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A Foil for Fazzolari: Recent Negligence Case Law Weakens Duty Limitations

Introduction ................................................................................................................. 1
I. The Rise and Apparent Fall of the Fazzolari Trilogy ......................... 4
   A. Bagley v. Mt. Bachelor, Inc.: Limitations Based on Contract .................. 9
   B. Towe v. Sacagawea, Inc.: Limitations Based on Status or Relationship .... 12
   C. Rhodes v. U.S. West Coast Taekwondo Association, Inc.: Limitations Based on Transactions .................. 14
II. Oregon Appellate Courts’ Hostility Toward Constrained Duties ................. 9
   A. Bagley v. Mt. Bachelor, Inc.: Limitations Based on Contract .................. 9
   B. Towe v. Sacagawea, Inc.: Limitations Based on Status or Relationship .... 12
   C. Rhodes v. U.S. West Coast Taekwondo Association, Inc.: Limitations Based on Transactions .................. 14
Conclusion .................................................................................................................. 16

INTRODUCTION

Twenty-two years ago, Oregon Law Review published a colloquy by retired Oregon Supreme Court Chief Justice Kenneth J. O’Connell, titled A Postmortem Footnote upon the Demise of the Fazzolari Error.1 He was celebrating the fall of the so-called Fazzolari trilogy2—Fazzolari v. Portland School District No. 1J,3

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1 72 OR. L. REV. 933 (1993).
2 Id. Fazzolari trilogy is the most common name for this group of cases. E.g., Robert E. Lawrence-Berry, Note, The Proper Judicial Role in Negligence Actions: The Fazzolari Trilogy Redefines “Negligence,” 24 WILLAMETTE L. REV. 443, 443 (1988). But that term calls to mind three works in a series, even though one of the definitions of trilogy is “a group of three related things, topics, or sayings.” Trilogy, MERRIAM-WEBSTER UNABRIDGED ONLINE DICTIONARY, http://unabridged.merriam-webster.com/unabridged
Kimbler v. Stillwell, and Donaca v. Curry County—three cases decided on the same day that completed the ouster of duty from Oregon’s common-law elements of negligence while exalting foreseeability.

Triad (last visited Jan. 29, 2016). Triad does not evoke a sense of serial works, but it is less commonly used to refer to the three cases—often derisively. See, e.g., Kenneth J. O’Connell, Ruminations on Oregon Negligence Law, 24 WILLAMETTE L. REV. 385, 387 (1988). Hands down, the most appropriate sobriquet would have to be triptych, meaning “a work (as in art, literature, or music) made up of three matching or contrasting parts.” Triptych, MERRIAM-WEBSTER UNABRIDGED ONLINE DICTIONARY, http://unabridged.merriam-webster.com/unabridged/triptych (last visited Jan. 29, 2016). The problem with triptych, however, is that it has not appeared in the cases or literature interpreting Fazzolari and its companion cases, so this Article will use trilogy throughout.

Fazzolari v. Portland School District No. 1J:
High school student brought action against school district to recover for injuries suffered in an attack and rape by a third person which occurred as plaintiff was about to enter her school building early one morning. Plaintiff alleged that defendant owed her a duty of care both as a possessor of land and because of the special relationship of a school toward its students. The circuit court granted defendant’s motion for a directed verdict at the close of plaintiff’s evidence on the ground that no reasonable factfinder could find the attack on plaintiff to have been a foreseeable risk. Held: The circuit court erred in directing a verdict for defendant. While defendant’s duty of care toward plaintiff did not arise from the fact that she stepped onto defendant’s real property, the relationship between educators and children entrusted to their care gives rise to a special obligation of supervision. This special duty of care is not limited to those times when the student is present for school-sponsored activities, but may extend to off-school hours. Whether defendant is liable for plaintiff’s injury in this case turns primarily on whether defendant took reasonable precautions to avert foreseeable risks of harm. The court noted that ‘foreseeability’ refers not to the predictability of the actual sequence of events but rather to generalized risks of the type of incidents and injuries that occurred. The Court held that it would not have been unreasonable for a factfinder to conclude that the school should have taken some steps, given the information available to it, to avert the harm suffered by plaintiff, or that no preventive steps were required. The circuit court erred in taking the issue from the jury.

Donaca v. Curry County:
Plaintiff sought damages for injuries suffered when his motorcycle collided with an automobile on a country road as the automobile pulled out from an intersection that was obscured by tall grass growing on the right-of-way. Plaintiff’s complaint alleged that defendant county was negligent in failing
Fazzolari and its companion cases embodied the extreme legal formalism of Justice Hans Linde, the Court’s chief intellectual force of the time. O’Connell hypothesized that the Court’s (read: Linde’s) “obsessive” pursuit of pure legal outcomes and structural judicial restraint had unduly excluded judges’ “intuitive sense of justice” from legal decision-making. Moreover, this change made it nearly impossible for defendants to succeed on pretrial motions in most negligence cases—even where the merits seemed highly suspect.

Kimbler v. Stillwell:
Plaintiff brought a wrongful death action against John Stillwell and G.I. Joe’s, a retail merchant, alleging that Stillwell had intentionally shot plaintiff’s son with a shotgun and shells which G.I. Joe’s had made it too easy for Stillwell to take from its store. The circuit court dismissed the complaint against G.I. Joe’s for failure to state ultimate facts sufficient to constitute a claim, ORCP 21A(8), on grounds that the harm caused plaintiff’s decedent was not reasonably foreseeable and that defendant G.I. Joe’s owed no duty to plaintiff’s decedent for the intentional conduct of defendant Stillwell. Held: The judgment of dismissal is reversed. The fact that plaintiff’s injury was inflicted by the intentional, even criminal, act of a third person does not foreclose liability if such an act was a foreseeable risk facilitated by the defendant’s alleged negligence. Defendant’s ‘no duty’ defense is only another way of stating that the harm to plaintiff’s decedent by the firearm taken from the defendant’s store was not a foreseeable risk of the conduct alleged as negligence. Whether the risk of harm involved here was reasonably foreseeable was not an issue to be resolved on the pleadings.

Id.

7 In this Article, “Court” will be used interchangeably with Oregon Supreme Court, because of the limited scope of the subject matter.

8 O’Connell, supra note 1, at 937.
When the Court later pared back some of the Fazzolari trilogy’s teachings, O’Connell rejoiced.9

This Article argues that in the last year negligence decisions from the Oregon appellate courts have recaptured the expansionist spirit of Fazzolari. Without Linde’s formalist philosophy guiding the way, modern courts have been set free to assume significant policy-making responsibilities. Counterintuitively, this trend has weakened duty-based defenses.

I
THE RISE AND APPARENT FALL OF THE FAZZOLARI TRILOGY

The Oregon Supreme Court summarized the Fazzolari trilogy’s new negligence doctrine in a few sentences of the headline case:

[U]nless the parties invoke a status, a relationship, or a particular standard of conduct that creates, defines, or limits the defendant’s duty, the issue of liability for harm actually resulting from defendant’s conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff. The role of the court is what it ordinarily is in cases involving the evaluation of particular situations under broad and imprecise standards: to determine whether upon the facts alleged or the evidence presented no reasonable factfinder could decide one or more elements of liability for one or the other party.10

9 See id. at 933 (“The decision in Buchler v. Oregon Corrections Division was a heartening event for those of us in the legal profession in Oregon who have looked upon the so-called ‘Fazzolari triad’ as an abomination in the development of negligence law in Oregon.”).

10 Fazzolari v. Portland Sch. Dist. No. 1J, 734 P.2d 1326, 1336 (Or. 1987). For its part, the Court argued that this streamlined rule constituted a natural outgrowth of negligence precedents, in particular Stewart v. Jefferson Plywood Co., 469 P.2d 783, 785 (Or. 1970). Id. The case involved a volunteer who, wanting to help fight a fire that started at defendant’s sawmill, was sent to a neighboring warehouse to control sparks on that building’s roof. Stewart, 469 P.2d at 784. “He . . . was injured when he fell through a skylight opening that had been covered by a piece of plastic and was obscured by dust.” Fazzolari, 734 P.2d at 1332–33. The Court held that a “reasonable man could foresee” that the careless conduct of defendant’s employees, who started the fire, could result in a fall from or through a neighboring building. Stewart, 469 P.2d at 786–87. In Stewart, “the court replaced proximate cause . . . with foreseeability as the basis for limiting liability” and it “treated foreseeability as part of breach of duty.” Caroline A. Forell, Replacing Pragmatism and Policy with Analysis and Analogy: Justice Linde’s Contribution to Oregon Tort Law, 70 OR. L. REV. 815, 825 (1991). O’Connell wrote Stewart. Stewart, 469 P.2d at 783.
Narrowing the elements of negligence like this was a formalist coup because it cut out redundant, circular analyses of duty and foreseeable risk. According to the then-constituents of the Oregon Supreme Court, the Fazzolari trilogy accomplished the twin aims of denuding the duty element of the morals, value judgments, and judge-specific biases inherent in subjective duty rulings and setting up a kind of judicial restraint that stripped the courts of the power to generate new duty-based defenses in the common law.

Legal realism was anathema to Linde’s judicial philosophy. As the intellectual leader of the Court, Linde unleashed his formalist theories on the wilds of Oregon’s negligence jurisprudence—among other subject areas—causing the Court to eschew “pragmatic policymaking and open judicial activism.” The Fazzolari trilogy grew out of his belief “that in order to take law seriously, judges need to view their role in the law-making process as secondary to the legislature and rigorously limit the role of policy evaluations in their legal reasoning.”

Professor Caroline Forell, who chronicled Linde’s influence on Oregon common law, has argued, on the other hand, that “[t]o entirely deny judges the power to make policy judgments while leaving them the power to make judgments based on principles

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11 Formalism is here defined as “self-contained, internally consistent, systematized and rationalized law, rather like geometry, [to derive] correct legal answers . . . to any question by reference to the logic of [the] system.” Paul N. Cox, An Interpretation and (Partial) Defense of Legal Formalism, 36 IND. L. REV. 57, 60 (2003).

12 Lawrence-Berry, supra note 2, at 447 (“[D]uty’s scope, as defined by the foreseeability of the harm, depends upon how broadly foreseeability is defined.”).

13 See Fazzolari, 734 P.2d at 1328; Donaca v. Curry Cty., 734 P.2d at 1342–43; Forell, supra note 10, at 818.

14 Forell, supra note 10, at 818.

15 Forell, supra note 10, at 818. As Linde noted, courts were already struggling with the limits on the tension between their role and the jury’s:

The record suggests some confusion as to what a court must find within the range of a factfinder’s determination of foreseeability. A defendant can be expected to argue that no one could have foreseen exactly what happened to the plaintiff. . . . A plaintiff’s definition of what a responsible defendant should foresee can be expected to encompass all the animate and inanimate sources of injury in a dangerous world. But foresight does not demand the precise mechanical imagination of a Rube Goldberg nor a paranoid view of the universe. As already noted, Stewart v. Jefferson Plywood Co. made clear that the concept of foreseeability refers to generalized risks of the type of incidents and injuries that occurred rather than predictability of the actual sequence of events.

Fazzolari, 734 P.2d at 1338.
assumes an ability to separate policy from principle. Most judges cannot feel confident of possessing this ability.\textsuperscript{16}

As a practical matter, the \textit{Fazzolari} trilogy placed defendants accused of negligence at a strategic disadvantage.\textsuperscript{17} Forell had predicted that under the new foreseeability paradigm:

[S]pecific duties will receive much attention. Plaintiffs’ attorneys will often plead specific duties in negligence cases because of the added benefits these duties provide their clients.

Similarly, defense attorneys will try to show that a specific “no duty” defense applies so that the court will take the negligence case from the jury. However, they will have a difficult time succeeding unless this “no duty” defense is located in a statute, contract, or some other noncommon law.\textsuperscript{18}

And, without judicial intervention at the pleading and summary judgment phases, far-fetched theories of negligence could survive on the slimmest of connections between a defendant’s action and plaintiff’s injury. Said one Portland attorney in a 1988 news report, “We can no longer count on local judges on the front lines to weed out cases that don’t have any merit . . . . The only filtering process I see is what a lawyer decides to file for his client.”\textsuperscript{19} The door to the jury-roulette room stood wide open, because “almost all cases [we]re submissible to the jury (Multnomah County Circuit Judge Charles

\textsuperscript{16} Forell, \textit{supra} note 10, at 828–29. This brings up an important distinction in terms. Decisions based on principle, according to legal philosophers involve “adjustment of individual interests” pursuant to generally accepted social norms. See O’Connell, \textit{supra} note 2, at 407. On the other hand, policy-based decisions implicate adjustment to “the interests of the whole society.” See id. Nevertheless, one could argue that nearly every contribution to the common law advances one policy or another. The Court’s “extreme version of judicial self-restraint,” according to Forell, would cause it to “either stop the common law in its tracks, a huge act of policy in itself, or find ways to circumvent its own rules without openly acknowledging its actions.” Forell, \textit{supra} note 10, at 853.

\textsuperscript{17} O’Connell, \textit{supra} note 2, at 404–06 (arguing that defendants would not be able to advocate for no-duty “immunity” because all duty-based defenses are a matter of policy). A reduced threat of pretrial dismissal must have drastically increased plaintiffs’ leverage in settlement negotiations during this period. See J. Maria Glover, \textit{The Federal Rules of Civil Settlement}, 87 N.Y.U. L. REV. 1713, 1738–39 (2012) (explaining that weak pretrial adjudication mechanisms “increase the parties’ settlement ranges. For instance, if a claim survives a summary judgment motion or a motion to dismiss, both parties will raise settlement estimations.”).\textsuperscript{18}

\textsuperscript{18} Forell, \textit{supra} note 10, at 836–37.

\textsuperscript{19} Steve Duin, \textit{At Risk Is Our Patience}, \textit{OREGONIAN}, Dec. 8, 1988, at C13. Even the plaintiff’s lawyer in the \textit{Kimbler} case seemed to have some recriminations when he stated, “The trend in our society is a remedy for every wrong . . . . [But y]ou have to draw the line. You can’t protect people from every bump and bruise.” \textit{id}.  

Crookham is reported to have said: ‘If it happened, it is for the jury’.

It is easy to see why trial court judges would take this position. In the year after Fazzolari, the Court stated in its Fuhrer v. Gearhart-By-The-Sea, Inc. decision, “[e]ven if there is no relationship between the parties, if the risk is great, either in likelihood or magnitude, and the cost is minimal, the reasonableness of the action should be determined by the factfinder,” most often a jury.

The Fazzolari doctrine made the pursuit of factually correct outcomes more robust, but it also tilted the scales of justice in plaintiffs’ favor. Proponents and critics of Linde would agree that the allure of theoretical elegance, at least in part, guided the Fazzolari trilogy’s design—and proved to be its undoing.

Six years after publishing the Fazzolari trilogy—years filled with what one justice referred to as “much confusion in the bench and bar”—the Oregon Supreme Court retrenched in Buchler v. State By and Through the Oregon Corrections Division, the cause of O’Connell’s celebratory colloquy. There a convicted felon, assigned to a work camp outside prison, went on the lam in a stolen corrections department vehicle. That the keys were negligently left in the ignition allowed the convict to escape, then drive to his mother’s home, from which he stole a gun. He later shot two people near the home, killing one. Plaintiffs sued the state, alleging negligence in allowing the escape to occur in the first place, failing to recapture the prisoner, and failing to warn residents near the mother’s home to take

20 O’Connell, supra note 2, at 413. Crookham would also state to The Oregonian, “I’ve been concerned by the Fazzolari doctrine because I think it shifts from the judge to the jury the policy of deciding the outer limits. The jury is setting the outer limits of foreseeability.” Duin, supra note 19 (case name italicized).

21 760 P.2d 874, 878 (Or. 1988) (emphasis added).

22 See O’Connell, supra note 1, at 936 (“[T]he court’s methodology always works for plaintiffs and against defendants. A finding that there is no duty arising out of the relationship never absolves the defendant because plaintiff can insist on the submission of the case on the issue of foreseeability.” (footnote omitted)); Note, The Fazzolari Triad: An Alternative Interpretation of the Fazzolari Trilogy, 28 WILLAMETTE L. REV. 433, 454 (1992). The parties in Fazzolari agreed to settle before trial, and the jury in Kimbler “quickly ruled” for defendant “after six years of litigation.” Duin, supra note 19.

23 See O’Connell, supra note 2, at 413–14; Forell, supra note 10, at 853 (“The new Oregon jurisprudence is too mechanical and formalistic.”).

24 853 P.2d 798, 809 (Or. 1993) (Peterson, J., concurring).

25 Id. at 799 (majority opinion).

26 Id.

27 Id.
caution.\textsuperscript{28} Turning back to its traditional common law roots, the Court concluded that the shootings were “not risks unreasonably created by that escape, nor did they occur because of violation by defendant of any duty arising out of any special relationship between the plaintiffs and the defendant or defendant’s status as the prisoner’s jailer.”\textsuperscript{29} To guide later decisions, the Court made clear that “[a] plaintiff must allege facts from which the court may find that the defendant has an obligation to avoid or prevent harm to a person in the plaintiff’s position, i.e., a duty.”\textsuperscript{30} And, like that, normative negligence determinations reverted to the courts with the express charge that “[d]etermining whether a duty exists is a function for the court.”\textsuperscript{31} No longer would the jury be the sole gatekeeper by virtue of its role as factfinder.\textsuperscript{32}

Of this turn of events, O’Connell would write, “Now that Buchler appears to put the Fazzolari trilogy to rest, it behooves us to examine, in retrospect, the cause or causes for this egregious aberration in our law, so that we never again fall into a similar costly fallacy.”\textsuperscript{33} The Fazzolari doctrine was elegant in its theoretical simplicity, because it recognized that, in general, negligence cases’ duty and foreseeability are, in many ways, one and the same.\textsuperscript{34} Yet it did not work in practice. Its weakness was sardonically summarized in Thing v. La Chusa, a contemporary California Supreme Court opinion: “there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury.”\textsuperscript{35}

\begin{itemize}
\item \textsuperscript{28} Id. at 799–800.
\item \textsuperscript{29} Id. at 802.
\item \textsuperscript{30} Id. at 811 (Peterson, J. concurring).
\item \textsuperscript{31} Id. (emphasis added).
\item \textsuperscript{32} O’Connell, supra note 1, at 937.
\item \textsuperscript{33} Id. (emphasis added).
\item \textsuperscript{34} O’Connell, supra note 2, at 387. O’Connell himself applauded the court’s effort “to clean the Augean stables of negligence,” but in the same breath expressed his concern that “many lawyers and judges . . . [would] not understand the lessons taught in that triad.” Id.
\item \textsuperscript{35} 771 P.2d 814, 830 (Cal. 1989). Oregon Supreme Court Justice Peterson would later lament that he “erred in joining in all the reasoning of [Fazzolari, Kimbler, and Donaca].” Buchler, 853 P.2d at 809 (Peterson, J., concurring). He argues, in the same vein as Thing, that “[a]lmost all harm is foreseeable, even though it occurred through some strange concatenation of events. . . . As Fazzolari now stands, only in an ‘extreme case’ may a court decide that ‘no reasonable factfinder could find the risk foreseeable.’” Id. at 811 (quoting Donaca v. Curry Cty., 734 P.2d 1339, 1344 (Or. 1987)).
\end{itemize}
II
OREGON APPELLATE COURTS’ HOSTILITY TOWARD CONSTRAINED DUTIES

The fate of the Fazzolari doctrine represents the adoption and rejection of rigid formalism in Oregon’s negligence jurisprudence. This Article does not attempt to track the complete history of that jurisprudence. But after Buchler it was thought that courts would set predictable limits on the scope of potential liability by resurrecting judges’ authority to rule on duty.36 Later cases show that, at least to some extent, this occurred for a while.37

Of late, however, the judicial policy-making path that Buchler reopened has led to some interesting places. Oregon appellate courts have altered established limitations on negligence duties, functionally turning back to the teachings of the Fazzolari trilogy but without its philosophical foundation.

In certain respects, we have come full circle. O’Connell and Forell thought that the Fazzolari trilogy had missed the mark by giving the Court too little power to make policy determinations. Now the freedom from rigid constraints allows the courts to bring down the established safe harbors of duty that even Fazzolari, at least theoretically, left standing. A brief review of two Oregon Supreme Court opinions and one Oregon Court of Appeals opinion from roughly the last year demonstrates this phenomenon, which amounts to a judicial ascension to policy-setting power.

A. Bagley v. Mt. Bachelor, Inc.: Limitations Based on Contract

Until Bagley v. Mt. Bachelor, Inc. reached the Oregon Supreme Court, it was more of a contract dispute than a negligence action, even

36 See Buchler, 853 P.2d at 807–09 (Peterson, J., concurring) (describing development of common law duty doctrines à la Holmes and Cardozo).

37 See, e.g., Boothby v. D.R. Johnson Lumber Co., 137 P.3d 699, 705 (Or. 2006) (maintaining general rule that hiring an independent contractor does not create in the hirer, a duty to the contractor’s employees); Or. Steel Mills, Inc. v. Coopers & Lybrand, LLP, 83 P.3d 322, 329–32 (Or. 2004) (drawing parallels with Buchler to hold that accounting firm’s special relationship with client did not implicate a duty to protect client from market losses); Garrison v. Deschutes Cty., 48 P.3d 807, 812 (Or. 2002) (finding that a public entity owes only limited duties to invitees on public property). Following Buchler, questions persisted about the continuing authority of Fazzolari itself. See Buchler, 853 P.2d at 812 (Unis, J., concurring). Nevertheless, Oregon courts continue to cite it to identify the boundaries of general negligence duties. See, e.g., Cortez v. Nacco Material Handling Grp., Inc., 337 P.3d 111, 119 (Or. 2014).
though it arose out of an accident that left a snowboarder paralyzed.\textsuperscript{38} Plaintiff alleged that the ski resort, where he held a season pass, negligently built, maintained, and inspected a terrain park jump from which he fell.\textsuperscript{39} Earlier in the season, plaintiff had signed a season pass agreement, which included language barring “any claim” for injury, “even if caused by negligence.”\textsuperscript{40}

Exculpatory clauses like this are commonplace tools that allow contracting parties to alter the default obligations they owe, including negligence duties.\textsuperscript{41} The \textit{Fazzolari} trilogy reiterated that it is the parties’ prerogative to “limit tort remedies by defining their obligations in such a way that the commonlaw standard of care has been supplanted.”\textsuperscript{42} Furthermore, the private ordering on display in an exculpatory clause is consistent with the formalism that Linde advocated, as it identifies specific duties without imposing broader social rules.\textsuperscript{43}

Without question plaintiff had seen and agreed to defendant’s limitation of duties, because some version of it appeared on each of the resort’s passes and lift terminals.\textsuperscript{44} Plaintiff nevertheless argued that such a limitation was unconscionable and therefore invalid.\textsuperscript{45}

Although the Oregon Supreme Court acknowledged that it had in the past given effect to exculpatory clauses,\textsuperscript{46} it deployed a new “totality of the circumstances” test to hold that the subject clause was

\textsuperscript{38} 340 P.3d 27, 32 (Or. 2014).
\textsuperscript{39} Id. at 30.
\textsuperscript{40} Id. at 31.
\textsuperscript{41} See id. at 30–31. The type of exculpatory clause at issue in \textit{Bagley} was what the Court called an “anticipatory release.” Id. at 30 n.1.
\textsuperscript{42} Abraham v. T. Henry Constr., Inc., 249 P.3d 534, 540 (Or. 2011) (citing Fazzolari v. Portland Sch. Dist. No. 1J, 734 P.2d 1326, 1336 (Or. 1987), and K–Lines, Inc. v. Roberts Motor Co., 541 P.2d 1378, 1381 (Or. 1975)); cf. \textit{In re Melridge, Inc. Secs. Litig.}, No. 87-1426-JU, 1988 WL 220581, at *3 (D. Or. Aug. 11, 1988) (“As non-client third-parties the instant plaintiffs must establish a duty beyond the common law that required the defendant not to act negligently towards them . . . . The duty's content is located in law, it is not derived from morals, manners, or from judicial policy decisions.”).
\textsuperscript{43} Jay M. Feinman, \textit{The Economic Loss Rule and Private Ordering}, 48 ARIZ. L. REV. 813, 814 (2006) (“The logic of private ordering is, of course, the logic of contract law: individuals are the best judges of their own interests; individuals maximize those interests through contracts; the expectation and reliance interests created by contracts deserve protection; promoting private contracting produces a social benefit; contract law provides the framework through which the individual and social benefits are realized in practice.”).
\textsuperscript{44} Bagley, 340 P.3d at 32.
\textsuperscript{45} Id.
\textsuperscript{46} See id. at 37 (quoting \textit{K-Lines}, 541 P.2d at 1381).
unfair, ran afoul of public policy, and should be invalidated.\textsuperscript{47} As the author argued in a previous piece:

The critical innovation in \textit{Bagley} consists of fusing consideration of the substantive and procedural unconscionability “components” into a single analysis not bounded by strictly defined factors. The Supreme Court explicitly refused to determine whether one, the other, or both components of unconscionability are needed to invalidate a contract or its terms, and instead established an all-encompassing standard.\textsuperscript{48}

The analysis has quite an expansive scope, encompassing “any . . . considerations that may be relevant, including societal expectations.”\textsuperscript{49} \textit{Bagley} is emblematic of the Court’s no longer demur view of its policy-setting role. The Court expressed in its opinion that ski areas are better insurers against risk than individual patrons, clearly stating its policy preference “to place responsibility for negligently created conditions of business premises on those who own or control them, with the ultimate goal of mitigating the risk of injury-producing accidents.”\textsuperscript{50} The Court did so in the face of compelling evidence that Oregon’s legislative and executive branches had determined that ski areas should not bear that risk.\textsuperscript{51}

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\item \textsuperscript{47} Id. at 38.
\item \textsuperscript{49} \textit{Bagley}, 340 P.3d at 38.
\item \textsuperscript{50} Id. at 43. \textit{Bagley} seems to have had its intended effect, leading necessarily to appellate losses in similar negligence cases, for example—\textit{Emerson v. Mt. Bachelor, Inc.}, 359 P.3d 510, 513 (Or. App. 2015) (“After this case was submitted on appeal, the Supreme Court determined that a release that is identical to the release in this case was unconscionable as a matter of law.”), and \textit{Becker v. Hoodoo Ski Bowl Developers, Inc.}, 346 P.3d 620, 623 (Or. App. 2015) (“The release here is materially indistinguishable from the release at issue in \textit{Bagley}, and, therefore, under the analysis set forth by the Oregon Supreme Court . . . , we conclude that enforcement of the release in this case would likewise be unconscionable.”)—and setting off a rash of inquiries to defense counsel regarding similar release language.
\item \textsuperscript{51} \textit{Blair v. Mt. Hood Meadows Development Corp.}, 630 P.2d 827 (Or. 1981), modified, 634 P.2d 241 (Or. 1981), led to the enactment of ORS 30.970 to 30.990, defining the inherent risks of skiing and snowboarding with the apparent intent of limiting ski area liability for injuries incurred during those inherently dangerous activities. See Buchler v. Or. Corr. Div., 853 P.2d 798, 809 (Or. 1993) (Petersen, J., concurring). The Court of Appeals stated “that the legislature has enacted statutes indemnifying landowners from liability in connection with ‘use of the land for recreational purposes[,]’ ORS 105.682; see ORS 105.672–105.696. Accordingly, we add that, as a general matter, it would be counterintuitive to hold that a contract with the same operative effect as that statutory
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\end{footnotesize}
B. Towe v. Sacagawea, Inc.: Limitations Based on Status or Relationship

Whereas Bagley cut back contractual limitations on duty, Towe v. Sacagawea, Inc. demonstrates the Court’s willingness to alter common law status- and relationship-based limitations on duties. Plaintiff Billie Charles Towe was injured when he drove his motorcycle into a steel cable slung across defendant’s private road. Defendant argued that it owed only the minimal duty of not willfully or wantonly injuring plaintiff, the ordinary standard of care that property owners owe to trespassers. The Court did not agree.

Defendant’s property consisted of a quarry at the end of a private access road, and that road crossed through two other properties, belonging to the Bureau of Land Management and a person named Kinyon, respectively.

Where the access road crosses onto [defendant’s] property, and changes from gravel to paved road, [defendant] placed a cable across the road in an effort to deter theft and vandalism at the quarry. The cable was on or nearly on [defendant’s] property line, and stretched between two metal posts on either side of the road. . . . [T]he cable hung only about 10 to 12 inches off the ground, and it was weathered and rusted. Likewise, the metal posts on either side of the road to which the cable was attached were rusted steel and not particularly visible. Yellow caution tape and a blackened—but once orange—construction cone had been placed on the cable to warn oncomers. “After the accident, a no trespassing sign was found face up on the ground nearby, but not attached to the cable or otherwise visibly posted at the


53 Id. at 773. For an early description of the traditional duty owed to a trespasser, see Monnet v. Ullman, 276 P. 244, 247 (Or. 1929) (“In the absence of willfulness or wantonness, or permission . . . , express or implied, the authorities are all against a recovery in a case of that character.”).

54 See Towe, 347 P.3d at 783.

55 Id. at 769–70. Plaintiff also pursued a negligence claim against a real estate agency that had posted a sign erroneously marking the Kinyon property, which instructed interested parties to go up the access road toward the cable. Id. at 773. Plaintiff claimed that his injuries occurred as a result of the distraction of searching for a property that was not in fact for sale. Id. The Court upheld summary judgment for defendant real estate agency because plaintiff had admitted hearing about the property from his girlfriend, disqualifying the erroneous signage as a cause in fact of his injuries. Id. at 780.

56 Id. at 770.

57 Id.
boundary to [defendant’s] property.” At the turnoff from the public road to the private access road, defendant’s owner had years earlier posted a still-visible sign that stated, in part, “Private Road No Trespassing.”

Plaintiff was undoubtedly a trespasser at the time his motorcycle hit the cable and “slingshot” back, causing his injuries. To get past the formal bar that plaintiff’s status as trespasser would have thrown up, the Court adopted a rule from Section 368 of the Restatement (Second) of Torts. The Court’s rule makes property owners liable for artificial conditions “so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others brought into contact with such condition.” This heightened duty allowed plaintiff’s claim to survive summary judgment, as the Court found a material issue of disputed fact in whether the adjacent portion of the access road, “the portions owned by the BLM and the owner of the Kinyon property[,] were open for public use.” If plaintiff was lawfully traveling on those portions of the access road, because they were open to the public, the dispute over the reasonableness of the low-slung cable itself would remain for the jury. To put the issue slightly differently, defendant’s standard of care in deterring trespassers from entering its property—the cable, the signage, the warning tape—was contingent on its neighbors’ diligence in keeping trespassers off the access road.

The new rule announced in Towe represents a clear expansion of Oregon negligence duties, which explicitly references Fazzolari for

58 Id.
59 Id. at 771. Another property owner, Clarke, whose land was serviced by the access road had assisted in posting the sign. Id.
60 Id. at 772.
61 Id. at 782–83.
62 Restatement (Second) of Torts § 368 (1965). The comments to Section 368 refer to intentional and unintentional deviations somewhat distinct from the facts in Towe. Comment e mentions that travelers deserve protection from slipping and falling into an excavation on adjacent land. But plaintiff in Towe was an intentional trespasser because he had the objective of entering onto defendant’s property. Id. cmt. The relevant comments, f and g, on the other hand indicate that the purpose of this section is to protect the continuous flow of traffic and ongoing travel as opposed to barriers to entry to a property. Id. cmt. For example, comment g states that this exception “has no application where the deviation . . . is for a purpose not normally connected with the travel, as where the traveler runs off the highway when pursued by criminals seeking his life.” Id. cmt.
63 Towe, 347 P.3d at 787–88.
64 Id. at 784.
the proposition that the general duty of all to all does not apply in every situation—especially in cases involving possessors of land.65

The erosion of old duty limitations not only expands the universe of potential claims against landowners, but also introduces new lines of factual dispute into premises liability cases: How close must a hazard be to the public highway to elicit a heightened duty of care? What kinds of artificial hazards trigger a property owner’s duty to trespassers? Do commercial owners of real estate owe a greater or lesser duty to potential trespassers than residential owners? What distinction might be made between mere possessors of real property and owners? Towe further rejects legal limitations by blurring the application of formerly definite boundaries circumscribing common law duties. Instead, the Court chose to protect “the value that society places on the interest in public passage, [while] strik[ing] a balance between that interest and a landowner’s equally important interest in the exclusive use and enjoyment of his or her own property.”66

C. Rhodes v. U.S. West Coast Taekwondo Association, Inc.: Limitations Based on Transactions

Whereas Towe poses a dormant intervening cause question (i.e., How can a property owner’s duty of care depend on his or her neighbor’s diligence in enforcing the right to exclude?), Rhodes v. U.S. West Coast Taekwondo Association, Inc.67 challenges an entity’s ability to divest itself of duties by severing its control over the danger. In Rhodes, defendant school district had owned and operated a pool at a public high school.68 When voters heard that the school district intended to shut down the pool, they passed a measure creating a new aquatic district, which became “responsible for operating and maintaining the pool and for the pool’s employees.”69 Although the agreement transferring control over the operation provided that the aquatic district would have to establish its own safety regulations and

65 Id. at 775.

We have not before had a case in which we have adopted the common-law rule for the duty owed by a landowner (or other possessor of land) to a person lawfully traveling adjacent to the land. This case, however, implicates that duty, and we agree in general principle with the rule as stated by the authorities above.

Id. at 783 (footnote omitted).

66 Id.


68 Id. at 1198.

69 Id. at 1198 & n.1.
operating procedures, it hired former school district staff to continue working at the pool.70

Fifty days after the aquatic district took over operation of the pool, a six-year-old girl nearly drowned there, causing her “permanent injuries.”71 Her mother sued the aquatic district and the school district for negligence, despite the earlier transfer of control. The school district won summary judgment on the Buchler-esque grounds “that the risks of injury as a result of any negligence by the school district were unforeseeable as a matter of law because of the transfer of the pool operation to the aquatic district.”72 The Court of Appeals reversed, finding that because the injury occurred soon enough after the transfer that a jury could find the carryover of the school district’s old risks to be a foreseeable cause of the injury.73

As with Towe, the court looked to the potential actions of third parties, stating that the proper inquiry is “whether it was reasonably foreseeable that the aquatic district would carry on” the school district’s allegedly defective policies and procedures.74 And, as with Bagley, Rhodes expands the potential scope of duty by undermining the effect of an underlying transaction. A court seeking formalist goals could have upheld summary judgment as a means of respecting the corporate form or the voters’ choice to sever the school district’s future liability. If it remains good law, Rhodes has the potential to affect a wide variety of transactions, such as mergers and acquisitions, asset sales, and lease agreements, all of which are indistinguishable from the transfer of operations at issue here.75

70 See id. at 1198.
71 Id.
72 Id.
73 Id. at 1203.
74 Id.
75 Id. at 1217 (DeVore, J., dissenting) (“I fear that this theory of transfer liability, based on a vague argument about foreseeability, portends the ready disregard for corporate form. It could haunt public entities like these, even after one organization ceases service and a later organization causes harm. It could haunt private entities when one business closes under an asset purchase agreement and a separate business later causes injury. If merely being a ‘bad’ model (even one without injuries) suffices to make a predecessor entity liable for a successor’s wrong, then unwarranted mischief may trouble both private and public entities hereafter.”).
Standing in contradistinction to the Fazzolari trilogy, Bagley, Towe, and Rhodes show the Oregon appellate courts’ willingness to achieve policy objectives through the common law. This new trilogy of sorts has at its core a complete rejection of Fazzolari’s formalism—multifactor tests and loose duty determinations are welcome, if not the norm. Rhodes is perhaps the apotheosis of this school of thought because its reasoning leads to such wide-ranging legal consequences. (That is, if it remains a precedent.)

Each of these decisions, however, has a whiff of Fazzolari’s expansive scope of duty. Weakening limitations on duties too much would return negligence jurisprudence to the judge-on-the-sidelines paradigm that O’Connell considered an “aberration,” only without the theoretical backbone.