owners of private beach did not own or control ocean).

[300] *Pacheco*, 220 F.3d at 1128 (describing prior incidents in which visitors to beach sustained injuries because of riptides).

[301] *See supra* notes 297-98 and accompanying text.

[302] *Id.*

[303] *Id.*

[304] *See, e.g.*, SHAPO, *supra* note 28, § 19.02(C) (explaining that in typical negligence cases courts hesitate to extend liability if harm was not foreseeable).

[305] *See supra* notes 291-292 and accompanying text; *see also* KEETON ET AL., *supra* note 22, §§ 3-4 (discussing various policy considerations that motivate law of torts).

[306] A risk is foreseeable if the danger is readily apparent, or should be apparent, to one in the actor's position. KEETON ET AL., *supra* note 22, § 31; *see also* SHAPO, *supra* note 28, § 19.02(C) (indicating even infrequent occurrence may be grounds for liability if actor had reason to know of possibility that serious injury could occur).

ocean access or bear the undue burden of insuring the ocean's safety.[307] Furthermore, unforeseeable injuries to weak swimmers or injuries resulting from unusual weather conditions would not warrant liability because the danger would be unknown.[308] This standard would not expect landowners to control the uncontrollable. It would only encourage awareness and the use of caution in dealing with others - the goal of tort law generally.[309]

If the foreseeability standard were applied in the *Pacheco* case, the surviving family members would have a greater likelihood of recovery.[310] Recovery would be more likely because the deaths of the three family members were not unprecedented.[311] In fact, only two months before the drownings, there was an emergency helicopter rescue of a man swept out to sea.[312] This suggests the dangers were known, or at the very least knowable, to the landowners.[313]

Under the current California standard, the defendant's knowledge is essentially inconsequential.[314] California courts have adjudicated cases involving ocean injuries under adjacent premises liability law.[315] The standard in adjacent premises liability cases precludes recovery for ocean injuries under most circumstances.[316] Landowner control of adjacent premises is relevant in a case like *Alcaraz* where the land in question was

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[307] Courts also consider whether it is fair to burden defendants, particularly when defendant belongs to an identifiable class. *See* KEETON ET AL., *supra* note 22, § 4. Courts frequently hesitate to "saddle an industry or class of persons with the entire burden because it may prove ruinously heavy." *Id.*

[308] *See id.*

[309] *See id.* §§ 3-4.

[310] *See, e.g.*, Rygg v. County of Maui, 98 F. Supp. 2d. 1129, 1139 (D. Haw. 1999) (denying motion for summary judgment and allowing case to proceed to trial).

[311] Pacheco v. United States, 220 F.3d 1126, 1128 (9th Cir. 2000).

[312] *Id.*

[313] *Id.* (stating plaintiffs alleged that defendants had actual knowledge of extreme hazards at beach for at least year prior to deaths of Ivy, her mother, and grandmother). The court stated that defendants should have foreseen the likelihood of a child being swept away to drown. *Id.*

[314] *See generally* THOMAS ET AL., *supra* note 22, § 1:39 (explaining that when determining adjacent premises liability only relevant inquiry is whether landowner controlled adjacent premises).

[315] *See, e.g.*, Princess Hotels Int'l, Inc. v. Superior Court, 33 Cal. App. 4th 645, 652, 39 Cal. Rptr. 2d 457, 461 (1995) (applying control standard used in adjacent landowner liability); Swann v. Oliver, 22 Cal. App. 4th 1324, 1326, 28 Cal. Rptr. 2d 23, 24 (1994) (applying control standard used in adjacent landowner liability and finding landowner not liable for injury in ocean).

[316] *See Pacheco*, 220 F.3d at 1133-34 (Graber, J., dissenting) (indicating that bright-line approach in *Swann* should yield result that landowners were not liable for ocean injuries).

in the middle of the defendant's tract of land.[317] It does not equally apply, however, when the adjacent premises is the ocean. The ocean is uncontrollable, but it often exhibits particular characteristics in different areas.[318] If landowners are aware of a particular characteristic that has a potential for causing harm, it makes sense for them to pass this information along.[319] This will allow others to avoid injury, but if injury occurs it will not preclude recovery to the degree the current California standard does.[320]

CONCLUSION

The Ninth Circuit's decision in *Pacheco* marks an unwarranted departure from California's standard for assessing the liability of adjacent landowners.[321] Despite the existence of a clear-cut rule, the *Pacheco* court manipulated prior case law to find defendants had exercised sufficient control to give rise to a duty.[322] The court also erroneously found that the landowners owed a duty of care to the Pachecos because they created the hazard by giving toy buckets to children to play with.[323] The motivation for wanting to provide the opportunity to victims to recover for their loss is understandable given the tragic dimensions of the case. Nevertheless, the court was wrong in failing to abide by the applicable California law and guiding public policy.[324]

There is an approach to ocean injuries that is mindful of the human consequences while also satisfying the relevant policy goals.[325] The foreseeability approach, employed by Hawaii, balances both of these

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[317] *See* Alcaraz v. Vece, 14 Cal. 4th 1149, 1152 929 P.2d 1239, 1240 (1997).

[318] *See, e.g., Swann*, 22 Cal. App. 4th at 1334, 28 Cal. Rptr. 2d at 29 (describing two cases where defendants were held to have created hazard because of unique condition of surf).

[319] *See generally* WITKIN, *supra* note 22, § 925 (stating liability particularly appropriate when landowner has actual knowledge of danger).

[320] *Id.*

[321] *See Pacheco*, 220 F.3d at 1133-34 (Graber, J., dissenting).

[322] *Id.* (Graber, J., dissenting) (disagreeing with exception created by court for area of beach that ocean sometimes covers, depending on tides).

[323] *Id.* at 1132-33 (explaining that providing buckets to children suggested it was safe to play in water and that this exposed them to harm).

[324] *Id.* at 1133-34 (Graber, J., dissenting) (explaining tragic nature of case did not alter court's duty to apply law correctly).

[325] *See, e.g.*, Rygg v. County of Maui, 98 F. Supp. 2d 1129, 1136-38 (D. Haw. 1999) (explaining whether hazard was known or knowable to landowner was significant inquiry).

important objectives.[326] The *Pacheco* court's sudden shift in the rule of law was inappropriate. Accordingly, the Ninth Circuit should have affirmed the motion to dismiss. At the same time, a message should have been sent to the legislature that California's approach to ocean injury cases needs to be revised.

[326] *Id.*

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