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The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid

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Three learned judges are presented with the following set of facts and asked to provide the appropriate tort analysis. A young woman was badly injured when she fell down the stairs in her rented home because the stair railing was defective. It is undisputed that her landlord's failure to repair the defective railing violated a statute requiring landlords to maintain their rental properties in good repair. The tenant sues the landlord for injuries.

All three judges solemnly chant in unison: "*Caveat* lessee." They are right about this; the common law rule prevents tenants from suing their landlords for personal injuries suffered on the premises.[1]

Judge Number One concludes: "The statute does not expressly create a tort action; thus, none exists and the landlord cannot be sued."[2]

Judge Number Two scrutinizes the statute's penumbras and explains: "When the legislature enacted this statute, they intended to provide a civil remedy. Therefore, the injured tenant has an implied tort action."[3]

Judge Number Three concurs with Number Two that a tort action exists, but applies a common law, rather than a statutory, analysis by asserting: "This was a clear case of negligence per se."[4]

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1. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability*, 1975 Wis. L. Rev. 19, 29; Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 Colum. L. Rev. 21, 23 (1949).

2. *See, e.g.*, Johnson v. Carter, 218 Iowa 587, 255 N.W. 864, 866-67 (1934); Richmond v. Warren Inst. of Sav., 307 Mass. 483, 30 N.E.2d 407 (1940).

3. *See, e.g.*, Mangan v. F.C. Pilgrim & Co., 336 N.E.2d 374, 379 (Ill. 1975); Humbert v. Sellers, 300 Or. 113, 708 P.2d 344 (1985).

4. *See, e.g.*, Morningstar v. Strich, 326 Mich. 541, 40 N.W.2d 719, 721 (1950).

This fact pattern is representative of the situations that this Article analyzes. In these situations, the defendant has breached a statutory duty of care in the process of injuring the plaintiff, and the following criteria are met:

1. The statute creating the duty is silent on whether a tort action should be provided for breach of the duty; and

2. Either the courts have not previously decided whether a common law tort action should be provided or the courts, without considering this statutory duty, have refused to provide such an action.

In describing these statutory duty actions,[5] Judge Number One's decision addressed the wrong issue. Although the legislature did not provide a tort action, the correct issue is whether, taking the statutory duty into account, the court should change the common law rule. Similarly, Judge Number Two was incorrect because legislatures, when enacting criminal or regulatory statutes, usually do not address the question of civil liability in any determinable way.[6] Judge Number Three was incorrect because negligence per se is a doctrine which modifies an existing common law negligence action.[7] Because in these situations there was no preexisting common law action, the creation of a new tort action based on a statutory duty is not negligence per se. Negligence per se terminology is particularly misleading where the court previously rejected a common law negligence action on similar facts. By creating a new tort action in such cases, the court overrules rather than supports previous case law.

Statutory duty cases are hybrids involving both the legislative and judicial branches.[8] The three examples introducing this Article highlight the need for a critical evaluation of statutory duties. These analyses typify how courts treat statutory duties.

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5. The closest counterpart to these actions is the implied right of action derived from federal statutes. In state courts, duties derived from statutes are also involved in a much larger category of cases, those which are described as negligence per se. *See infra* note 7 and accompanying text.

6. *See, e.g.*, Buckley, *Liability in Tort for Breach of Statutory Duty*, 100 LAW Q. 204, 207 (1984); Forell, *The Interrelationship of Statutes and Tort Actions*, 66 OR. L. REV. 219, 254 (1987); Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 320 (1914).

7. *See, e.g.*, Seeman v. Liberty Mut. Ins. Co., 322 N.W.2d 35, 37 (Iowa 1982); W. PROSSER & W. KEETON, ON TORTS 222 (5th ed. 1984).

8. *See* Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 473 (1962):

> In one respect, however, tort law has depended heavily on applications of statutes as a guide to civil decisions within the context of negligence per se and related doctrines. This development demonstrates that the legal system is not confronted with an either-or choice between decisional and statutory creativity for solution of emerging problems.

A combination of the twentieth century's "orgy of statute making"[9] and the litigation explosion has resulted in a large number of statutory duty cases. Regardless of whether cases involved the liability of landlords, dramshop operators,[10] police officers,[11] private hospitals,[12] dog owners,[13] drivers who failed to render aid,[14] or municipalities,[15] state courts consistently fail to ask, much less answer, the right questions. Most fundamentally, where there is no evidence of legislative intent to create a tort action, but there is an applicable statutory duty, should the court exercise its common law powers and provide a new tort action based on the statutory duty? If the answer to this question is yes, then the court must consider additional issues: the elements of the new tort action; and which of those elements the legislature has determined or the judge or jury should determine.

The few commentators writing about statutory duties in the state court context for the most part have also ignored these issues.[16] In contrast, these issues have been subjects of scholarly debate in the federal context[17] and in other common law countries such as England[18] and Canada.[19] Nevertheless, the confusion so evident at the state level is

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9. G. GILMORE, THE AGES OF AMERICAN LAW 95 (1977).

10. *See, e.g.*, Ontiveros v. Borak, 136 Ariz. 500, 667 P.2d 200 (1983); Rong Yao Zhou v. Jennifer Mall Restaurant, 534 A.2d 1268 (D.C. 1987).

11. *See, e.g.*, Irwin v. City of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984); Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983).

12. *See, e.g.*, Guerrero v. Copper Queen Hosp., 122 Ariz. 104, 537 P.2d 1329, 1331 (1975); Cain v. Rijken, 300 Or. 706, 717 P.2d 140 (1986).

13. *See, e.g.*, Lange v. Minton, 303 Or. 484, 738 P.2d 199 (1987).

14. *See, e.g.*, Brooks v. E.J. Willing Transp. Co., 40 Cal. 2d 669, 255 P.2d 802 (1953); Brumfield v. Wofford, 143 W. Va. 332, 102 S.E.2d 103 (1958).

15. Turner v. District of Columbia, 532 A.2d 662 (D.C. 1987).

16. *See, e.g.*, Comment, *Implied Causes of Action in State Courts*, 30 STAN. L. REV. 1243 (1978) [hereinafter Comment, *Implied Causes*]; Gamm & Eisberg, *The Implied Rights Doctrine*, 41 U. Mo. K.C. L. REV. 292 (1972) (describing statutory duties as implied rights of action). *See also* Love, *supra* note 1 (landlord/tenant); Comment, *Cain v. Rijken: Creation of a Statutory Duty of Care to Protect Others from the Tortious Conduct of Third Parties*, 23 WILLAMETTE L. REV. 493 (1987) (hospital liability for outpatient's conduct). Notable exceptions to this are: Morris, *supra* note 1, at 21-27 and Note, *The Use of Criminal Statutes in the Creation of New Torts*, 48 COLUM. L. REV. 456 (1948).

17. *See, e.g.*, Ashford, *Implied Causes of Action Under Federal Law: Calling the Court Back to Borak*, 79 NW. U.L. REV. 227 (1984); Bender, *The Powell-Stevens Debates on Federalism and Separation of Powers*, 15 HASTINGS CONST. L.Q. 549 (1988); Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981); Mowe, *Federal Statutes and Implied Private Actions*, 55 OR. L. REV. 3 (1976); and Note, *Implied Private Rights of Action*, 123 U. PA. L. REV. 1392 (1975).

18. Buckley, *supra* note 6.

19. *See, e.g.*, Klar, *Recent Developments in Canadian Law: Tort Law*, 17 OTTAWA L. REV. 325, 350-53 (1985); Klar, *Developments in Tort Law: The 1982-83 Term*, 6 S. CT. L. REV. 309, 314-15, 323-24 (1984); Linden, *Tort Liability for Criminal Nonfeasance*, 44 CAN. B. REV. 25 (1966); Comment, 62 CAN. B. REV. 668 (1984).

universal; federal courts and courts of other common law countries continually wrestle with the problems which statutory duties present.[20] Besides attempting to clarify this confusion, analysis of statutory duties at the state level has broad implications in areas such as federal implied rights of action, common law "no duty" defenses[21] and, in particular, negligence per se.

Before thoroughly examining statutory duty actions, the analytical framework which applies when a statute appears to be relevant to a tort case must be introduced.[22] The first issue to resolve is whether the statute applies to the defendant's conduct. The usual statutory purpose test is whether the statute was intended to protect persons like the plaintiff from the risk that resulted in the plaintiff's injury.[23] This is a *focus* test.[24] A focused statute is one which was intended to create a duty which the defendant owed to the plaintiff in the situation upon which plaintiff's case is based.[25]

If the statute is focused, the second question is whether the legislature either expressly or implicitly created a tort action. Legislatures occasionally enact statutory torts, such as wrongful death acts.[26] Such express

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20. *See, e.g.,* Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989); Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. 11 (1979); Cort v. Ash, 422 U.S. 66 (1975); J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Cunningham v. Moore, 28 D.L.R.3d 277 (Can. 1972); Thornton v. Kirklees Metro. Borough Council, (1979) Q.B. 626.

21. Examples of categorical "no duty" defenses which statutory duties have affected are: purely economic injury, Adam v. State, 380 N.W.2d 716 (Iowa 1986); purely psychic injury, Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983); the no duty to rescue doctrine, Brooks v. E.J. Willing Transp. Co., 40 Cal. 2d 669, 255 P.2d 802 (1953); and the public duty doctrine, Schear v. Board of County Comm'rs, 687 P.2d 728 (N.M. 1984).

22. *See* Forell, *supra* note 6.

23. *See* Beeman v. Gebler, 86 Or. App. 190, 193 (1987).

> Claims based on theories of statutory tort or negligence per se require both an initial determination that the statute or rule which is the source of the defendant's duty protects a class of persons of which the plaintiff is a member by proscribing or requiring certain conduct and that the harm that the defendant has inflicted is of the type against which the rule is intended to protect.

Id. See also RESTATEMENT (SECOND) OF TORTS § 874 comment i (1965).

24. *See* MORRIS, ON TORTS 167-72 (2d ed. 1980).

25. Inevitably, the judge's determination of these issues is, in many cases, somewhat subjective. *See, e.g.,* Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 427 (1989) ("The characterization of legislative purpose is an act of creation rather than discovery."). *See also* Moore, *Semantics of Judging*, 54 S. CALIF. L. REV. 151, 167 (1981).

26. *See, e.g.,* ILL. REV. STAT. ch. 70, para. 1 (1987); N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney 1981); OR. REV. STAT. § 30.020-.070 (1989). The Michigan legislature expressly created a statutory tort action against a landlord:

> (1) When the owner of a dwelling regulated by this act permits unsafe, unsanitary or unhealthful conditions to exist unabated in any portion of the dwelling . . .

statutory torts are unusual; implied statutory torts are even rarer. Implied statutory torts may be found by negative implication[27] or because the text of a criminal or regulatory statute mentioned a civil defense such as assumption of risk.[28]

A focused statute which does not create a statutory tort is an *influencing statute*. Such a statute neither provides nor disallows a tort remedy; however, because it is focused the court should consider whether changing the existing common law rule would better effectuate the statute's purpose. The court should examine the appropriateness of using the statutory duty as a basis for providing a common law tort remedy. Statutory duty actions, by definition, always involve influencing statutes.[29]

The first section of this Article considers two issues concerning the roles of the legislature, judge, and jury. First, it examines which branch of government, the legislature or the judiciary, is the source of statutory duty actions. Second, it discusses whether a statutory duty should affect the roles of judge and jury. This Article addresses these issues from the jurisprudential position that state judges are legitimate lawmakers[30] who,

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where such condition exists in violation of this act any occupant after notice to the owner and a failure thereafter to make the necessary corrections shall have an action against the owner for such damages he has actually suffered as a consequence of the condition.

MICH. COMP. LAWS ANN. § 125.536 (West 1989). *Accord* Landlord and Tenant Act 1985 § 8 (England's statutory tort action for tenants' injuries on landlord's premises).

27. *See, e.g.*, VT. STAT. ANN. tit. 12, § 519 (1973):

(a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

(b) A person who provides reasonable assistance in compliance with subsection (a) of this section shall not be liable in civil damages unless his acts constitute gross negligence or unless he will receive or expects to receive renumeration. (By negative implication a person who does not provide reasonable assistance would be liable.)

Id. See also Chartrand v. Coos Bay Tavern, 298 Or. 689, 698 P.2d 513 (1985) (statute created liability for dramshop operators by negative implication).

28. *See* Foy, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in State and Federal Courts*, 71 CORNELL L. REV. 501, 520 (1986). *See, e.g.*, Safety Appliance Act, 45 U.S.C. § 7 (1982); Mines and Quarries Act, 1954, Vict. sched. 157 (Eng.); Mines Act, 1958, Vict. sched. 411 (Eng.) (all referring to civil defenses).

For examples of implied statutory prohibitions on tort actions see Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15 (1982) (no action allowed because legislative history expressly indicated that Congress did not intend to create a federal right of action); Hayman v. Morris, 36 N.Y.S.2d 756 (N.Y. Sup. Ct. 1942).

29. *See* RESTATEMENT (SECOND) OF TORTS § 874A comment d (1965).

30. I align myself with those legal scholars who believe that courts make law

when they make law, should do so openly.[31] Because our system of government allows state courts to make law,[32] state court judges are not compelled to attribute the law they make to the legislature. The first Section concludes that it is judges who create statutory duty actions, and that it is appropriate for them to do so openly when they believe that providing such actions best effectuates the purpose of focused statutes. It further concludes that a court's determination that a statute is focused should preempt the usual role of the jury as the determiner

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instead of merely finding it. *See, e.g.*, Green, *The Thrust of Tort Law Part II: Judicial Law Making*, 64 W. VA. L. REV. 115 (1962); Keeton, *supra* note 8; O'Connell, *Ruminations on Oregon Negligence Law*, 24 WILLAMETTE L. REV. 385 (1988); Moore, *supra* note 25, at 151; Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1 (1990).

There is much jurisprudential disagreement over whether common law judges create law or find law. *Compare* H. HART, THE CONCEPT OF LAW (1961) (legal positivism) *with* L. GREEN, JUDGE AND JURY (1930) and O'Connell, *Ruminations on Oregon Negligence Law*, 24 WILLAMETTE L. REV. 385, 420 (1988) (legal realism). *See also* R. DWORKIN, LAW'S EMPIRE 313-14 (1986) (chain novel analogy). Nevertheless, it is undeniable that state appellate court decisions regularly change the legal landscape without clear guidance from other branches of government. Major examples of judicial lawmaking in the area of tort law are both the creation and the later abolition of parental and spousal immunities and the development of actions for intentional infliction of emotional distress and strict products liability.

For an example of how a positivist court deals with its common law lawmaking powers, see Heino v. Harper, 306 Or. 347, 368-75, 759 P.2d 253, 262-65 (1988) (abolishing spousal immunity).

31. *See* Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

32. The United States Supreme Court has never held that the limits imposed on federal common lawmaking, *see, e.g.*, Erie R.R. v. Tompkins, 304 U.S. 64 (1938), should also be applied to state common lawmaking. In fact, federalism has been one of the bases for limiting federal common lawmaking while allowing state common lawmaking. *See, e.g.*, Court v. Ash, 422 U.S. 66 (1975). The Court set out a four-part test for determining when a right of action should be implied from a federal statute. One of the factors was whether "the cause of action (was) one traditionally relegated to state law, in an area basically the concern of the States, so that is would be inappropriate to infer a cause of action based solely on federal law." *Id.* at 78.

Commentators agree that state courts can and do make law. "[C]ourts . . . have made the great bulk of tort law and legislatures have made comparatively very little." Green, *supra* note 30, at 117. *See also* Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749 (1965); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, (1967).

Another distinction between federal judges and many state judges in regard to whether they are appropriate lawmakers is that federal judges are appointed while many state judges are elected. Voters hold elected judges accountable for the law they make on controversial social issues. The most dramatic recent example of this was the 1986 California election in which three "liberal" judges, Chief Justice Rose Bird, Justice Cruz Reynoso and Justice Joseph Grodin, were rejected by the voters and removed from the California Supreme Court after an extremely politicized campaign.

of the scope of duty. Instead, the judge's application of the focus test should determine the scope of the duty as a matter of law.

The second Section of this Article analyzes the different kinds of statutory duties: those that use the mandatory "shall" or similar language and those that use the permissive "may" or similar language. This Article then discusses the two different kinds of influencing statutes which provide these duties — declaratory statutes which provide no remedy of any kind, and statutes which contain criminal and administrative penalties. The final Section of this Article proposes an analysis for judges to apply when presented with statutory duties which can be synthesized with present tort doctrine.

I. The Roles of Legislatures, Courts, and Juries in Statutory Duty Actions

A. The Source of Statutory Duty Actions

Statutory duty actions exist in most jurisdictions. Some courts maintain that the source of these actions is legislative;[33] a few claim that the source is judicial;[34] and many others equivocate.[35] Many of the courts

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33. *See, e.g.,* Bob Godfrey Pontiac v. Roloff, 291 Or. 318, 342, 630 P.2d 840, 854 (1981) (Linde, J., concurring); Burnette v. Wahl, 284 Or. 705, 727, 588 P.2d 1105, 1117 (1978) (Linde, J., dissenting); Groves v. Wimborne, (1898) 2 Q.B. 402, 407.

See also Restatement (Second) of Torts § 874A comment g (1965); Atiyah, *Common Law and Statute Law*, 48 Mod. L. Rev. 1 (1985). "As all lawyers know, the theory of the civil action for breach of statutory duty is that the courts find in some legislative prohibition an implied intention on the part of Parliament to create civil liability for its breach." *Id.* at 12-13.

The United States Supreme Court once espoused this view in Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39-40 (1916). However, as noted in Restatement (Second) of Torts § 874A comment g (1965):

> A special problem exists for the federal courts dealing with federal legislation. In cases brought before the federal court solely for diversity of citizenship of parties there is ordinarily no federal "general common law". . . . There is a doctrine of "federal common law" in areas of distinctly federal concern. . . . [B]ut in cases of this nature the federal courts have noted that their role is of narrower scope and more modest than that of state courts engaged in reshaping common law rules governing relations between private individuals. . . . Predominantly, . . . the federal courts address areas of federal private remedy in terms of carrying forward a federal statute or a provision of the United States Constitution.

34. *See, e.g.,* Ontiveros v. Borak, 136 Ariz. 500, 667 P.2d 200 (1983).

35. *See* Holdych, *The Presumption of Negligence Rule in California: The Common Law and Evidence Code Section 669*, 11 Pac. L.J. 907, 921-23 (1980) (discussing the California courts' treatment of statutory duty actions).

Most scholars recognize statutory duty actions and attribute their existence to the

which maintain that statutory duty actions are legislative use one of three analyses. Some claim that when the legislature enacted a criminal or declaratory statute, it also intended to impliedly create a tort action.[36] Other courts assert that unless a common law tort action already existed or the statute expressly created such a tort action, the legislature intended that none be allowed.[37] In addition, a few courts erroneously attribute to the legislature the ancient equitable doctrine that there is no right without a remedy.[38]

These three bases for claiming that statutory duty actions are legislative creatures are analytically unsound. The first view that, by enacting a statute which is silent on the issue of civil liability, the legislature implicitly created a tort action, is not realistic.[39] It is difficult enough for legislators to enact statutes at all. The compromises and debate that

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judiciary. *See, e.g.,* Buckley, *supra* note 6, at 232; Forell, *supra* note 6, at 244; Morris, *supra* note 1, at 23-25; Note, *The Use of Criminal Statutes*, *supra* note 16, at 459; RESTATEMENT (SECOND) OF TORTS § 874A (1965). *But see* Foy, *supra* note 28, at 571. Professor Foy would limit the impact of statutes to situations where a state legislature intended, either expressly or impliedly, to create a tort action. His justification for this radical proposal is that state law would then be in line with the present treatment of federal statutes under the federal implied rights of action doctrine. However, Professor Foy himself is concerned about the appropriateness of the federal doctrine. *Id.* at 582-85.

In contrast to the uncertainty that surrounds statutory duty actions, negligence per se's existence is well-established and its source in common law is widely accepted. *See, e.g.,* Justice Traynor's statement in Clinkscales v. Carver, 136 P.2d 777, 778 (1943):

> A statute that provides for a criminal proceeding only does not create a civil liability; if there is no provision for a remedy by civil action to persons injured by a breach of the statute it is because the Legislature did not contemplate one. A suit for damages is based on the theory that the conduct inflicting the injuries is a common-law tort. . . . The significance of the statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court adopts in the determination of such liability. . . . The decision as to what the civil standard should be rests with the court, and the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it.

See also RESTATEMENT (SECOND) OF TORTS § 874A comment e (1965).

36. *See, e.g.,* Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947); Amberg v. Kinley, 214 N.Y. 531, 108 N.E. 830, 831 (1915).

37. *See, e.g.,* Mack v. Wright, 180 Pa. 472, 36 A. 913 (1897); Queen v. Saskatchewan Wheat Pool, 1 S.C.R. 205, 143 D.L.R. 9 (1983). At least two commentators agree: Thayer, *supra* note 6, at 320 and Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 MOD. L. REV. 233, 256 (1960).

38. *See, e.g.,* Cutler v. Wandsworth Stadium, 1949 A.C. 398, 407, 1949 All E.R. 544, 550. *See infra* notes 131-33 and accompanying text.

39. "When it is said that civil liability hinges on the meaning of the statute, this effect is usually '*given*' to the legislation by the court and not '*found*' therein as claimed." A. LINDEN, CANADIAN TORT LAW 188 (3d ed. 1982).

resulted in most criminal or declaratory legislation reveal that legislators had enough on their minds in coming up with what they expressly provided. Usually, the legislature did not resolve the issue of whether civil liability ought to be allowed unless it expressly addressed this question in the statute.[40]

Implying a statutory tort based on a statutory duty is a legal fiction which directly conflicts with the analysis most courts use when a common law action exists. It is difficult to understand why some courts assert that legislatures intend to create implied statutory torts in the statutory duty area, and also assert that in the negligence per se area it is the court modifying the existing common law action, rather than the legislature impliedly creating an additional tort action.[41]

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40. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361, 364 (1932); J. FLEMING, THE LAW OF TORTS 114-15 (7th ed. 1987).

Erza Ripley Thayer put it well way back in 1914:

> [S]peculation as to unexpressed legislative intent is a dangerous business, permissible only within narrow limits; and the tendency to over-indulge it is responsible for much of the confusion in the law. Proper regard for the legislature includes the duty both to give effect to its expressed purpose, and also to go no further. . . . The true attitude of the courts, therefore, is to ascertain the legislature's expressed intent, to refrain from conjecture as to its unexpressed intent (except in so far as that inquiry is necessary in order to give effect to what is expressed), and then to consider the resulting situation in light of the common law.

Thayer, *supra* note 6, at 320.

41. *Compare* Shahtout v. Emco Garbage Co., 298 Or. 598, 601, 695 P.2d 897, 899 (1985) (negligence per se is a common law creature) *with* Nearing v. Weaver, 205 Or. 702, 711-14, 670 P.2d 137, 143-45 (1983) (statutory duty action is a statutory creature).

Possibly this false distinction made between the source of statutorily influenced actions where a common law action already exists and where it does not is due, in part, to confusion about how the federal implied rights of action doctrine relates to state law. The United States Supreme Court has determined that the federal courts' power to make law is extremely limited. Federal courts will only create "federal common law in cases raising issues of uniquely federal concern." Northwest Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77, 95 (1981). Therefore, cases rarely involve a federal statute's effect on an existing federal common law action, and a federal negligence per se doctrine has never flourished. Instead, cases in which focused federal statutes are present usually involve attempts to imply private rights of action from these statutes.

Since 1975, when the Supreme Court decided Cort v. Ash, 422 U.S. 66, however, the federal implied rights of action doctrine has been strictly limited to the rare cases in which the court finds clear legislative intent to provide a civil remedy. *See* Karahalios v. National Fed'n of Fed. Employees, Local 1263, 109 S. Ct. 1282 (1989); Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979). In Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979), the Court said: "The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action."

Examination of negligence per se reveals that when state courts developed this as a

Attributing negligence per se to the judiciary, and statutory duty actions to the legislature, may be partly politics. Where a common law action already exists, courts have previously made the policy decision to provide a tort remedy. The presence of a focused statute does not require courts to decide whether providing a tort remedy in these circumstances is sound public policy. Courts are willing to attribute the modification of an existing action to themselves because the change is not at the level of remedy versus no remedy, but is simply an incremental change regarding what kind of tort action plaintiff should have.

In contrast, where a common law action was rejected previously or the question is one of first impression, labelling a decision to create a new action "judicial" may be viewed as a judicial policy decision of substantial dimensions. The court must survey the legal landscape and determine whether allowing a cause of action will benefit society. In light of numerous recent charges of judicial activism or, more derogatorily, judicial legislating, and other related tort reform issues,[42] courts may be reluctant to allow new actions unless they can point to another entity as the source of these actions. As a result, the courts may choose to proclaim judicial deference to legislative will in order to more fully legitimize an unstated judicial policy decision.[43]

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purely common law doctrine, they paid no attention to how federal courts treated focused statutes. In contrast, the federal implied rights of action analyses appear to have affected some states' statutory duty analyses. *See, e.g.,* Bob Godfrey Pontiac v. Roloff, 291 Or. 318, 340-41 (1981) (Linde, J., concurring).

See also Gamm & Eisberg, *supra* note 16, at 292; Comment, *Implied Causes*, *supra* note 16, at 1243.

These state courts have accurately discerned that both statutory duty actions and federal implied actions involve the presence of focused statutes in situations where no common law civil action exists. However, these courts fail to comprehend that the widely accepted authority of state courts, unlike federal courts, to make law distinguishes how state courts can and should treat statutory duties from the federal courts' necessarily more limited treatment.

42. *See generally* P. Huber, Liability: The Legal Revolution and Its Consequences (1988). *See also* P. Atiyah & R. Summers, Form and Substance in Anglo-American Law 109 n.30 (1987).

43. *See* Green, *supra* note 30, at 123:

> [J]udges frequently deny that courts have the power to make law, and have asserted that the courts' function is to decide a case and declare the law that controls the decision; that judges may find the law but they do not make law. How much of this attitude reflects defensive coloration, how much is semantics, and how much honest belief cannot be known. Sometimes we think we detect the tongue in cheek; sometimes the protests are so violent that we are reminded of Shakespeare's lady. But giving the judges credit for a deep sense of innocence we suggest that no case can be decided without making law. The making of a decision of necessity means the making of law whether it is the result of statutory construction or the product of reasoning from precedent or principle.

See also Atiyah & Summers, *supra* note 42, at 117.

Implying statutory torts absent evidence that the legislature intended to create such actions may be counterproductive. The courts' credibility will be damaged if critics of judicial activism perceive that the judiciary is expanding tort liability while hiding behind the fiction of legislative approval. A more serious side effect of attributing statutory duty actions to the legislature is that it can lead courts to create causes of action routinely, without first considering and assessing the consequences that will flow from the judicial decisions. By attributing tort law changes to the legislature, courts often avoid discussing either principles or policy rationales for the changes. It is more principled and intellectually satisfying for courts to acknowledge that they are deciding whether a tort action should exist. In making this judicial decision, courts should give appropriate deference to the legislature by treating the presence of a focused statute as important in determining whether to provide an action.

Courts following this first view of attributing their actions to the legislature can be criticized for engaging in surreptitious judicial activism. At the other end of the spectrum, courts deserve criticism for failing to carry out their common law role in the lawmaking process by following the second view and asserting that unless a common law tort action already existed or the statute expressly provided for one the legislature intended that none be allowed.[44] The assertion that legislatures never intend to create tort actions unless they expressly provide for them is not implausible.[45] However, some courts go further than this and view legislative silence as also implying that the legislature did not want to change the present common law rule of "no tort action."[46] These courts contend that the legislature implicitly prohibited judicial creation of a tort action for violation of the statutory duty and, therefore, barred the courts from changing the status quo. These claims of legislative preemption and preclusion are legal fictions. There is no evidence that legislatures, when enacting criminal or regulatory statutes, routinely intend to prohibit tort actions.[47] Because statutory duty cases involve influencing

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44. *See* R. Dworkin, Law's Empire 312, 337-41; *see also* O'Connell, *supra* note 30, at 419-20.

45. *See* J. Fleming, The Law of Torts 114 (7th ed. 1987). "But, save in exceptional cases . . . the legislature's silence on the question of civil liability rather points to the conclusion that it either did not have it in mind or deliberately omitted to provide for it." *Id.*

46. *See, e.g.,* Utley v. Hill, 155 Mo. 232, 55 S.W. 1091, 1103 (1900); Plevy v. Schaedel, 44 N.J. Super. 450, 454-55, 130 A.2d 910, 913 (1957); Burnette v. Wahl, 284 Or. 705, 711, 588 P.2d 1105, 1109 (1978). *Accord* Thayer, *supra* note 6, at 320.

47. Justice Hans Linde makes this point in Bob Godfrey Pontiac v. Roloff, 291 Or. 318, 342, 630 P.2d 840, 854 (1981):

> To assume that statutory silence means to exclude civil recovery attributes to the lawmakers a needlessly hostile policy toward making whole the intended

statutes, the court should decide whether a tort remedy should be allowed.

A few courts offer a third basis for attributing judicial actions to the legislature when a statute is declaratory and thus provides no express remedy, or when a statute provides a criminal or administrative penalty, but in no way provides a remedy to the injured party.[48] Because statutory duty cases are by definition ones where no common law action exists, courts treat the lack of an effective remedy for the plaintiff as an indication that the legislature intended to impliedly create a tort action. These courts turn the traditional equitable doctrine of no right without a remedy into a means for determining legislative intent. Once again, such courts are using a legal fiction. Although no right without a remedy may be a sound doctrine, it does not address the issue of the legislature's intention. Instead, it provides a principled basis for the court to create a new common law action.[49]

Courts which wholly attribute statutory duty actions to the legislature are refusing to acknowledge that courts are partially responsible for those actions. Statutes which neither expressly nor by clear implication create tort actions are not the source of statutory duty actions; they are also not the source of prohibitions against statutory duty actions. Although such a statute provides an obligation, it does not provide a civil remedy. Whether a remedy should be provided and, if so, what that remedy should be are issues courts should determine.

B. The Roles of Judge and Jury in Statutory Duty Actions

The judicial creation of a new tort action based on a statutory duty presents issues concerning the roles of the legislature, judge, and jury.

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beneficiaries of a statutory obligation imposed for their protection. Rather, when a plaintiff seek damages for injuries of a kind which a prohibitory or regulatory law was enacted to prevent, the court must decide without preconceived assumptions.

48. *See, e.g.,* Cutler v. Wandsworth Stadium, Ltd., 1949 A.C. 398, 407. *See infra* notes 131-33 and accompanying text.

49. The source of "no right without a remedy" has been traditionally judicial. *See* Foy, *supra* note 28, at 528. *See also* Texas Pac. Ry. v. Rigsby, 241 U.S. 33, 43 (1916); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). In many states it is also a state constitutional doctrine. *See generally* Schuman, *Oregon's Remedy Guarantee: Article 1, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35 (1986).

Oklahoma law is an exception to the claim that "no right without a remedy" is not statutory. An Oklahoma statute provides: "Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation thereof in money, which is called damages." OKLA. STAT. ANN. tit. 23, § 3 (West 1955). A few Oklahoma cases have used this statute as the basis for providing new tort actions. *See, e.g.,* Johnson v. Harris, 187 Okla. 239, 102 P.2d 940 (1948); Crosbie v. Absher, 174 Okla. 593, 51 P.2d 970 (1935); Copeland v. Anderson, 707 P.2d 560, 564 (Okla. Ct. App. 1985).

Under a traditional negligence analysis, the judge determines whether the defendant owed the plaintiff a duty of care.[50] The jury determines whether there was a breach, cause in fact, foreseeability/proximate cause, and damages.[51] In a statutory duty action, the statute provides the duty the defendant owed to the plaintiff.[52] The judge is responsible for instructing the jury that the legislature has determined that the defendant owed this duty.

Of the remaining negligence elements, the issue of foreseeability presents the most difficulty because of an overlap between the focus test's function in determining the statute's applicability and foreseeability's "scope of duty" function.[53] If the focus test is crucial to the statutory duty analysis, and if this test supersedes foreseeability, a court's

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50. L. Green, Judge and Jury 30 (1930); Prosser & Keeton, *supra* note 7, at 236. In most negligence cases it is presumed that the defendant owed plaintiff a general duty of reasonable care. *See* Terry, *Negligence*, 29 Harv. L. Rev. 40, 52 (1915): "There is a negative duty of due care of very great generality, resting upon all persons and owed regularly to all persons, not to do negligent acts." *Accord* E. White, Tort Law in America 57 (1985), which refers to Professor Terry's views and says that they were "a restatement of Holmes' 'duty of all to all,' first formulated in 1873." *See also* Holmes, *The Theory of Torts*, 7 Am. L. Rev. 652 (1873) (Mark DeWolfe Howe attributes this essay to Holmes in M. Howe, Justice Oliver Wendell Holmes: The Proving Years 64 (1964)).

51. Green, *supra* note 30, at 30-31. The terms proximate cause and legal cause are frequently used in place of the term foreseeability. *See* Prosser & Keeton, *supra* note 7, at 165; Restatement (Second) of Torts § 328C (1965). Furthermore, cause in fact is often treated as a subcategory of proximate or legal cause. Restatement (Second) of Torts §§ 328c, 431 (1965).

In addition, many courts and commentators limit cause in fact to "but for" (*sine qua non*) causation. *See* Harper, James & Gray, *infra* note 53, § 20.2 at 91. Others apply a "substantial factor" test which requires that "defendant's conduct has such an effect in producing the harm as to lead reasonable men (sic) to regard it as a cause." Restatement (Second) of Torts § 431 comment a (1965). *See also* Smith, *Legal Cause in Actions of Torts*, 25 Harv. L. Rev. 103, 223, 229 (1911). I prefer "substantial factor" to "but for" in assessing cause in fact because it leaves the jury a little bit of judgment beyond the purely factual issue of whether A was a cause of B. If substantial factor were the test for cause in fact in a statutory duty case it would allow the jury to retain a small degree of normative input when focus entirely preempted foreseeability. *See infra* note 63 and accompanying text.

52. If the duty is mandatory and specific, see *infra* note 67 and accompanying text, some courts may also use the statute to determine what constitutes breach, thereby making defendants strictly liable for the consequences of their prohibited acts. *See, e.g.*, Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983) (described as an implied statutory tort action, but actually a statutory duty action). Most statutes used to affect civil liability are strict liability statutes. *See* Forell, *supra* note 6, at 263.

In cases involving mandatory and specific duties, all that remains for the jury to determine on the breach question is whether the defendant did the prohibited act.

53. F. Harper, F. James & O. Gray, The Law of Torts ch. 18 (2d ed. 1986).

finding that a focused statute provides the duty precludes the jury from determining the scope of duty.

Focus is the means courts use to determine whether the legislature intended that persons like the defendant owed a certain statutory duty to persons like the plaintiff. "[I]t is only with reference to the risks perceived by the lawmakers that the actor has set his judgment up against theirs in omitting a statutory requirement."[54] Unless a finding of focus is made, the statute cannot realistically be considered the source of the defendant's duty to the plaintiff. Without focus, the statute is only some evidence of what the common law rule should be.[55]

Examination of the focus and foreseeability tests shows that they are redundant. A statute has focus if its purpose is to protect persons like the plaintiff from the risk of harm the plaintiff suffered. This is the test courts usually apply to determine whether a statute ought to affect a civil liability.[56] Although tests for foreseeability have been described in many different ways, there is widespread agreement that foreseeability tests address whether it is fair to hold the defendant responsible to someone in the plaintiff's situation for the risk of harm the plaintiff suffered.[57] When one compares the tests for focus and foreseeability, their similarity is apparent.[58]

The functions of focus and foreseeability are also similar. Focus limits a statutory duty's use to tort cases that serve the purpose the statute was intended to accomplish; focus provides the statutory duty's boundaries. The function of foreseeability is to limit defendant's liability to situations where, applying community standards, it is fair and reasonable to find liability.[59] It limits liability by having the jury determine

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54. HARPER, JAMES & GRAY, *supra* note 53, § 17.6, at 629 n.32.

55. RESTATEMENT (SECOND) OF TORTS § 288B comment d (1965); HARPER, JAMES & GRAY, *supra* note 53, § 17.5, at 605-06.

56. *See, e.g.*, Ontiveros v. Borak, 135 Ariz. 500, 667 P.2d 200, 211 (1983) (statutory duty); Lange v. Minton, 303 Or. 484, 488, 738 P.2d 576, 578 (1987) (statutory duty); Stachneiwicz v. Mar-Cam Corp., 259 Or. 583, 586, 488 P.2d 436, 438 (1971) (negligence per se); Erickson v. Kongsli, 240 P.2d 1209, 1210 (Wash. 1952) (negligence per se). *Accord* HARPER, JAMES & GRAY, *supra* note 53, § 17.6, at 628; MORRIS, ON TORTS 168 (2d ed. 1980); W. PROSSER & W. KEETON, ON TORTS 224-25 (5th ed. 1984).

57. *See* HARPER, JAMES & GRAY, *supra* note 53, at 655. "The obligation to refrain from that particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous. . . . [This] is the prevailing view." *Id.*

58. *Id.* at 662-63.

59. *See, e.g.*, HARPER, JAMES & GRAY, *supra* note 53, at 657-59, 747; O'Connell, *supra* note 30, at 432-33 ("But foreseeability has relevance in negligence cases only in its normative sense: harm is deemed foreseeable only if we decide that defendant is eligible for the imposition of liability.").

The jury's roles in tort actions are that of factfinder, law applier, and determiner

who ought to be protected from what risks in the particular set of circumstances which the jury concludes existed in the case before them. Although foreseeability is sometimes described as purely a question of fact,[60] it is more accurately a mixed question of fact and policy. The jury must determine what actually happened and then make the normative determination of whether the plaintiff and the risk of harm the plaintiff suffered were *reasonably* foreseeable; thus, "the concept of foreseeability is elastic."[61] The foreseeability element is satisfied where the defendant actually foresaw neither the plaintiff nor the risk because defendant's failure to foresee may have been unreasonable. Foreseeability is also satisfied when a reasonable person could not have foreseen either the way the accident occurred or the extent of injury to plaintiff.[62] Both focus and foreseeability are means of deciding what the limits on defendant's duty *ought* to be. Therefore, the determination that a statute is focused should preclude the jury's determination of foreseeability.[63]

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and applier of community norms. Defenders of the jury's role as determiners of social values argue that it is more appropriate that jurors, instead of trial judges, determine such things as the scope of duty based on foreseeability. They assert that jury determinations of what is fair are more likely to represent the community's values than would a judge's determination. The jury is viewed "as a microcosm of the community, applying the moral standards forged by society, democratizing the judicial process and ameliorating the harshness of rules of law." *Id.* at 414-15. Thus described, it provides the next best thing to a legislative determination of who and what are deserving of legal protection. *But see* L. GREEN, JUDGE AND JURY 412-17 (1930).

60. "Foreseeability is a judgment about a course of events, a factual judgment that one often makes outside any legal context." Fazzolari v. Portland School Dist. No. 1J, 303 Or. 1, 4 734 P.2d 1326, 1327 (1987). *But see* O'Connell, *supra* note 30, at 395: "There is language in . . . opinions which might be taken as an indication that the court considers foreseeability as an empirical fact. But this position cannot be taken seriously because the term is always defined in each case by the decision maker's conceptions of the defendant's liability."

61. HARPER, JAMES & GRAY, *supra* note 53, § 18.2, at 669.

62. Most courts and commentators agree that the exact manner in which the injury occurs is irrelevant to the question of foreseeability; only the general risk of harm needs to be reasonably foreseeable. "[T]he 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 v. Portland School Dist. No. 1J, 303 Or. 1, 21, 734 P.2d 1326, 1338 (1987).

Furthermore, most courts and commentators agree that so long as the general risk of harm to plaintiff was reasonably foreseeable, the fact that the extent of harm was much greater than a reasonable person would have anticipated is irrelevant. It is a "universally accepted rule that the defendant takes the plaintiff as he finds him and will be responsible for the full extent of the injury even though a latent susceptibility of the plaintiff renders this far more serious than could reasonably have been anticipated." Petition of Kinsman Transit Co., 338 F.2d 708, 724 (2d Cir. 1964).

63. The one exception to this when both a common law negligence action exists and a permissive statute is present is discussed *infra* note 88 and accompanying text.

The essential corollary to this is that if a statute is not focused, it should not preclude a jury's determination of foreseeability even though it is somewhat relevant to the case at bar.

For example, if a statute requires landlords to maintain their rental property in a habitable condition for the protection of their tenants, and a tenant is injured because a landlord violated this duty, the statute is focused and the court should consider incorporating the statutory duty into a new common law liability rule. In such a case, the jury's foreseeability role was preempted. In contrast, if a trespasser who occupied the landlord's premises without the landlord's consent is injured, the statute is not focused, and the statutory duty should not be the basis for the court's common law rule. It might be a factor the court considers in determining whether to allow injured trespassers to bring an action. However, if the court allows an action, the statute should in no way change the judge's role as the determiner of duty and the jury's role as the determiner of foreseeability.

Thus, in the case of the injured tenant, the court might use the statutory duty as the basis of a new tort action. If it did, there would be no foreseeability issue for the jury to decide because the court's finding of focus would determine the scope of duty question. In the case of the injured trespasser, the court could create a duty if it found one was appropriate, and the jury would determine the scope of that duty through a foreseeability test.[64]

Deciding whether the legislature determined the scope of a duty, or whether the jury should do so, requires courts to acknowledge that it is often difficult, if not impossible, to discover what the legislature intended. Courts should be conservative in determining a statute's cov-

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64. The presence of a habitability statute could cut either way on the question of whether the court should create a tort action for an injured trespasser. On the one hand, the court might conclude that the legislature provided protection to one class of persons with the intent of excluding all others. Creation of a new tort action would therefore interfere with the purpose of the statute. On the other hand, the court might conclude that the legislature's express provisions protecting some people from the risk of harm that befell plaintiff is evidence that the legislative purpose would be best served if the court provided tort actions for all persons injured when the conduct the statute prohibited was engaged in.

If there was a question of fact about whether plaintiff was a trespasser, then it might be appropriate for the court to instruct the jury that if it found plaintiff was a tenant, no issue of foreseeability would be allowed. On the other hand, if the jury found that the plaintiff was a trespasser, and if the court decided to allow an action by a trespasser, the jury would apply a foreseeable plaintiff/foreseeable risk test. The harder case would be where the injured party was a tenant's guest. *See* Daniels v. Brunton, 7 N.J. 102, 80 A.2d 547 (1951); Humbert v. Sellers, 300 Or. 113, 708 P.2d 344 (1985). The court would have to examine the legislation closely to determine whether tenant's guests were intended to be protected and instruct the jury accordingly.

erage, and only base a civil action on the statutory duty when persons and risks fail within the core of the statute's coverage.[65] Courts should not claim legislative authority as the basis for what was actually judicial law-making.

When cases involve legislation of uncertain applicability, courts should acknowledge that although the statute may be relevant to the court's decision whether to create a new action, it is not focused. Any allowed action is purely a judicial creation, and the court should allocate functions between the judge and jury in the usual way. In these cases, courts should leave the scope of duty issue to the jury's application of the foreseeability test.[66]

II. The Different Kinds of Statutory Duties

A. The Standard of Care in Statutory Duty Actions

A focused statute can be the source of the duty to prevent injury. A related issue is what standard of care should be applied when a statute is the source of a tort action's duty. Statutory language varies greatly. The most important variation concerning the standard of care is mandatory "shall" language contrasted with permissive "may" language.

1. Mandatory Statutory Duties.—Most courts addressing the issue of the standard of care involving a focused statute have done so in the negligence per se context. Typically, the statutes use mandatory language such as "shall" or "must" and describe the prohibited or mandated conduct very specifically. Classic examples of these statutes are various traffic regulations concerning speed limits, stop signs, and traffic lights. When violations of these statutes are prosecuted criminally, the standard of care is strict liability; that is, if defendants engaged in the prohibited conduct they are guilty.[67] When these statutes are used in the civil arena, more leeway is provided through whatever negligence per se test a particular jurisdiction applies. Some form of either negligence per se with excuses[68] or prima facie evidence of negligence[69] is most commonly used.

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65. Gattman v. Favro, 306 Or. 11, 757 P.2d 402 (1988). *See* Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 607-08 (1958).

66. Of course, where the evidence presented is insufficient to allow a reasonable jury to find foreseeability, the court can determine the scope of duty/foreseeability issue. *See, e.g.*, Hefty v. Comprehensive Care Corp., 307 Or. 247, 766 P.2d 1026 (1988). The court said: "[I]n an extreme case a court can decide that no reasonable factfinder could find the risk foreseeable. . . . This is an 'extreme case.'" *Id.*

67. LaFave & Scott, Criminal Law 242 n.1 (2d ed. 1986).

68. Singleton v. Collings, 40 Colo. App. 340, 574 P.2d 882 (1978); Carter v.

Whatever negligence per se standard of care a court uses in cases in which a common law negligence action already exists is equally appropriate as the uniform standard used when a court creates a new mandatory statutory duty action. Nevertheless, courts sometimes use a different standard of care in mandatory statutory duty cases without providing any explanation. For example, the District of Columbia Court of Appeals recently created two statutory duty actions. One used an ordinary negligence standard of care; the other used the District's negligence per se standard.

In *Turner v. District of Columbia*,[70] a mother sued the District of Columbia for the wrongful death of her child, alleging the District had breached its specific mandatory duties under the Child Abuse Prevention Act.[71] Because the District had failed to remove plaintiff's infant son from his abusive father's custody, the baby died of starvation and dehydration.[72] The District of Columbia Court of Appeals previously had held, based on the much criticized but widely followed public duty doctrine,[73] that no tort action lay against the government when the injury allegedly resulted from the government's failing to provide public services.[74] In *Turner*, the court rejected this common law rule because of the presence of a number of focused statutes. The District's standard of care when a common law negligence action already existed and a focused statute was present was negligence per se with excuses.[75] Nevertheless, in this statutory duty action based on the Child Abuse Prevention Act, the court declared that the standard of care was ordinary negligence.

The use of the ordinary negligence standard of care in *Turner* was inconsistent with the District of Columbia courts' use of the negligence per se with excuses standard of care, both in its cases in which a common

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William Sommerville & Son, Inc., 584 S.W.2d 274, 278-79 (Tex. 1979). *See also* RESTATEMENT (SECOND) OF TORTS § 288A (1965).

69. *See, e.g.*, Satterlee v. Orange Glenn School Dist. of San Diego County, 29 Cal. 2d 581, 592, 177 P.2d 279, 285 (1947); Zeni v. Anderson, 397 Mich. 117, 243 N.W.2d 270 (1976); Freund v. DeBuse, 264 Or. 447, 451, 506 P.2d 491, 493 (1973); Duncan v. Wescott, 142 Vt. 471, 476, 457 A.2d 277, 279 (1983).

70. 532 A.2d 662 (D.C. 1987).

71. 24 D.C. Reg. 3341 (1977) (codified as amended at D.C. CODE ANN. §§ 6-2101 to -2127 (1981 & Supp. 1987)).

72. *Turner*, 532 A.2d at 666.

73. This doctrine rejects tort liability for public entities because the duty to protect is owed only to the public at large and not to any particular individual who might be injured unless a special relationship exists. *See infra* notes 107-08 and accompanying text.

74. Platt v. District of Columbia, 467 A.2d 149 (D.C. 1983).

75. Leiken v. Wilson, 445 A.2d 993, 1002 (D.C. 1982); Bauman v. Sragow, 308 A.2d 243, 244 (D.C. 1973).

law negligence action already existed, and in a later specific and mandatory statutory duty case, *Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.*[76] *Zhou* presented the issue of whether the District of Columbia's Alcoholic Beverage Control Act,[77] which provided that tavern owners had a statutory duty not to serve alcohol to intoxicated persons, was an appropriate basis for a tort action against a tavern owner by a third party injured in an automobile accident with a drunk driver. This was a case of first impression.[78] In *Zhou,* the court created a tort action because of the presence of a focused statute. Without the statutory duty, the court would not have allowed a tort action.[79]

Although no common law negligence action against a tavern owner existed, the court labeled the new action it created based on a specific and mandatory statutory duty, "negligence *per se*."[80] As noted earlier,

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76. 534 A.2d 1268 (D.C. 1987).

77. D.C. CODE ANN. §§ 25-101 to -139 (1981). The language of this statute arguably places it in the permissive rather than mandatory category. It prohibits tavern owners from "permit[ting] on the licensed premises . . . the consumption of any beverage by any intoxicated person. . . ." The use of the word "permit" in other contexts has been treated as providing for exercise of some judgment and therefore as making an ordinary negligence standard of care appropriate. *See infra* note 87 and accompanying text.

78. Apparently, this issue had never been presented on a purely common law basis.

79. Certainly, the traditional common law rule has been that, unless there is a focused statute, a tavern owner is not liable to third parties for injuries drunk drivers cause. *See supra* note 10. However, starting with Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959), many jurisdictions have changed their common law rule to allow liability.

See also Mitseff v. Wheller, 38 Ohio St. 3d 112, 526 N.E.2d 798 (1988), in which the court created a new statutory duty action against a social host who served alcohol to a minor who was then involved in an auto accident in which plaintiff was injured. The court distinguished *Mitseff* from a previous case, Settlemyer v. Wilmington Veteran's Post No. 49, 11 Ohio St. 3d 123, 464 N.E.2d 521 (1984), in which the court had refused to create a new tort action against a social host who served a visibly intoxicated guest who was then involved in an auto accident in which plaintiff was injured. The court explained:

> There exists a clear distinction between *Settlemyer* . . . and the case before this court. *Settlemyer* concerned a social host providing alcohol to one who was apparently an adult guest, an act that is *not precluded by statute.* However, appellee provided Johnson, a seventeen-year-old minor, with alcohol. This action was clearly in violation of R.C. 4301.69. . . . Therefore, it is incorrect to maintain that appellee's action, which violated a statute, can be equated with *Settlemyer.* . . . The statute created a duty that appellee, because of Johnson's age, refrain from furnishing Johnson with alcohol. Accordingly, *Settlemyer,* being distinguishable, does not apply.

Mitseff, 38 Ohio St. 3d at 114, 526 N.E.2d at 800 (emphasis added).
The *Mitseff* court does not say what kind of tort action they created, but most likely, because negligence per se was not mentioned, the action is for ordinary negligence.

80. *Zhou,* 534 A.2d at 1275. For a similar treatment and labelling of a new statutory duty action against a tavern owner as "negligence pe se," see Davis v. Billy's

negligence per se is the doctrine courts apply when changing a common law negligence action into a more pro-plaintiff action based on the presence of a focused statute.[81] Because there was no preexisting negligence action, the "negligence per se" label was technically incorrect. The misuse of this terminology tends to gloss over the important fact that the court created a new tort action.

Substantively, however, it is appropriate to treat mandatory statutory duties as affecting the common law in the same way, whether or not a common law negligence action previously has been or now would be allowed without a statute.[82] Furthermore, regardless of the label, when

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Con-Teena, Inc., where the court found that plaintiff's complaint

> was drafted to state a cause of action for negligence *per se* for violation of ORS 471.131(1), rather than as a cause of action for ordinary common law negligence. It may be that the allegations of the complaint are sufficient to state such a cause of action. Because, however, the complaint appears to have been drafted on a theory of negligence for violation of the statute and because we believe that it states such a cause of action . . . we prefer not to decide in this case whether or not such allegations may also be sufficient to state a cause of action for common law negligence.

284 Or. 351, 354, 587 P.2d 75, 76 (1978).

Another area where statutory duty actions are mislabelled "negligence per se" is dog bite cases. *See, e.g.,* Jensen v. Feely, 691 S.W.2d 926, 928 (Mo. Ct. App. 1985); Miller v. Hurst, 448 A.2d 614, 618 (Pa. Super. Ct. 1982).

See also Wright v. Moffitt, 437 A.2d 554 (Del. 1981); Sagebrush, Ltd. v. Carson City, 660 P.2d 1013 (Nev. 1983).

81. *See supra* note 7.

82. Some courts do treat mandatory focused statutes as creating stricter standards of care both where a common law negligence action already exists and where it does not, but apply different stricter standards of care in the two situations. For example, the Oregon Supreme Court applies a prima facie evidence of negligence standard of care to cases involving focused statutes in which a common law negligence action already exists. *See* Freund v. DeBuse, 264 Or. 447, 506 P.2d 491 (1973); Barnum v. Williams, 264 Or. 71, 504 P.2d 122 (1972).

In contrast, when a mandatory focused statute is used as the basis of a new tort action, the standard of care is strict liability. This use of a more stringent standard of care in statutory duty cases than in cases involving similar mandatory statutes when common law negligence already exists is hard to justify.

In addition, the Oregon Supreme Court has labelled these statutory duty actions implied statutory torts. *See* Humbert v. Sellars, 300 Or. 113, 708 P.2d 344 (1985); Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983). An implied statutory tort is a tort action which the legislature actually intended to create, but failed to expressly provide for it. *See supra* notes 27-28 and accompanying text. Such actions are exceedingly rare. In both *Nearing* and *Humbert*, there is little evidence that the legislature actually thought about a tort action and intended to provide for one. It appears that the Oregon court is attributing new tort actions to the legislature which are actually common law statutory duty actions. The District of Columbia recently was presented with the opportunity to apply a similar implied statutory tort analysis to a statutory duty case. In Rong Yao Zhou v. Jennifer Mall Restaurant, 534 A.2d 1268 (D.C. 1987), discussed *supra* in the

a common law tort action's mandatory duty was derived from a focused statute, the standard of care should be consistently higher than mere negligence. A higher standard provides appropriate deference to the legislative decision to strictly prohibit the defendant's conduct. The higher standard of care will make it more difficult for the jury to conclude that the defendant's conduct was not culpable.[83] Therefore, the court's use of its negligence per se standard of care in *Zhou* is sounder than its use of the ordinary negligence standard of care in *Turner*, and should be applied in all mandatory statutory duty cases arising in the District of Columbia.[84]

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text accompanying note 76, the court said the following:

> Incorporating into the common law a standard of care set by a legislative enactment is distinct from determining that a cause of action arises, by implication, under a statute. The latter task is a matter of statutory construction, requiring the court to determine whether the legislature intended something other than that which it provided expressly. . . . Courts appropriately refrain from making such inferences except under certain narrowly defined circumstances. . . . By contrast, the decision to adopt from a penal statute a standard of care to be applied in determining common law negligence is "purely a judicial one, for the court to make". . . . Defining the contours of common law liability, including the duty that may have been breached in a negligence case, is a task traditionally within the purview of the judicial branch.

Id. at 1273-74.

Similarly, the Arizona Supreme Court rejected an implied statutory tort analysis in their case overruling the common law rule that a tavern owner owed no duty to a third party injured by a drunk driver. Ontiveros v. Borak, 667 P.2d 200 (Ariz. 1983). In *Ontiveros*, the court declared that there was both a simple common law negligence action and a negligence per se action against the tavern owner.

> The question before us is not whether the legislature established a statutory cause of action, but whether there is a "duty" or "obligation" imposed on the tavern owner. We believe that the portion of the statute forbidding the sale of liquor to an already intoxicated person was "enacted to protect members of the public who might be injured or damaged as a result of the intoxication which was aggravated by the particular sale of the alcoholic liquor". . . . We conclude, therefore, that the legislative enactment imposes an obligation upon tavern owners and that the particular obligation under consideration is one which was intended partly for the safety of others. We therefore recognize the duty described in that statute as a duty imposed by statute and adopted by the common law.

Id. at 210-11.

83. *See* HARPER, JAMES & GRAY, *supra* note 53, § 17.6, at pp. 621-22. The only courts which can justify routine selection of an ordinary negligence standard of care for mandatory and specific statutory duty cases are those who also refuse to treat specific mandatory statutes as anything more than evidence of negligence when a common law negligence action already exists. *See, e.g.*, Duplechain v. Turner, 444 So. 2d 1322, 1326 (La. Ct. App. 1984); Shatz v. TEC Technical Adhesives, 174 N.J. Super. 135, 415 A.2d 1188 (1980).

84. One possible explanation for the different standards of care used in *Zhou* and

2. Permissive Statutory Duties.—Treating similarly worded statutory duty language consistently, whether a common law negligence action existed, is also appropriate for the other category of cases involving focused statutes: those that used either permissive or vague general language. Even when a common law negligence action already existed, few commentators have addressed how courts should treat these types of statutes.[85] Some courts have recognized that, in regard to the applicability of the negligence per se standard of care, courts should treat mandatory statutes differently from either statutes that describe conduct very generally or statutes that use permissive language. For example, the Ohio Court of Appeals in *Swoboda v. Brown*[86] said:

> Where a specific requirement is made by statute and an absolute duty thereby imposed, no inquiry is to be made whether the defendant acted as a reasonably prudent man (sic), or was in the exercise of ordinary care. In such a situation, the obligation

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Turner is that *Zhou* involved a private defendant and the defendant in *Turner* was a governmental entity. A court could conclude that, although the public duty doctrine which precludes governmental liability in a large class of cases is inapplicable when a specific and mandatory statutory duty exists, the public policy of limiting the liability of governmental entities justifies applying a more pro-defendant standard of care to the conduct of governmental entities. If such a rationale was the basis for the use of different standards of care in *Zhou* and *Turner*, the court failed to note this anywhere in either opinion.

Such a distinction might run into difficulties under a particular state's tort claims act if the act was one which made public bodies liable for their torts to the same extent as private persons. For example, in Adam v. State the court said this about the public duty doctrine: "The state tort claims act provides that the State is liable 'in the same manner, and to the same extent as a private individual under like circumstances. . . .' § 25A.24. It clearly excludes the public duty doctrine." 380 N.W.2d 716, 724 (Iowa 1986).

In the federal context a recent Sixth Circuit decision, Schindler v. United States, 661 F.2d 552 (6th Cir. 1981), applied the reasoning of a number of earlier United States Supreme Court decisions interpreting the Federal Tort Claims Act. *See* United States v. Muniz, 374 U.S. 150 (1963); Rayonier, Inc. v. United States, 352 U.S. 315 (1957); Indian Towing Co. v. United States, 350 U.S. 61 (1955). The Act's pertinent language says that the federal government can be sued "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). The *Schindler* court interpreted this language as meaning the state's public duty doctrine could not bar an action based on violation of a federal statute. 661 F.2d at 559. States with similar tort claims act language may feel equally compelled to jettison distinctions between tort rules applied to public entities and private parties.

85. Many authorities seem to presume that courts will treat all focused statutes similarly, and that treatment will be whatever the negligence per se test is in the particular jurisdiction. *See* HARPER, JAMES & GRAY, *supra* note 53, § 17.6; PROSSER & KEETON, *supra* note 7, § 36; RESTATEMENT (SECOND) OF TORTS § 288A, B and § 874A comment e (1965).

86. 129 Ohio St. 512, 196 N.E. 274 (1935).

> and requirement has been fixed and established by law. . . . Where the standard of duty is thus fixed and absolute, it being the same under all circumstances, the failure to observe that requirement is clearly negligence per se. But, where duties are undefined, or defined only in abstract or general terms, leaving to the jury the ascertainment and determination of reasonableness and correctness of acts and conduct under the proven conditions and circumstances, the phrase "negligence per se" has no application.[87]

Courts which reject negligence per se when a focused statute has used generalized or permissive language are concluding that the appropriate standard of care is ordinary common law negligence. Thus, if a common law negligence action exists,[88] unlike negligence per se cases, the permissive statute does not affect the plaintiff's burdens of production or proof on the issue of reasonableness. Courts which use focused statutes to create new statutory duty actions also should prefer the ordinary negligence standard of care when the statutes' duty language is generalized or permissive.[89]

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87. *Id.* at 522, 196 N.E. at 276. *Accord* Dahle v. Atlantic Richfield Co., 725 P.2d 1069, 1073-74 (Alaska 1986).

> In order for a provision to be the basis of a negligence per se instruction, it must set forth a specific standard of conduct beyond that defined in a common law duty. . . . This provision is not the proper basis for a negligence per se instruction because it amounts to little more than a duplication of the common law tort duty to act reasonably under the circumstances.

Dahle, 725 P.2d at 1073-74.

88. However, these courts typically permit the statute to be admitted as a factor for the jury to consider on the issue of whether defendant acted reasonably. *See, e.g.*, Bachner v. Rich, 554 P.2d 430, 442 (Alaska 1976).

89. Courts which reject negligence per se when focused statutes use generalized or permissive language usually do not address specifically whether the statute affects the plaintiff's burden of showing that the risk was foreseeable. This is one situation where a preexisting common law action for negligence should result in applying a foreseeability test despite the presence of a focused statute.

When a common law action already exists, the permissive statute neither affects the standard of care as does negligence per se, nor is the source of the duty the same as in statutory duty actions. Therefore, the statute does not really change anything; it serves no independent function apart from the existing negligence action. In contrast, if no common law negligence action exists and the basis for creating one is the permissive statute, focus should preempt foreseeability because the court can only be basing the new action on the statute if the plaintiff and the risk of harm involved are those which the statute was enacted to cover. *See supra* note 63 and accompanying text.

In Dunlap v. Dickson, 307 Or. 175, 765 P.2d 203 (1988), the court stated that the negligence action was a common law action effectuating the permissive statute's intent. The court said: "We conclude that plaintiff may state a claim for common law negligence. This accords with legislative policy. . . . The legislature has enacted a statute . . . that

How courts treat generalized or permissive statutes when a common law action for negligence already exists is less important than how courts treat such statutes when there is no preexisting negligence action. In the former situation, a tort remedy exists regardless of how the court treats the statute. In the latter situation, the court must decide whether to allow a tort remedy. With generalized or permissive statutory duties, there is less impetus for courts to allow new tort actions even when these actions would aid in the accomplishment of a statute's purpose.[90] Nevertheless, in many cases the presence of the focused statute using permissive language will be an important factor in a court's decision to create a new action. If, but for the permissive statute, the court probably would not have created the new action, the court should note this and limit the scope of the duty to act reasonably to those persons and risks of harm which the legislature intended to cover.[91]

3. Statutes Using "Permit" or "Allow."—When the statutory language included "permit," or "allow," most courts use simple negligence's reasonableness standard of care.[92] "Permit" or "allow" are frequently used in statutes applicable to vehicle-livestock collision cases. These cases represent how courts typically treat such statutory language.[93]

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prohibits *permitting* livestock to run at large upon the highway. . . ." *Id.* at 181, 765 P.2d at 206 (emphasis added).

In a case like *Dunlap*, focus should preempt foreseeability if the court only created the tort action because of the existence of the focused permissive statute. If, on the other hand, the court would have created a negligence action even without a focused statute, the jury should determine foreseeability.

90. *See* Buckley, *supra* note 6, at 221; RESTATEMENT (SECOND) OF TORTS § 874A comment h(1) (1965).

91. In contrast, if the court would have created a new negligence action even if the statute had not existed, then the statute is not the basis of the new action's standard of care or anything else, and foreseeability should remain an element of plaintiff's chief case.

92. *See infra* note 102 and accompanying text.

93. A statutory duty area where statutes and ordinances often use "permit," "allow," or similar discretionary language is off-premises dog bite cases. However, instead of allowing simple negligence actions, many courts mislabel their new action based on the statutory duty "negligence per se."

The following ordinance is typical:

> (a) The following acts or conditions are hereby declared to be public nuisances, and it shall be unlawful for any owner or custodian of an animal to cause, suffer, permit, keep or maintain any such nuisance;
>
> (1) An animal, other than a cat of a species felis catus, found running at large, or which has run at large on two or more occasions.

SALEM OR., R.C. 91.015(a)(1). The Oregon Supreme Court, in Lange v. Minton, 303 Or. 484, 738 P.2d 199 (1987), based an action by a boy who was bitten by defendant's dog on the permissive language of this ordinance. They labelled the action "negligence per se" even though prior to this decision no common law negligence action was available

The original United States common law rule in vehicle-livestock collisions was that the owner of the livestock owed no civil duty to prevent the animal from wandering onto the roadway "unless he [had] knowledge of the vicious propensities of the animal or unless he should reasonably have anticipated that injury would result from its being so at large on the highway."[94] Until the mid-twentieth century, courts concluded as a matter of law that a plaintiff could not recover in livestock-motorist collisions.[95] More recently, the common law rule has changed. Owners of livestock now owe a duty to prevent their animals from straying onto the roadway unless there is a statute to the contrary.[96] Often the courts' basis for finding this duty is a fencing-in statute.[97]

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to a person bitten by a dog which was running at large. *See also* Kathren v. Olenik, 46 Or. App. 713, 719-20, 613 P.2d 69, 75 (1980); Jensen v. Feely, 691 S.W.2d 926, 928 (Mo. App. 1985); Alex v. Armstrong, 385 S.W.2d 110, 114 (Tenn. 1964).

94. 4 AM. JUR. 2D *Animals* § 114 p. 364 (1962). *Accord* Annotation, *Liability of Owner of Animal For Damages to Motor Vehicle or Injury to Person Riding Therein Resulting from Collision with Domestic Animal at Large in Street or Highway*, 29 A.L.R. 4th 431, 439 (1984). *See also* Eixenberger v. Belle Fourche Livestock Exch., 75 S.D. 1, 58 N.W.2d 235, 237 (1953); Fox v. Koehning, 190 Wis. 528, 209 N.W. 708 (1926), *overruled,* Templeton v. Crull, 16 Wis. 2d 416, 114 N.W.2d 843 (1962).

95. *See, e.g.,* Fox v. Koehnig, 190 Wis. 528, 209 N.W. 708, 713 (1926). The court concluded:

> [T]he conduct of the horse in running into the automobile in the instant case was a most unusual and unnatural occurrence. It was not the usual conduct of a horse. It was an accident not within the field of reasonable anticipation. It therefore follows that, even if the defendant may have been guilty of a want of ordinary care in failing to maintain a more secure fence around his barnyard, his failure in such respect was not the proximate cause of the damages sustained by plaintiffs.

Id. See also Annotation, *supra* note 94, at 447.

96. *See, e.g.,* Templeton v. Crull, 16 Wis. 2d 416, 114 N.W.2d 843 (1962) (overruling Fox v. Koehnig, 190 Wis. 528, 209 N.W. 708 (1926) (discussed *supra* note 95)).

HARPER, JAMES & GRAY, *supra* note 53, at 258-59, says:

> Several of these states passed "fencing out" statutes. But times and conditions changed and the advent of large cities, heavily populated areas, thickly settled agricultural communities, and the development of important heavy industries, led a number of these states either to abolish or modify the rule permitting cattle to run at large.

For a discussion of similar experience in Canada, see Linden, *supra* note 19, at 59:

> The Ontario courts have utilized legislation making it unlawful for animals to roam the highways to create a duty of care on the part of their owners where at common law none existed. These cases accepted the view that no duty was owed at common law, but manufactured a legislative intention to create civil liability. After the statute was amended in 1939 matters became rather confused until the Supreme Court of Canada finally held that a duty to use reasonable care with regard to animals on modern highways exists independently of any legislation.

97. *See, e.g.,* Dunlap v. Dickson, 307 Or. 175, 765 P.2d 203 (1988).

Therefore, some of the vehicle-livestock accident cases in which courts created new negligence actions are statutory duty cases.[98]

The "fencing in" statutes typically make it unlawful to "permit" or "allow" livestock to run at large on highways.[99] Most courts presented with violations of these statutes have provided a negligence cause of action for the injured motorist.[100] Conversely, where livestock-motorist accidents occurred in jurisdictions governed by "fencing-out" statutes that allow livestock to run at large, the statutes were often the basis for denying civil liability entirely.[101]

Courts' reliance on permissive statutes in livestock-motorist cases as the source of a standard of reasonable care, rather than strict liability

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98. If the court would have created a negligence action even without the presence of the focused statute, it would not be a statutory duty action. In most of the vehicle-livestock collision cases it is unclear whether a negligence action would have been created regardless of the existence of the statute.

99. *See, e.g.*, OR. REV. STAT. § 607.145(1) (1989): "No person owning or having the custody, possession or control of an animal of a class of livestock shall permit the animal to run at large . . . in a livestock district in which it is unlawful for such class of livestock to be permitted to run at large."

100. *See, e.g.*, Hammarlund v. Troiano, 146 Conn. 470, 152 A.2d 314, 315 (1959); Gardner v. Black, 217 N.C. 573, 9 S.E.2d 10 (1940); Parker v. Reter, 234 Or. 344, 383 P.2d 93 (1963); Rice v. Turner, 191 Va. 601, 62 S.E.2d 24, 26 (1950); Hinkle v. Siltamaki, 361 P.2d 37, 41 (Wyo. 1961). *But see* Cosby v. Oliver, 265 Ark. 156, 577 S.W.2d 399, 401 (1979) (rebuttable presumption of negligence); Peterson v. Pawelk, 263 N.W.2d 634, 637 (Minn. 1978) (negligence per se). The tortured analysis in *Peterson* illustrates the problem a court faces when it does not distinguish between mandatory and permissive statutes in its application of negligence per se. When a statute is mandatory, proof of its violation usually results in negligence per se being some form of strict liability. *See supra* notes 68-69 and accompanying text. Negligence per se is found to mean something different in *Peterson*:

> [V]iolation of the statute of negligence per se; thus, if the violation is the proximate cause of injury to another, the person violating the statute is liable for the resulting damage unless the violation is excusable or justifiable under the circumstances of the case. Moreover, the burden of proving excuse or justification is upon the owner. . . . The meaning of the word "permit" as used in the statute . . . clearly negates a legislative intent to impose strict liability on the owner of an animal running at large. . . . Under the evidence, whether defendant . . ., by his conduct, gave the bull an opportunity to run at large or made it possible for him to do so would have been a jury question.

263 N.W.2d at 637. For the plaintiff to benefit from negligence per se he must first show that defendant "gave the bull an opportunity to run at large or made it possible for him to do so." *Id.* This sounds very much like the plaintiff must show the defendant acted unreasonably; therefore, it would seem that negligence per se in no way aids plaintiff's case.

101. *See, e.g.*, Kendall v. Curl, 222 Or. 329, 353 P.2d 227 (1960), which said:

> The legislature has said that stock may range at large on the highways of Umatilla County. . . . If cattle and horses have a right to be on the road, their owner is not negligent in allowing them on the road. . . . There being no duty, there is no breach of a duty, hence no fault, and no liability.

or negligence per se, is entirely appropriate. The following statement in the North Carolina decision, *Gardner v. Black*,[102] provides the usual rationale: "Such a statute as this relating to allowing or permitting livestock to run at large, 'implies knowledge, consent, or willingness on the part of the owner that the animals be at large, or such negligent conduct as is equivalent thereto.'"

Based on such an interpretation of "permit" or "allow," a more demanding standard of care is unjustified. Most statutes using permissive language involve owners of animals or custodians of other people.[103] Because of the difficulty in controlling the actions of an animal or another person, negligence is the appropriate standard of care.

B. The Use of "May" and its Special Applicability to Governmental Bodies

The other statutory language upon which some courts base ordinary negligence actions is "may." The discretion this word implies justifies courts' conclusion that choosing whether to engage in the described conduct only should result in liability if the plaintiff proved the act or failure to act was unreasonable under the circumstances.[104] By far, the greatest number of statutes using the permissive "may," instead of the mandatory "shall," apply to government bodies. Actions against governmental defendants present special problems, particularly when the focused statute is permissive.

While governmental immunity has been statutorily abolished for the most part, various doctrines make it difficult to sue government entities in tort. One major obstacle is the public duty doctrine. This common law doctrine provides that "the duty imposed on state agencies and public officials is one owed to the public generally, and breach of this

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102. 217 N.C. 573, 577, 9 S.E.2d 10, 12 (1940). *Accord* Parker v. Reter, 234 Or. 533, 549, 383 P.2d 69 (1963); Pongetti v. Spraggins, 215 Miss. 397, 61 So. 2d 158 (1952).

103. *See, e.g.*, Or. Rev. Stat. § 421.165(3) (1989) ("The Department of Corrections shall adopt rules to *permit* an inmate confined in a Department of Corrections institution to be granted temporary leave from the institution."); Or. Rev. Stat. § 426.680(1) (1989) ("The superintendent of the facility designated . . . to receive commitments for medical or mental therapeutic treatment of sexually dangerous persons may *grant* a trial visit to a defendant committed as a condition of probation.") (emphasis added).

104. For example, in Bauer v. Southwest Denver Mental Health Center, Inc., 701 P.2d 114 (Colo. Ct. App. 1985), the Colorado Court of Appeals refused to apply its negligence per se standard because the statute involved used the discretionary "may" instead of the mandatory "shall." The court said: "In order for an actionable claim of negligence *per se* to arise, the statute in question must prohibit or require a particular act." *Id.* at 118.

duty does not provide an individual with a cause of action."[105] Simply put, because a duty is owed to all, it is owed to none. The state and its subdivisions owe no duty to render assistance unless, in addition to there being a focused statute, a special relationship existed between the state and the injured party.[106]

Even where the public duty doctrine is no longer the rule,[107] there are two further hurdles the plaintiff may have to overcome when statutes use the permissive "may": duty versus power; and discretionary/planning versus ministerial/operational. The Iowa Supreme Court's 1986 decision, *Adam v. State*, discussed both doctrines.[108]

In *Adam*, the state was liable for economic harm the plaintiff grain producers suffered because the Iowa State Commerce Commission (ICC) negligently licensed and inspected a grain elevator whose owners sub-

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105. State v. Superior Court of Maricopa County, 123 Ariz. 324, 599 P.2d 777, 785 (1979), *overruled*, Ryan v. State, 132 Ariz. 308, 656 P.2d 597 (1982). *See infra* note 109.

106. The Arizona Supreme Court described this doctrine in State v. Superior Court of Maricopa County, 123 Ariz. 324, 599 P.2d 777 (1979), *overruled*, Ryan v. State, 132 Ariz. 308, 665 P.2d 597 (1982). This case involved a class action on behalf of depositors of various insolvent thrift associations against the Arizona Corporation Commission for economic harm suffered because the Commission failed to fulfill various regulatory duties. The court explained that the traditional common law rule treated the state's duty as owed to the general public, and that breach did not result in liability to injured individuals. *Id.* at 785. *Accord* 2 COOLEY, TORTS 385 (4th ed.); Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821, 823 (1981).

The court in *Superior Court of Maricopa County* added that under the public duty doctrine, a statute would not be the source of a duty of care in tort unless the "obligation owing to the general public [was] narrowed into a specific duty to an individual." 665 P.2d at 785. The Arizona court found a special relationship in this case and therefore allowed a tort action even though the language of some of the focused statutes was permissive.

107. The public duty doctrine has been widely criticized. *See, e.g.*, 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 458-59, § 25.06 (1958); PROSSER & KEETON, *supra* note 7, at 1049-50. The modern trend is to reject it entirely. *See, e.g.*, Leake v. Cain, 720 P.2d 152 (Colo. 1986); Ransom v. City of Garden City, 113 Idaho 202, 743 P.2d 70 (1987); Adam v. State, 380 N.W.2d 716 (Iowa 1986); Maple v. City of Omaha, 222 Neb. 293, 384 N.W.2d 254 (1986); Brennan v. City of Eugene, 285 Or. 401, 591 P.2d 719 (1979); Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976). *But see* Everton v. Willard, 468 So. 2d 936 (Fla. 1985).

In 1982, the Arizona Supreme Court overruled State v. Superior Court of Maricopa County, in Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (1982), and held that it would "no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery." 656 P.2d at 599. The court completely abandoned the public duty doctrine, concluding "the parameters of duty owed by the state will ordinarily be coextensive with those owed by others." *Id.*

108. 380 N.W.2d 716 (Iowa 1986).

sequently went bankrupt. There was no preexisting common law tort action.[109] One of the bases for the suit was a permissive statute which provided that the ICC "may" inspect grain dealers.[110] Another statute provided that "'may' confers a power rather than a duty."[111] The court noted that when a power is created rather than a duty, there is no requirement that the state act and that, therefore, there can be no liability for failure to act.[112] However, once the state exercised that power, "it had a responsibility to act with due care."[113]

Denying a statutory duty action unless the state exercised its power by acting affirmatively, even though it was not required to, has its roots in the treatment of voluntary assumption of duty by affirmative conduct, most commonly described as the "Good Samaritan" doctrine.[114] Under this doctrine, a stranger has no duty to assist a person in difficulty or peril. Once the stranger affirmatively acts, liability will exist if the acts are negligent and result in harm to another. When a statute merely creates a power in the state to act, the state is viewed as having the role of the stranger who is under no obligation to act and is liable only if action is taken which negligently injures someone.

The distinction between a duty and a power will not always be determinable by the presence of "shall" instead of "may." As one

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109. *Id.* at 720.

110. IOWA CODE § 542.9 (1989).

111. IOWA CODE § 4.1(36)(c) (1989).

112. *Adam*, 380 N.W.2d at 723.

113. *Id.* In *Adam*, the harm suffered was purely economic. Economic harm is one of the classic "no duty" categories at common law. *Adam* illustrates how a court can use a focused statute to justify creating a tort action when, without the statute, the action would not be permitted. The principled basis for creating the action is that the court finds that the statute was intended to prevent economic harm and effectuates this purpose by creating a statutory duty action to remedy this harm. *Accord* Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983) (a statutory duty action for purely emotional harm).

114. Typically, unless there is a special relationship between the parties, defendant has no duty to rescue plaintiff from harm caused by sources independent of defendant's control. This is illustrated by the lack of a stranger's duty to rescue another person who is drowning even if the stranger is standing next to a life preserver which he fails to throw to the drowning person. *See* RESTATEMENT (SECOND) OF TORTS § 314 (1965).

The "Good Samaritan" doctrine, which allows liability if a stranger acts affirmatively, is an exception to this heartless rule. *See* PROSSER & KEETON, *supra* 7, at 378-82.

RESTATEMENT (SECOND) OF TORTS § 323 (1965) describes the doctrine as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if:
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

See also RESTATEMENT (SECOND) OF TORTS § 324A (1965).

commentator notes: "[S]tatutes inevitably do vary enormously in the extent to which the obligations they impose involve scope for the exercise of judgment and discretion, and the distinction between 'power' and 'duty' will always be to some extent a matter of degree."[115]

When an action is based on allegedly negligent conduct under a permissive statute, most state tort claims acts create the further issue of whether the conduct was an immune discretionary/planning decision.[116] This issue was raised in *Adam* and the court held that, despite the permissive nature of the statute, the negligent conduct did not involve "policy considerations."[117] "The policy-planning decisions were made by the legislature in enacting the . . . act."[118] The discretionary versus ministerial issue may also arise when a statute's language is mandatory, although it will be much less likely that the governmental conduct will be found to involve an immune discretionary decision.[119]

In summary, where a governmental entity is the defendant, there are certain doctrines that merit examination before a court decides to create a new tort action based on a statutory duty. In addition to finding the statute focused, it is necessary to determine whether the jurisdiction still applies the public duty doctrine and, if so, whether there was a specific duty which created a special relationship that excepted the action from the doctrine. The special relationship exception is more likely found when the statute uses mandatory language.

If the case comes within the special relationship exception, or the court has rejected the public duty doctrine, it is then necessary to determine whether the statute creates a duty or only a power. If the statute is permissive, a court is likely to treat it as merely providing a power, and to allow a new tort action only when the governmental entity has, in fact, exercised the power. Finally, especially when the statute is permissive, courts should examine whether the defendant's conduct involved discretion or was merely ministerial. Tort claims acts

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115. Buckley, *supra* note 6, at 221.

116. *See generally* PROSSER & KEETON, *supra* note 7, at 1062. *See also* RESTATEMENT (SECOND) OF TORTS § 895D (1979).

117. 380 N.W.2d at 726.

118. *Id.* at 725. *Accord* Brennen v. City of Eugene, 285 Or. 401, 591 P.2d 719 (1979). *See also* Nordbrock v. State, 395 N.W.2d 872 (Iowa 1986) (court dismissed tort action against the state by shareholders of a bank that became insolvent for its negligence in bank examinations and supervision because the court found that the conduct involved discretionary/planning decisions).

119. This question has been discussed extensively in cases brought under the Federal Tort Claims Act, 28 U.S.C. § 2680(a). *See, e.g.,* Berkovitz by Berkovitz v. United States, 108 S. Ct. 1954, 1963 (1988); Schindler v. United States, 661 F.2d 552, 555-57 (6th Cir. 1981); Griffin v. United States, 500 F.2d 1059 (3d Cir. 1974).

usually authorize the creation of a new tort action only if the conduct is determined to be ministerial.

C. *The Effect of the Doctrine of No Right Without A Remedy on Statutory Duty Analysis*

The next section addresses what effect the venerable doctrine of *ubi ius ibi remedium* (no right without a remedy) should have on a state court's decision to create a new tort action based on a statutory duty.

In fifteenth century England,[120] and probably even nineteenth century America,[121] the existence of a focused statute made a court's job easy. Sir Edward Coke's commentary on the Magna Carta said that "every Act of Parliament made against any injury, mischief, or grievance doth either expressly, or impliedly give a remedy to the party wronged,"[122] and was the source of the "no right without a private remedy" doctrine.[123] It enabled courts to provide a new tort action whenever a statutory duty was breached. Although it has sometimes been described as a maxim of statutory construction,[124] this doctrine has been much too influential for mere maxim. It was the source of remedies clauses in 35 state constitutions.[125] Furthermore, it has been the nonconstitutional source of statutory actions in numerous cases.[126]

The "no right without a remedy" doctrine has been the basis for English "statutory negligence" actions[127] and federal implied rights of actions.[128] The source of both types of action is said to be the legislature. However, if what is meant by "source" is that the legislature impliedly intended to create these actions, this claim is pure fiction. It is incorrect

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120. Prior of Bruton v. Ede, Y.B. Pasch. 10 Edw. 4, fo. 31, pl. 7 (Q.B. 1470), *reprinted in* 47 Selden Society 31 (N. Neilson ed. 1931).

121. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 154-73 (1803).

122. E. Coke, Second Part of the Institutes of the Laws of England 55 (1642).

123. *See* Foy, *supra* note 28, at 524-25; Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 Or. L. Rev. 35, 38 (1986).

124. "One maxim is *Ubi ius ibi remedium*, suggesting that if the legislation created a right it must have been intended to create an adequate remedy to enforce that right." Restatement (Second) of Torts § 874A comment c (1979).

125. Schuman, *supra* note 49, at 40; Note, *State Constitutional Remedy Provisions and Article I, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies*, 64 Wash. L. Rev. 203, 204 (1989); Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, 63 Neb. L. Rev. 150, 170 (1984).

126. *See, e.g.*, Foy, *supra* note 28, at 556 n.234.

127. Fricke, *The Juridical Nature of the Action Upon the Statute*, 76 L.Q. Rev. 240, 243 (1960).

128. *See, e.g.*, Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916).

to describe the doctrine as legislative.[129] As one commentator noted, even in Coke's time, "the right to maintain a private action under a statute did not depend on the text of the statute or the demonstrable intentions of Parliament. The implied right of action depended instead upon a general legal principle extrinsic to the legislation itself."[130] "No right without a remedy" has been, since its inception, a judicial doctrine allowing courts to do what is equitable.[131]

When the doctrine has been found applicable, most courts have not distinguished between statutes which are purely declaratory and those that provide criminal or administrative penalties.[132] However, a few jurisdictions, most notably England, expressly prefer to provide a civil action when a statute does not provide any penalty.[133] The English rationale for this distinction is not tied explicitly to "no right without a remedy." Instead, the English courts claim that when the legislature provides some form of sanction, it is intended to be the exclusive sanction. In contrast, where the legislature provides no sanction, it intended that

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129. An exception to this assertion arguably may exist in the few jurisdictions where a statute such as the one set out below is in effect: "Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages." 23 OKLA. STAT. tit. 23, § 3 (1981), *see* N.D. CENT. CODE § 32-03-01 (1989). *See also* CAL. CIV. CODE §§ 3281, 3282 (1989). *See supra* note 49.

Where such a statute exists, every injury to a person or property as a result of violation of a focused statute may be viewed as requiring a tort remedy. In regard to such a statute one court has said: "It does not create any duties but only provides for a remedy should an established duty be breached." Butts Feed Lots, Inc. v. United States, 690 F.2d 669 (8th Cir. 1982). However, like jurisdictions which have remedies clauses in their constitutions, see *infra* note 127 and accompanying text, jurisdictions with these statutory remedies provisions have not developed any doctrine for routinely using them as the basis for tort actions. *But see* CAL. EVID. CODE § 669 (1967) *discussed in* Holdych, *The Presumption of Negligence Rule in California: The Common Law and Evidence Code section 669*, 11 PAC. L.J. 907 (1979-80) *cited with approval in* Huang v. Garner, 157 Cal. App. 3d 404, 203 Cal. Rptr. 800, 806 n.9 (1984).

130. Foy, *supra* note 28, at 528.

131. In addition, in many states it is provided for in the state constitution. Nevertheless, a theory of constitutional duty actions analogous to statutory duty actions has, so far, not been developed. *See* Schuman, *supra* note 49, at 70.

132. Foy, *supra* note 28, at 527; RESTATEMENT (SECOND) OF TORTS § 874A (1979).

133. *See* Doe d. Bishop of Rochester v. Bridges, 1 B. & Adol. 847, 859 (1831), in which the court said that

> where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case.

See also Buckley, *supra* note 6, at 214-21.

the courts provide a civil remedy.[134] Any discussion of legislative intent as a rationale for distinguishing between statutes which provide a sanction and those that do not is usually yet another fiction.

Under the "no right without a remedy" principle, it is dubious whether the provision of a criminal or administrative penalty is a remedy for injured individuals. Nevertheless, there appears to be a tendency, even among American courts, to create a statutory duty action when the statute is purely declaratory and to deny such a remedy when the statute provides a criminal sanction. For example, in Oregon there are two cases whose different outcomes may be based on the declaratory versus criminal or administrative sanction distinction.

In 1978, the Oregon Supreme Court refused to create a statutory duty action for plaintiff children against their mothers who had abandoned them in violation of a mandatory criminal statute.[135] Yet, in 1983, the same court created a statutory duty action for a plaintiff who sued police officers for failing to arrest her husband who had physically threatened her at home in violation of a restraining order.[136] The statute upon which the action was based was a purely declaratory mandatory arrest statute. Even though the court did not use "no right without a remedy" language, it was probably an important factor in providing a new tort action.[137]

Under the principle of "no right without a remedy," no valid basis exists for preferring statutory duty actions when a statute is declaratory. When no private remedy is available under either common law or the statute, courts should accord the same weight to this principle for both types of statutes. Other justifications for preferring actions when a statute is declaratory are equally dubious. The legislature will have rarely decided the question of whether civil liability should be available unless it does so expressly.

One commentator used the statutory purpose argument as the basis for concluding that declaratory statutes "provide the strongest case for implying a private cause of action."[138] He argued that the new tort action "may be the only means to carry out the legislative intent."

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134. *See* Cutler v. Wandsworth Stadium, A.C. 398, 407 (1949); Phillips v. Britannia Hygenic Laundry Co., [1923] 2 K.B. 832, 838.

135. Burnette v. Wahl, 284 Or. 705, 588 P.2d 1105 (1978).

136. Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983). In *Nearing*, the action created appears to be a statutory duty action although the court seems to treat it as an implied statutory tort. *Id.* at 711-12, 670 P.2d at 143-144.

137. *Id. See also* Cain v. Rijken, 300 Or. 706, 717 P.2d 140 (1986) (created a statutory duty action based on a permissive declaratory statute). *See generally* Schuman, *supra* note 49, at 70.

138. Comment, *Implied Causes*, *supra* note 16, at 1254.

However, as another commentator pointed out: "Prescriptions unsupported by penalties are usually instructions of an essentially administrative nature, often addressed to public bodies. The grafting of civil liability in tort upon such provisions is likely to give rise to considerable practical difficulties and may also involve defiance of (various) policy factors."[139] Creating a statutory duty action based on a declaratory statute may often *defeat* the legislative purpose.[140]

In cases involving both declaratory statutes and statutes with penalties, courts should examine the legislative purpose in enacting the statute and determine whether the creation of a new tort action would better effectuate that purpose. Consideration of whether the statute is purely declaratory occasionally may provide some guidance in determining this question.[141]

D. Responsible Judicial Lawmaking

Statutory duties raise particularly troublesome questions about who makes law and who should make law. Statutory duty cases are often what Ronald Dworkin calls "hard cases."[142] By definition, they involve situations in which the issue is either one of first impression or one in which courts previously have declared no duty was owed and, therefore, no tort remedy was available. In statutory duty cases, courts must decide whether the presence of a focused statute should influence them to change the common law. When the case presents a new fact pattern to the court, the effect of the statute may be less obvious than when a court is asked to overrule previous case law. Nevertheless, in both situations courts are not asked merely to correct the lower courts' errors in applying the existing law; courts are asked to make law.

How should courts make new law? Many judges, attorneys, and commentators shrink at the use of words like "make" and "create" to describe the role judges play in the legal system. They maintain that a

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139. Buckley, *supra* note 6, at 217.

140. *See, e.g.,* Burnette v. Wahl, 284 Or. 705, 712, 588 P.2d 1105, 1109 (1978) which said:

> If there is any chance that invasion into the field by the court's establishment of a civil cause of action might interfere with the total legislative scheme, courts should err on the side of non-intrusion because it is always possible for the legislature to establish such a cause of action if it desires. Courts have no omnipotence in the field of planning, particularly social planning. . . . Courts should exercise restraint in fields in which the legislature has attempted fairly comprehensive social regulation.

141. See Comment, *Implied Causes*, *supra* note 16, at 1254-59 for a thorough discussion of the various competing factors that go into determining whether a new tort action would better carry out the legislative purpose.

142. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

judge's role is limited to finding and applying the law the legislative and administrative branches have created.[143] Statutory duty cases are effective vehicles for challenging this view because they force courts to consider their role in the lawmaking process.

Asserting that courts create statutory duty actions does not mean that legislative intent is irrelevant.[144] It is very relevant if the meaning of "legislative intent" is not limited to the issue of whether the legislature intended to create a tort action. Almost certainly the legislature, as opposed to individual legislators, did not consider, much less decide, this issue. The best posture a court can take is to assume there was no legislative decision concerning tort liability unless there is evidence to the contrary.[145]

If legislative intent includes consideration of what social or, sometimes, private good[146] the legislature intended to accomplish by enacting a statute, it is indeed relevant to a judge's consideration of a statutory duty. In deciding whether to create a new tort action when a focused statute is present, a court should examine the legislature's purpose or purposes for enacting the statute. Its decision to create a new action

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143. *See, e.g.,* Donaca v. Curry County, 303 Or. 30, 35-36, 744 P.2d 1339, 1342 (1987); England, 9 J. LEGAL STUD. 27 (1980). They disapprove of the legal methodology and language of judges such as former California Supreme Court Justice Traynor who made new law in such cases as State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952) (intentional infliction of emotional distress) and Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (strict liability for products liability). They find especially inappropriate any discussion of making law based on policy considerations. *See, e.g.*, Walker v. Bignell, where the court said:

> Instead we prefer to declare directly that, as a matter of public policy, municipalities should not be exposed to common law liability under the circumstances present in this case. Exposure to such liability would, we feel, place an unreasonable and unmanageable burden upon municipalities such as the defendants herein.

100 Wis. 2d 256, 301 N.W.2d 447, 453 (1981).

144. Some commentators believe that there is no such thing as a discernible legislative purpose or intent. Federal Circuit Court Judge Easterbrook says:

> [J]udicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses. . . . Moreover, because control of the agenda and logrolling are accepted parts of the legislative process, a court has no justification for deciding cases it thinks the legislature would in their absence.

Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 548 (1983).

145. *See* Bob Godfrey Pontiac v. Roloff, 291 Or. 318, 342, 630 P.2d 840, 854 (1981) (Linde, J., concurring).

146. *See* Posner, *Economics, Politics, and Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265, 279 (1982). *See also* O.W. HOLMES, JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 107-09 (H. Shriver ed. 1936).

should be based on these legislative purposes if they are sufficiently determinable.[147] However, in creating or rejecting a new tort action as a means of carrying out the legislature's purpose, a court should not attribute this to the legislature and thereby disclaim judicial responsibility for what is clearly a judicial act.

When examining the purpose of a statute, a court might benefit from Justice Felix Frankfurter's analysis of statutory purpose at the federal level.[148] He asserted that a court's function is to "decide what remedies are appropriate in the light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations."[149] Frankfurter was faced with a problem that state courts do not have: the *Erie* doctrine and other judicially imposed limitations on making federal common law.[150] These limitations on the federal courts' creative powers led Frankfurter and others[151] to attempt to attribute the source of private rights of action to Congress, even though Congress had not expressly provided for them. During Frankfurter's time, the Supreme Court's analysis was based on its claim that Congress knowingly had delegated to the courts the power to provide civil remedies for violations of federal statutes.[152]

State courts do not need to resort to such fictions.[153] They have the power to make common law. The search for legislative purpose is still

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147. Judge Posner believes that whether it is called legislative intent, motive or purpose, what the legislature would prefer will often be beyond the capacity of judges to determine. Posner, *supra* note 146, at 272-73.

148. *See, e.g.,* Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 255 (1951) (Frankfurter, J., dissenting); Board of Commissioners v. United States, 308 U.S. 343, 349 (1939).

149. *Montana-Dakota Utilities Co.*, 341 U.S. at 261.

150. With the exception of the years in which J.I. Case Co. v. Borak, 377 U.S. 426 (1964) was the controlling law, the Court has viewed itself as not possessing the power to create federal remedies based on federal statutes. Since Cort v. Ash, 422 U.S. 66 (1975) replaced *Borak* as the rule on private remedies, "[t]he Court has retreated from the notion, central to *Borak*, that the federal judiciary has inherent power to create private remedies for statutory violations absent a contrary congressional intent. Instead, the Court now treats the implication of private rights of action as a matter of statutory construction." Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 562 (1981).

151. *See, e.g.,* J.I. Case Co. v. Borak, 377 U.S. 426 (1964). *See generally* Foy, *supra* note 28, at 558-62.

152. Tunstall v. Brotherhood of Locomotive Fireman & Enginemen, 323 U.S. 210, 213 (1944).

153. And neither do the federal courts. Today's much more conservative and, in my view, honest view of federal implied rights of action does not mean that injuries resulting from violations of federal statutes and regulations are without a remedy. However, the source of that remedy is state court application of state tort doctrine to the federal statutes.

At least one commentator believes this is a bad thing. *See* Foy, *supra* note 28, at

appropriate, but not because the legislature expects the judiciary to effectuate this purpose by providing a civil action. Instead, judicial determination of the legislature's purpose for creating a statutory duty enables the court to exercise its common law powers to create or deny a new action responsibly.[154]

E. Proposed Analysis and Conclusion

Based on the previous discussion of statutory duty issues, the following analytical framework for dealing with statutory duties and their close relative, negligence per se, is proposed.

Whether a common law negligence action already exists, the first issue a court should resolve is focus. If a court determines that the plaintiff and the risk of harm that resulted in the plaintiff's injury are within the core of what the legislature intended to cover, the court should find the statute applies to the plaintiff's case. This finding of focus eliminates the jury's usual role of determining foreseeability.[155]

The court then should carefully investigate what purpose the statute was intended to serve. Determination of focus assists in resolving this question, but the court should inquire further as to whether the legislation itself already satisfies the legislature's goal of protecting certain people from certain risks of harm. If the creation of a new remedy or the strengthening of an existing remedy would better carry out the legislative purpose, the court should create a statutory duty or negligence per se action. It should be especially cautious in going forward with a statutory duty action when prior common law denied such an action. Usually, sound public policy reasons exist for common law "no duty" rules. The

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571. I disagree. Using a federal statutory duty as the basis of a tort action in state court is no more problematic than using a state statutory duty. If this results in lack of uniformity among jurisdictions, it is certainly no greater than that which exists in almost all areas of tort law.

Meanwhile, injured parties will be provided with some form of remedy if a remedy would help effectuate the purpose of the legislation.

154. An example of a situation where courts have held that a focused statutory duty should not be the basis for a new tort action is where the defendant in a lawsuit seeks to sue the attorney for the plaintiff in negligence for having brought an unwarranted action. In a number of states, such an action has been unsuccessfully sought based on violations of the state's Code of Professional Responsibility. *See, e.g.,* Nelson v. Miller, 227 Kan. 271, 607 P.2d 438, 451 (1980); Friedman v. Dozorc, 412 Mich. 1, 312 N.W.2d 585 (1981); O'Toole v. Franklin, 279 Or. 513, 569 P.2d 561 (1977).

The court in *Nelson* justifies its refusal to create such an action by asserting that to do so would thwart the Code's purpose of encouraging zealous representation of clients. 607 P.2d at 451.

155. Except where a common law action already exists and the statute is merely permissive. *See supra* note 88 and accompanying text.

presence of a focused statute should cause the court to carefully reconsider such a rule.[156] However, the rule should be abandoned only if the court believes such a change is necessary to achieve the legislative purpose underlying the statute.

Once the court determines that a change in the existing law is merited, it should examine the mandatory or permissive statutory language. If the statute evidences an intent that the actor to whom it is addressed be given little or no discretion, a stricter action than negligence should be provided uniformly even though a common law negligence action already exists.[157] This action probably will be labeled "negligence per se." However, if no common law action exists, it is important that the court not hide behind the "negligence per se" label, but instead openly weigh the consequences of creating a new statutory duty action.[158]

When a focused statute is permissive, negligence typically should be the kind of action retained or created. When a negligence action already exists, the permissive statute should have no impact on the existing negligence action.[159] Where no common law action exists, the permissive statute should be the basis of a new statutory duty action for negligence in which the focus determination resolves foreseeability, but the jury determines reasonableness. It may be appropriate in both situations to allow the jury to consider the statute in its determination of whether the defendant acted reasonably; however, the burden of production and proof on this element should remain with the plaintiff.

A court's adoption of this proposed analysis will make the interrelationship of statutes and tort actions more coherent, certain, and honest. Courts still will face hard policy choices in deciding whether to create a statutory duty action. These choices will be especially difficult when a longstanding "no duty" area of the law is involved.

Application of the proposed analysis will not always result in a new tort action. Instead, it will encourage courts to more openly acknowledge

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156. For one court's method of deciding whether to overrule an existing common law decision, see G.L. v. Kaiser Found. Hospitals, Inc., 306 Or. 54, 59, 757 P.2d 1347, 1349 (1988), in which the Oregon Supreme Court said:

> Ordinarily this court reconsiders a nonstatutory rule or doctrine upon one of three premises: (1) that an earlier case was inadequately considered or wrong when it was decided, . . .; (2) *that surrounding statutory law or regulations have altered some essential legal element assumed in the earlier case*, . . .; or (3) that the earlier rule was grounded in and tailored to specific factual conditions, and that some essential factual assumptions of the rule have changed.

See also Note, *Oregon's Hostility to Policy Arguments: Heino v. Harper and the Abolition of Interspousal Immunity*, 68 Or. L. Rev. 197 (1989).

157. *See supra* notes 68-69 and accompanying text.

158. Actually, it will most likely be some form of strict liability with limited defenses which will probably be labelled "excuses." *See* Forell, *supra* note 6, at 262.

159. *See supra* note 88 and accompanying text.

the extent of their role in making law when statutes are involved, and when courts make new law they will do so as a result of principled analysis rather than by judicial fiat.