5-1-1998

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Alcaraz v. Vece: If You Mow or Water Your Next-Door-Neighbor’s Yard, You Might Be Liable to Anyone Injured There

I. INTRODUCTION

Before the California Supreme Court’s holding in Alcaraz v. Vece, the rationale for imposing adjacent premises liability was reasonably clear. “Although a landowner is most commonly held liable for injuries that occur on his property, there are occasions when a landowner may be liable for a dangerous condition, which results in injury off the premises.”

The occasions when landowners are typically held liable for injuries which occur on adjacent premises are when: (1) the adjacent landowner has exercised substantial control over the land where the injury occurred or over the hazard that caused the injury; (2) the adjacent landowner has received a direct benefit or advantage when the plaintiff uses the neighboring land which caused the injury; (3) the adjacent landowner has exercised substantial control over the bordering land, and that landowner receives a benefit from the plaintiff’s use of the connecting land; (4) the adjacent landowner failed to take reasonable steps to reduce the chance of a foreseeable injury occurring on adjacent property; or (5) the land...
owner created the hazard on the nearby land, and that hazard caused the injury.⁷

Alcaraz greatly expands both the scope and uncertainty of premises liability. Alcaraz disregards any precedent which subjects landowners to liability only when they have exercised substantial control over neighboring land which caused injury.⁸ The court ignores prior case law providing examples of how much control is enough to be considered substantial by holding that evidence of mowing the lawn of a city owned strip of land where an injury occurred may¹⁰ rise to the level of sufficient control to create a duty in the adjacent landowner to warn of any potential dangers on that strip of land.¹¹ The court undermines the certainty and reliability of the traditional "substantial control" analysis for imposing premises liability and the result is a rule of law with no clear limits.

Contrary to precedent, the court states that in order to hold a landowner responsible for injuries occurring on adjacent property it is not necessary that the landowner derive a commercial benefit from the portion of the property which caused the injury.¹² Once again, the court abandons a predictable analysis for imposing premises liability.

Additionally, the court does not analyze in detail the issue of foreseeability. Scattered throughout the opinion are references to the importance of a landowner's "actual notice" of a hazard on adjacent land as another justification for holding landowners liable for off-premises injuries.¹³ Tragically, the court fails to emphasize the issue of whether, in Alcaraz, the landowner knew or should have known of the potential danger on the city-owned strip of neighboring land.

Before Alcaraz, a landowner knew that his potential liability for injuries occurring on neighboring land would depend on whether he: (1) exercised substantial control over the neighboring land;¹⁴ (2) received a liability for injuries caused by the artificial condition. RESTATEMENT (SECOND) OF TORTS § 364 (1996).

⁷ See Carter v. City of Houma, 536 So. 2d 573, 577 (La. Ct. App. 1988). Since the landowner in Alcaraz clearly did not create the hazard which caused the injury, this justification for holding an adjacent landowner responsible for injuries occurring on an adjoining land will not be thoroughly discussed in this Note.

⁸ See supra note 3 and accompanying text.

⁹ See infra notes 54-76 and accompanying text for a full discussion of prior case law illustrating how much control over adjacent land is sufficient to create a duty.

¹⁰ The court sent the case back to a jury to decide whether the landowner's actions were sufficient to give rise to a duty. 929 P.2d at 1253.

¹¹ See id. See infra notes 20-50 and accompanying text for a full discussion of the facts and reasoning in Alcaraz v. Vece.

¹² See 929 P.2d at 1247-50.

¹³ 929 P.2d at 1244 (stating that possessor of land who knows of hazard on adjacent property has duty to warn or protect third parties).

¹⁴ See supra note 3 and accompanying text.
benefit from the plaintiff's use of the neighboring land;\textsuperscript{15} (3) exercised control \textit{and} received a benefit;\textsuperscript{16} or (4) failed to take reasonable steps to reduce the chance of a foreseeable injury occurring on neighboring land.\textsuperscript{17} Now, after Alcaraz, a landowner cannot rely on the first traditional rule of \textit{substantial} control because simply mowing a lawn might be enough control to give rise to a duty.\textsuperscript{18} The court also provides no further guidance as to how much control is \textit{substantial} control. Further, a landowner cannot rely on the second traditional rule of receiving a benefit because the Alcaraz court held a "benefit" was unnecessary to the determination of adjacent premises liability. Landowners can no longer rely on the third traditional rule of "control \textit{and} benefit" because the Alcaraz court, as mentioned previously, held the "benefit" portion of the analysis to be unnecessary. Finally, landowners may no longer rely on the fourth traditional rule of failure to take reasonable steps to reduce the chance of a foreseeable injury occurring on neighboring land because the Alcaraz court did not even address this critical issue. Accordingly, a landlord is left with uncertainty as to what factors will determine adjacent premises liability.

This Note examines Alcaraz and concludes that applying the certainty, predictability and reliability of the traditional standards for imposing adjacent premises liability would have resulted in a more reasonable outcome in Alcaraz. Part II of this Note reviews the facts and the court's reasoning in Alcaraz. Part III analyzes the traditional approaches to adjacent premises liability,\textsuperscript{19} applies these traditional approaches to the facts in Alcaraz, and provides a better analysis for determining adjacent premises liability.

II. \textit{ALCARAZ v. VECE}

A. Facts

Plaintiff, Gilardo C. Alcaraz, was injured when he stepped on a broken water meter box\textsuperscript{20} located on a narrow strip of land in front of the apartment complex where he was a tenant.\textsuperscript{21} Alcaraz sued his landlord, Peter Vece, and the other owners of the property\textsuperscript{22} seeking damages under

\begin{enumerate}
\item \textit{See supra} note 4 and accompanying text.
\item \textit{See supra} note 5 and accompanying text.
\item \textit{See supra} note 6 and accompanying text.
\item The holding in \textit{Alcaraz}, of course, will only be binding precedent on courts in California. This Note, however, will consider the \textit{Alcaraz} decision to be persuasive in other jurisdictions.
\item \textit{See supra} notes 3-7 and accompanying text.
\item "The cover of the water meter box was either missing or broken." 929 P.2d at 1240.
\item \textit{See id.}
\item For purposes of this Note, the name Peter Vece represents all of the owners of the
\end{enumerate}
a theory of premises liability. However, the strip of land containing the water meter box was not owned by Vece, but was owned by Redwood City. Vece moved for a summary judgment arguing that he could not be held liable for an injury occurring on property owned by the city. Plaintiff opposed the summary judgment motion by asserting that the defendant landlord had control over this strip of city-owned land, and therefore had a duty to warn of the potential hazard or repair the meter box. This "control," maintained Alcaraz, was evidenced by the fact that Vece's gardener mowed that strip of city-owned lawn where the meter box was located when he mowed Vece's lawn and that after the accident, Vece erected a fence around the meter box.

The trial court granted Vece's motion for summary judgment on the ground that "no triable issue of fact existed, because [Vece] neither owned nor exercised control over the meter box . . . ." The California Court of Appeal reversed the summary judgment of the trial court. The appellate court agreed with the trial court that "there was no triable issue as to the fact of ownership of the meter box, because defendants neither owned nor exercised control over the meter box." However, the court concluded that the trial court erred in granting the summary judgment motion "because there existed a 'triable issue of fact as to whether . . . defendants' actual or apparent control over immediately adjacent premises and the foreseeability of injury . . . created a duty . . . to either warn plaintiff . . . or protect him . . . or both.'" The court reasoned that Vece's gardener's maintenance of the lawn surrounding the meter box and Vece's "actual notice of the broken or missing cover" gave rise to a duty to protect or warn [Alcaraz]. The California Supreme Court held that a triable issue of fact existed as to whether

property.

23. See 929 P.2d at 1240-41, 1256.
24. See id. at 1241-42. Alcaraz admitted at oral argument that he had "not preserved his right to [bring suit against the City] because he did not file the required claim within the statutory time" pursuant to sections 905 and 911.2 of the California Government Code. Id. at 1256 n.1.
25. See id. at 1241.
26. See id. at 1241-42.
27. See id.
28. Id. at 1242.
29. See id.
30. Id.
31. Id.
32. A neighbor testified at trial that he had informed the Water Company meter readers and Vece that the cover of the meter box was either broken or missing. See 929 P.2d at 1242.
33. Id.
Vece's actions reached a level of sufficient control over the premises to give rise to a duty to warn or protect.

B. Reasoning

The California Supreme Court first reasoned that the law "requires persons 'to maintain land in their possession and control in a reasonably safe condition.'" Thus, Vece's not owning the land surrounding the meter box does not automatically exempt him from any potential liability. The court referred to Johnston v. De La Guerra Properties, Inc., stating that "a defendant who lacks title to property still may be liable for an injury caused by a dangerous condition on that property if the defendant exercises control over the property."

The court disapproved of any language in Princess Hotels International, Inc. v. Superior Court or Swann v. Olivier which held that a landlord is liable for injuries occurring on adjacent property if the landowner exercises control over and derives a direct benefit from that property. The court concluded that this language in Princess Hotels and Swann was unnecessary to the decisions of those cases.

Finally, the court explained that the existence and scope of a duty of care are normally questions of law for a court to decide. However, the role of the jury is not eliminated in determining if a duty exists. The court held that "a trier of fact could find . . . that [Vece] exercised control over the property on which the meter box was located." In other words, a jury could hold Vece responsible for the reasonable safety of the city-owned narrow strip of land because Vece's gardener mowed the strip of land, and Vece put a fence around the broken meter box after the injury. A jury could find that the actions of Vece's gardener amount to sufficient control to give rise to a duty to protect or to warn.

34. Vece's gardener mowing the strip of lawn where the meter box was located and Vece erecting a fence around the meter box after the accident.
35. 929 P.2d at 1253.
36. Id. at 1243 (quoting Ann M. v. Pacific Plaza Shopping Center, 863 P.2d 207 (Cal. 1993)).
37. See id.
38. 170 P.2d 5 (Cal. 1946).
39. 929 P.2d at 1244.
41. 28 Cal. Rptr. 2d 23 (Cal. Ct. App. 1994).
42. See 929 P.2d at 1248-51; 39 Cal. Rptr. 2d at 559; 28 Cal. Rptr. at 28.
43. 929 P.2d at 1247 n.4.
44. See id.
45. Id. at n.4
In holding that a landowner who mows a strip of lawn\textsuperscript{46} may be liable for injuries occurring on that lawn, the California Supreme Court in \textit{Alcaraz} ignores the precedent outlining the traditional occasions when landowners are typically held liable for injuries which occur on adjacent premises.\textsuperscript{47} The court undermines the first traditional basis for imposing adjacent premises liability, \textit{substantial control}, by holding that mere maintenance could be sufficient control to give rise to a duty.\textsuperscript{48} The second and third traditional basis for imposing adjacent premises liability is receiving a benefit from the plaintiff’s use of the land. This basis is revoked as the court disapproved of language in any cases requiring that a landowner receive a direct benefit from the plaintiff’s use of the land in order to hold the landowner liable.\textsuperscript{49} Also, the fourth traditional basis for imposing adjacent premises liability, foreseeability, is not emphasized as a significant requirement.\textsuperscript{50}

III. \textbf{ANALYSIS}

The traditional approach to imposing liability for off-premises injuries provides landowners with a sense of predictability concerning their potential liability. In other words, landowners ought to know what kinds of acts for which they will incur liability for injuries occurring on nearby land. Until the holding in \textit{Alcaraz}, landowners were aware that if they exercised substantial control over neighboring property, they could be liable for any injuries occurring on the property.\textsuperscript{51} Prior to \textit{Alcaraz}, landowners also knew that if they did not receive a direct benefit from the plaintiff’s use of the adjacent land, then they would not likely be subject to liability for injuries occurring on the adjacent land.\textsuperscript{52} Furthermore, case law concerning off-premises liability emphasized that if an adjacent landowner knew or should have known of a dangerous condition on neighboring land and did nothing to reduce the chance of injury, then the adjacent landowner could be subject to liability for injuries occurring on the neighboring land.\textsuperscript{53}

\textsuperscript{46} The court held that a landowner who mows a strip of lawn and erects a barrier around the meter box after the injury could rise to the level of sufficient control. \textit{See id.} The issue of subsequent remedial measures as admissible evidence (erecting the fence around the meter box after the injury) is beyond the scope of this note and will not be discussed.

\textsuperscript{47} \textit{See supra} notes 3-7 and accompanying text.

\textsuperscript{48} 929 P.2d at 1253.

\textsuperscript{49} \textit{id.} at 1249-50.

\textsuperscript{50} \textit{See infra} note 116 and accompanying text.

\textsuperscript{51} \textit{See supra} note 3 and accompanying text.

\textsuperscript{52} \textit{See supra} note 4 and accompanying text.

\textsuperscript{53} \textit{See supra} note 6 and accompanying text.
The analysis portion of this Note will discuss prior cases holding that (1) a landowner may be held liable for injuries occurring on a nearby premises if the landowner has exercised substantial control over the nearby premises, (2) a landowner may be held liable for injuries occurring on a nearby premises if the landowner has received a direct benefit or advantage when the plaintiff uses the feature on the land which caused the injury, (3) a landowner may be held liable for injuries occurring on a nearby premises if the landowner has received both a benefit and has exercised substantial control over the nearby premises, and (4) a landowner may be held liable for injuries occurring on a nearby premises if the landowner knew or should have known of the potential danger on the nearby land and has failed to take reasonable steps to reduce the chance of a foreseeable injury.

A. A landowner may be held liable for injuries occurring on a nearby premises if the landowner has exercised substantial control over the nearby premises

Many cases holding landowners liable for off-premises injuries are predicated on the idea of the landowner exercising substantial control over the adjacent premises. Because a landowner can be held liable for injuries occurring on adjacent premises if the landowner exercises "control" over the adjacent premises, the question then becomes: how much control is sufficient control to give rise to a duty? The reasoning from Hamilton v. Gage Bowl, Kormanyos v. Champlain Valley Federal Savings and Loan Association, and Husovsky v. United States sheds light on this question.

1. Case law

In Hamilton, a parking lot owner was not liable to a patron who was injured when a sign fell from an adjacent building that was not owned by the parking lot owner. The plaintiff argued that the parking lot owner had exercised substantial control over the adjacent premises.

54. See Sprecher v. Adamson Cos., 636 P.2d 1121, 1126 (Cal. 1981) ("[T]he duties owed in connection of land are not invariably placed on the person [holding title] but, rather, are owed by the person in possession of the land because of the possessor's supervisory control over the activities conducted upon, and the condition of, the land") (quoting Husovsky v. United States, 590 F.2d 944, 953 (D.C. Cir. 1978)); See also Schwartz v. Helms Bakery Ltd., 430 P.2d 68, 73 (Cal. 1967) (holding that when determining adjacent premises liability, "[t]he crucial element is control"); Low v. City of Sacramento, 87 Cal. Rptr. 173, 175 (Cal. Ct. App. 1970) (holding "control dominates over title").

55. 8 Cal. Rptr. 2d 819 (Ct. App. 1992).
57. 590 F.2d 944 (D.C. Cir. 1978).
58. 8 Cal. Rptr. 2d at 821, 823.
exercised sufficient control over the wall from which the sign fell to warrant imposition of a duty on the parking lot owner.\textsuperscript{59} As a measure of the parking lot owner's control, the plaintiff pointed to the fact that the parking lot owner had placed some touch-up paint on the wall\textsuperscript{60} and that this constituted sufficient control over the wall to justify imposing a duty on the parking lot owner.\textsuperscript{61} The court held that this single sign of control did not rise to the level of sufficient control to justify imposing a legal duty.\textsuperscript{62}

Painting a wall is akin to mowing a small strip of lawn. If, in \textit{Hamilton}, the court concluded that painting a wall is \textit{not} enough control to justify imposing a duty on the landowner, then mowing a small strip of lawn also is not enough control to justify imposing a duty. Unfortunately, the \textit{Alcaraz} court felt that the question of whether mowing a small strip of lawn is enough control to justify imposing a duty was a question for the jury to decide, leaving landowners unsure of what acts constitute substantial control because this question will be decided on a case-by-case basis.

Furthermore, in \textit{Kormanyos v. Champlain Valley Federal Savings and Loan Association}, the New York Supreme Court addressed the issue of how much control is sufficient to justify imposing a duty on an adjacent landowner.\textsuperscript{63} In this case, a child was injured when his bicycle skidded on a patch of sand and gravel on a sidewalk. The sidewalk was between a church and a bank.\textsuperscript{64} The child brought an action against both the bank and the church.\textsuperscript{65} Although the church did not own the sidewalk, counsel for the child contended that the church controlled the sidewalk.\textsuperscript{66} As evidence of the control, counsel for the child pointed to the fact that the church shoveled or plowed snow off of the sidewalk in the winter for its convenience.\textsuperscript{67} The court ruled that evidence of occasional shoveling of snow was not sufficient control to give rise to a duty of care.\textsuperscript{68} Once again, shoveling snow is comparable to mowing a small strip of grass. If the court concluded in \textit{Kormanyos} that shoveling snow is \textit{not} enough control to justify imposing a duty on the landowner, then mowing a small strip of lawn should also not be enough control to justify imposing a duty.

\textit{Husovsky v. United States} is another case concerning the amount of control necessary to give rise to a duty of care.\textsuperscript{69} In this case the plaintiff

\begin{itemize}
\item \textsuperscript{59} \textit{See id.}
\item \textsuperscript{60} \textit{See id.}
\item \textsuperscript{61} \textit{See id.}
\item \textsuperscript{62} \textit{See id.}
\item \textsuperscript{64} \textit{Id.} at 539.
\item \textsuperscript{65} \textit{See id.}
\item \textsuperscript{66} \textit{Id.} at 540.
\item \textsuperscript{67} \textit{See id.}
\item \textsuperscript{68} \textit{See id.}
\item \textsuperscript{69} 590 F.2d 944 (D.C. Cir. 1978).
\end{itemize}
was driving through a federally owned and maintained public park when a tree fell on his car. The tree stood on land which the United States government maintained but did not own. The court ruled that the United States government exercised sufficient control over the land to give rise to a duty of care. However, the evidence of control went beyond mere maintenance. The United States government agreed with the government of India regarding the use of the land and the placement of markings bearing the government of India's insignia. The Indian government agreed with the United States government "to 'preserve the present, natural, park-like character'" of its land. The court based on these and other factors decided that such evidence consisted of a "notorious and open public display of control." Since the court in Husovsky held that the level of control must go beyond "mere maintenance" in order to rise to sufficient control to justify holding the adjacent landowner to a duty, then mowing a small strip of lawn (mere maintenance) falls below the level of sufficient control to give rise to a duty of care.

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70. See id. at 948.
71. See id. The land was owned by the government of India. The United States government tried to purchase the land in 1945, but the government of India refused to sell it. See id. at 949.
72. See id. at 953.
73. See id.
74. Id. at 949.
75. Id. at 953; see also Donnell v. Cal. W. Sch. of Law, 246 Cal. Rptr. 199 (Cal. Ct. App. 1988). In this case, the plaintiff, a student at the defendant law school, left the defendant's building after dark and headed towards his car. While walking on a public sidewalk bordering the building, he was attacked by an unknown assailant. The plaintiff alleged that by failing to provide parking for its students, the defendant forced him to walk through a high crime area. Despite the defendant's knowledge of the danger, it provided neither warning nor other protective measures, such as security guards or lights or monitors on the building. Summary judgment for defendant was affirmed. The plaintiff argued that the defendant's alleged duty to take reasonable steps to protect its invitees from foreseeable criminal assaults on the sidewalks providing immediate access to its building was based on its power to control the sidewalk by placing lights or monitors on its own building. However, merely having the power to influence or affect adjoining property does not amount to control under premises liability law. See id. at 205.
76. The three discussed cases, Hamilton, Kormanyos, and Husovsky do not involve a landlord/tenant relationship like the parties in Alcaraz. They involve a building owner/customer relationship (Hamilton), a landowner/child or passerby relationship (Kormanyos), and a landowner/adult or passerby relationship (Husovsky). Nonetheless, subjecting the landowner to possible liability in Alcaraz did not turn on the landowner's status as a landlord. The landlord/tenant relationship in Alcaraz was not crucial to the court's holding. The person injured by the water meter box could have been a passerby and the court would have applied identical reasoning. There is nothing in the court's opinion which emphasizes that its decision turned on the parties' status as landlord and tenant. The critical relationship is simply that one party owns land near to the area where another party is injured. As such, Hamilton, Kormanyos, and Husovsky apply to Alcaraz by analogy.
2. **Comparing the traditional substantial control test to the facts in Alcaraz**

Mere maintenance is not sufficient to impose a duty on an adjacent premises landowner. 77 The control must be substantial. Applying touch-up paint to a neighboring building or shoveling snow on a sidewalk does not meet the standard of substantial control giving rise to a duty. 78 As such, in the case at hand, a gardener mowing the strip of land containing the water meter box does not rise to the level of substantial control. Simply exercising slight control over the adjacent premises containing a dangerous condition is not dispositive of a duty. The *Alcaraz* court should have considered this control factor in favor of the landowner.

By holding that a jury will determine a landowner’s level of control, *Alcaraz* has replaced a predictable body of law 79 with an unpredictable and limitless precedent. Allowing a jury to decide on a case-by-case basis what amount of control gives rise to a legal duty of care will inevitably lead to a wide range of holdings. Landowners will not be able to know with any degree of certainty what amount of control gives rise to a duty because the requisite amount will vary from jury to jury.

B. **A landowner may be held liable for injuries occurring on a nearby premises if the landowner receives a direct benefit or advantage when the plaintiff uses the feature on the land which caused the injury**

Other cases holding landowners liable for off-premises injuries are rooted in the idea that the landowner receives a direct benefit or advantage when the plaintiff uses the feature on the land which caused the injury.

1. **The cases**

*Johnston v. De La Guerra Properties, Inc.* held that the landowner must receive a direct benefit or advantage when the plaintiff uses the land or the feature on the land which caused the injury. 80 In that case, the prospective patron of a Mexican restaurant located in a commercial building fell while stepping down from a concrete curb onto a private walkway as she was approaching the side entrance to the building in the dark. 81 The court held that both the restaurant owner (a tenant in the building) and the commercial landlord could be liable for the injuries. The commercial

77. See *supra* notes 55-76 and accompanying text.
78. See *supra* notes 58-68 and accompanying text.
79. See *supra* notes 3-7 and accompanying text.
80. 170 P.2d 5 (Cal. 1946).
81. See *id* at 7.
landlord was potentially liable because the patron used the walkway to enter the restaurant, and the walkway did not have adequate lighting or guard rails. The tenant could be held liable because he had once installed a neon sign which was connected to the single light. The tenant therefore had "a limited right of control" over that portion of the premises. The customer's use of the adjacent walkway directly benefitted the landowner and the tenant's restaurant. In Alcaraz, Vece did not receive a benefit because Alcaraz walked on the small strip of grass in front of the apartment complex. Accordingly, Vece should not be responsible for Alcaraz's injuries.

Similarly, in Ross v. Kirby, a prospective patron fell over a drainage berm located on a private walkway on the way to the back entrance of a restaurant. The berm was similar to a speed bump and prevented rain from entering the restaurant. The berm was just three feet from the restaurant's door and was partly on the restaurant's property. In addition, the paint that had once made it visible had been worn away by the normal foot traffic from the restaurant. The court, following the holding in Johnston, emphasized that the restaurant exercised control over the entire berm and was benefitted by the location of the walkway. Again, in the case at hand, Vece received no benefit from Alcaraz's use of the city owned strip of lawn located in front of the apartment complex where Alcaraz was injured.

One of the more recent cases in this "benefit" category is Southland Corp. v. Superior Court. In Southland, a convenience store customer was attacked in a vacant, unpaved parking lot next to the store, but the area of the attack was about "ten feet beyond the easterly boundary of the property leased to the store." The court held that seven factors justified the possibility of a jury finding that the store "exercise[d] a sufficient control over the lot so as to legally permit the imposition of a duty to those customers using the lot." These factors are the following: the inadequacy of the store's own parking spaces, the regular use of the lot by the store's customers, the store's right (under its lease) to the nonexclusive use of the lot for customer parking, the store owner's awareness of the regular use of the lot by the store's customers, the commercial benefit

82. Id. at 9.
83. 59 Cal. Rptr. 601 (Ct. App. 1967).
84. See id. at 602.
85. See id.
86. See id. at 602-03
87. See id. at 604.
88. 250 Cal. Rptr. 57 (Ct. App. 1988).
89. Id. at 58.
90. Id. at 62-63.
the store received from the lot, the loitering by local juveniles on the property, and the occasional removal of the juveniles by store employees.91

2. **Comparison of the traditional benefit requirement to the facts in Alcaraz**92

The court in *Alcaraz* disapproved of language in other cases which required holding a landlord liable for an injury that occurs on adjacent property when the landlord derives a direct benefit or advantage from the property that caused the injury.93 Consequently, a rule of law which provided landowners with some predictability has now been disapproved by the California Supreme Court.

Liability in *Johnston, Ross, and Southland Corp.* is rooted in some attribute of the adjacent property whose use by the plaintiff directly benefitted the landowner. Courts appear to be justifying holding landowners liable for off-premises injuries due to some connection between the injury and the landowner's conduct. To establish this "connection" courts look for a benefit or an advantage that the landowner acquires when the plaintiff uses the area where the injury occurs.94 Without this connection, courts are not justified in holding the landowner responsible for injuries occurring on adjacent premises. Holding landowners liable with no connection between the injury and the landowner's conduct would simply be too attenuated.

Nevertheless, a more reasonable outcome may have been reached by applying the direct benefit requirement to the facts in *Alcaraz*. Vece received no direct benefit or advantage from Alcaraz's use of the narrow strip of land in question or from the use of the water meter box. Vece was not put in a position to attract more tenants or increase rent because Alcaraz used the strip of land containing the water meter box. Although this narrow strip of land was near Vece's property, the strip in no way enhanced the value of his property. In short, Vece received no direct advantage or benefit from this strip of land surrounding the water meter

91. See id.

92. In each of the discussed cases, *Johnston, Ross, and Southland.* the relationship between the parties is business owner/customer. Even though the relationship between the parties in *Alcaraz* was not business owner/customer but was landlord/tenant, the benefit requirement can still apply to non-business owners of land. The reason why the benefit requirement applies not solely to a business owner/customer relationship is because imposing liability on landowners for injuries occurring on adjacent premises is especially appropriate when there is at least some causal connection between the off-premises feature that caused the injury and the benefit or advantage the landowner receives when a person uses that feature.

93. 929 P.2d at 1248-51. See *supra* notes 40-43 and accompanying text.

94. See *supra* notes 80-91 and accompanying text.
box. As such, Vece should not be subject to liability for Alcaraz’s injuries.

C. A landowner may be held liable for injuries occurring on a nearby premises if the landowner has exercised substantial control over the nearby premises AND the landowner receives a direct benefit when the plaintiff uses the feature on the nearby premises which caused the injury.

The cases discussed thus far have required either “substantial control” alone or a “direct benefit” alone in order to justify subjecting a landowner to liability for an off-premises injury. There is also authority for combining these two requirements. In other words, a landowner may be subject to liability for off-premises injuries if the landowner both exercises substantial control over the neighboring land and receives a direct benefit or advantage from the plaintiff’s use of the land.

1. The cases

Two recent California Court of Appeal cases in which landowners were found not liable for off-premises injuries are Swann v. Olivier and Princess Hotels International, Inc. v. Superior Court. In Swann, the plaintiff was injured in the ocean in front of a homeowner association’s private beach property. The plaintiff argued that the association failed to warn him of the dangerous condition of the surf. The court restated the general principal that landowners are not held liable for off-premises injuries. This general rule, however, is subject to two exceptions. Landowners or businesses have been held liable for injuries not technically on their “premises” when: (1) they imposed or created some palpable external effect on the area where the plaintiff was injured; or (2) they received a special commercial benefit from the area of the injury plus had direct or de facto control of that area.

The California Court of Appeal held in Swann that the owners of a private beach do not own or control the ocean nor do they derive any di-

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95. See supra notes 54-76, 80-91 and accompanying text.
96. See Swann v. Olivier, 28 Cal. Rptr. 2d 23 (Ct. App. 1994); see also Princess Hotels Int’l, Inc. v. Superior Court, 39 Cal. Rptr. 2d 457 (Ct. App. 1995).
97. 28 Cal. Rptr. 2d 23 (Ct. App. 1994).
98. 39 Cal. Rptr. 2d 457 (Ct. App. 1995).
99. 28 Cal. Rptr. 2d at 23.
100. See id. at 24.
101. See id. at 26.
102. Id. (emphasis added).
rect benefit from the plaintiff’s use of the ocean.\textsuperscript{103} Therefore, the owners of the private beach were not responsible for the plaintiff’s injuries.\textsuperscript{104}

\textit{Princess Hotels}\textsuperscript{105} is a similar case. A vacationing couple in Mexico went swimming in the ocean which was next to the hotel where they were staying.\textsuperscript{106} Plaintiff was seriously injured, and her companion drowned when they were caught in the rip tide.\textsuperscript{107} The California Court of Appeal in \textit{Princess Hotels} held that the defendant hotel owner had no duty to warn its guests as a matter of law.\textsuperscript{108} The court ruled that the hotel benefited from the ocean but lacked control\textsuperscript{109} over the ocean. It then stated “[t]he California cases, as correctly analyzed by \textit{Swann}, require \textit{control as well as a commercial benefit.”}\textsuperscript{110} Accordingly, the court’s analysis did not end with a finding that the hotel owner did not control the ocean. The court looked at the second part of the “control plus benefit” test and concluded that the hotel did benefit from the plaintiff’s use of the ocean.\textsuperscript{111}

Hence, both \textit{Swann} and \textit{Princess Hotels} applied the control plus benefit test to determine off premises liability. The difference between the two cases was that in \textit{Swann} the landowner neither had control over nor benefitted from the ocean and in \textit{Princess Hotels} the landowner did not have control over the ocean but did benefit from the plaintiff’s use of the ocean. In both cases, because the landowners did not meet both parts of the control plus benefit test, the landowners were not liable for the off premises injuries.

2. \textit{Comparison of the substantial control and direct benefit test to the facts in Alcaraz}

Applying the control plus benefit standard to \textit{Alcaraz} again leads to the conclusion that the landowner should not be held responsible for Alcaraz’s injuries. Even assuming, \textit{arguendo}, that Vece’s actions did amount to sufficient control over the premises to give rise to a duty, Vece would still have to receive some advantage from Alcaraz’s use of the narrow strip of land in question. As discussed in sections B-1 and B-2 of this analysis, clearly Vece received no such advantage.

\begin{itemize}
  \item \textsuperscript{103} Id. at 28.
  \item \textsuperscript{104} See id.
  \item \textsuperscript{105} 39 Cal. Rptr. 2d 457 (Ct. App. 1995).
  \item \textsuperscript{106} See id. at 458.
  \item \textsuperscript{107} See id.
  \item \textsuperscript{108} See id. at 460.
  \item \textsuperscript{109} See id. at 460-61. In other words, even though the landowner met one part of the test (benefit), the landowner did not meet the other part of the test (control) and thus was not liable.
  \item \textsuperscript{110} Id. at 461.
  \item \textsuperscript{111} See id.
\end{itemize}
D. A landowner may be held liable for injuries occurring on a nearby premises if the landowner knew or should have known of the potential danger on the nearby land and failed to take reasonable steps to reduce the chance of a foreseeable injury.

One further example of landowner liability for off-premises injuries occurs when the landowner knew or should have known about the dangerous condition on nearby land and failed to take any reasonable steps to reduce the chance of an injury. One of the several cases addressing this issue is Bober v. New Mexico State Fair. In that case a motorist who was injured in a collision with another vehicle as it exited the state fairgrounds after a concert sued the state fair. The court held that a genuine issue of material fact existed as to whether the state fair could reasonably have foreseen the risk of accident arising from the stream of traffic leaving the fairground parking lot after a concert. The court stated: "[T]he extent of an existing duty of care [is] to be determined not with reference to physical locations, but rather with reference to the foreseeability of harm from the hazardous condition." The Restatement of Torts also adheres to this foreseeability approach. If the possessor of the land realizes or should have realized that an artificial condition on adjacent land poses an unreasonable risk of harm, and reasonable care is not taken to make the condition safe, then the possessor of land is subject to liability for injuries caused by the artificial condition.

Scattered through the Alcaraz opinion are hints of the foreseeability issue. A more predictable and reliable outcome could have been reached by the California Supreme Court had it stressed the foreseeability
The issue of whether Vece knew or should have known of the broken or missing water meter box is a critical point.

Perhaps the questions that the court should have sent back to the jury are: Did Vece know or should he have known that the broken or missing water meter box posed a potential hazard on adjacent property? Instead, the question sent back for the jury to determine was whether Vece "exercised control over the strip of land owned by the city so as to give rise to a duty to protect or warn persons entering the land." If he did know or should have known, did he take any steps to reduce the likelihood of injury? The facts given in the majority’s opinion are unclear as to Vece’s knowledge of the dangerous condition. Alcaraz submitted a declaration of a neighbor who resided in the same building who claims to have informed Vece on several occasions that the cover of the water meter box was either broken or missing. There is no reference to Vece admitting or denying that he was informed by another tenant of the broken or missing water meter box. Therefore, this question appears to be a question for the jury to decide.

If the California Supreme Court in Alcaraz had followed this traditional foreseeability test and sent the foreseeability question back to a jury, its holding would have been more consistent with the typical situations where landowners are held liable for injuries which occur on adjacent premises.

An additional case addressing the foreseeability issue is Contreras v. Anderson, which illustrates the problems and uncertainty created by Alcaraz. In this case the plaintiff, Leticia Contreras, slipped and fell on a brick pathway between the curb and the sidewalk in front of the defendant landowner’s home. The undisputed evidence at trial revealed that at the time of the alleged fall, the brick pathway or planting strip was owned by the City of Berkeley. The thirteen-foot-wide strip of land owned by the city extended from the curb of the street to the landowner’s property line. The plaintiff claimed that even though the landowner did

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117. Id. at 1253. This issue sent back to a jury raises an interesting point. When there are no disputes as to the facts, should not a court determine, as a matter of law, the existence of a duty? See Casa de Cambio Comdiv, S.A. De C.V. v. Fed. Reserve Bank, 115 F.3d 618, 620 (8th Cir. 1997); Carlson v. Branch Banking and Trust Co., 473 S.E.2d 631, 635-36 (N.C. Ct. App. 1996). However, this issue is beyond the scope of this Note.

118. For example, did Vece put a board over the broken portion of the meter box? Did he call a city employee who would have authority to fix the water meter box?

119. See 929 P.2d at 1242.

120. 69 Cal. Rptr.2d 69 (Ct. App. 1997).

121. See id. at 70.

122. This brick pathway is also referred to as a planting strip. Id. at 71.

123. See id.

124. See id.
not own the land where the injury occurred, the landowner nonetheless exercised sufficient control over the land to give rise to a duty.\textsuperscript{125} As evidence of this control, plaintiff pointed to the fact that the landowner trimmed the tree on the strip of land, planted and removed flowers from the strip of land, and swept leaves off of the strip of land.\textsuperscript{126} Plaintiff claimed that pursuant to \textit{Alcaraz}, the “evidence is sufficient to raise a triable issue of fact whether [Vece] controlled the public planting strip and, thus, owed [plaintiff] a duty of care.”\textsuperscript{127} The California Court of Appeal disagreed with the plaintiff’s contention and ruled that the landowner cannot be held liable for the injuries the plaintiff suffered on the city-owned strip of land.\textsuperscript{128} To sidestep the ultimate holding in \textit{Alcaraz}, which stated that control is a triable issue of fact for a jury, the court in \textit{Contreras} reasoned that “it is clear from \textit{Alcaraz} that simple maintenance of an adjoining strip of land owned by another does not constitute an exercise of control over that property.”\textsuperscript{129}

If it had been so clear that simple maintenance was insufficient control to give rise to a duty in \textit{Alcaraz}, then the California Supreme Court would have held such. In other words, the \textit{Alcaraz} court would have explicitly held that mowing the strip of lawn was not enough control to give rise to a duty. The California Supreme Court, however, held that the issue of control was a triable issue of fact for a jury to decide. Accordingly, by stating that it is clear in \textit{Alcaraz} that simple maintenance is not enough control to give rise to a duty, the court in \textit{Contreras} is attempting to bypass the confusion produced by \textit{Alcaraz} in order to do justice by declaring the landowner not liable for the off premises injury.\textsuperscript{130}

Additionally, the landowners in \textit{Contreras} claimed that they had never received any complaints that the strip of land was a hazard or in need of repair.\textsuperscript{131} In other words, it was not foreseeable to the landowners that someone could be hurt on this strip of adjacent land. The court, in analyzing this foreseeability issue, struggled to find guidance from the California Supreme Court in \textit{Alcaraz} but finally concluded that the \textit{Alcaraz} court “did not analyze the issue in detail.”\textsuperscript{132} Recognizing that

\begin{itemize}
\item \textsuperscript{125} See id.
\item \textsuperscript{126} See id.
\item \textsuperscript{127} Id. at 70.
\item \textsuperscript{128} See id. at 77.
\item \textsuperscript{129} Id. at 75.
\item \textsuperscript{130} The \textit{Contreras} court emphasizes the fact that, in \textit{Alcaraz}, the landowner (in addition to mowing the lawn) placed a fence around the water meter box after the injury. The \textit{Contreras} court reasoned that placing a fence around the meter box is more control than just mowing the lawn, and thus the landowner’s actions in \textit{Alcaraz} went beyond mere neighborly maintenance. Id. at 75-76.
\item \textsuperscript{131} Id. at 75.
\item \textsuperscript{132} Id. at 74 n.10.
\end{itemize}
foreseeability is an important factor in the court’s analysis, the court in *Contreras* stated: “Thus it appears the duty recognized in *Alcaraz* is limited to hazards on adjacent property of which the defendant landowner is actually aware or should be aware . . . .”133 If the California Supreme Court’s decision in *Alcaraz* would have followed the traditional foreseeability test in determining if a landowner should be held liable for off-premises injuries, then there would have been no need for the *Contreras* court to sidestep the ultimate holding in *Alcaraz* nor attempt to decipher what *appeared* to be the court’s reasoning.

**E. Alcaraz is bad public policy because it provides unfavorable incentives for landowners**

Landowners, now faced with the knowledge that mowing a small strip of grass on neighboring property may be enough control to create in them a duty of care, will cease neighborly good deeds. Now a landowner has an incentive to let a strip of grass next to his property, which he knows he does not own, grow wild. *Alcaraz* provides an incentive to cease any beautification activities on nearby land that make a community more attractive because it may result in potential liability.

Apparently, to avoid liability, Vece should have ignored the strip of city owned lawn and let it grow out of control to the point where it became a potential danger or an eye sore. Now Vece might be responsible for *Alcaraz*’s injuries simply because the gardener, who was already out mowing the lawn, decided to take a few extra moments to mow the city owned strip of lawn to improve the appearance of the community.

**F. A suggestion for the legal analysis for determining adjacent premises liability**

A more reasonable outcome may have been reached in *Alcaraz* in determining adjacent premises liability by using one of the following tests:

1. Did the landowner exercise substantial control over the adjacent premises, and/or134 did the landowner receive a direct benefit or advantage due to the plaintiff’s use of the adjacent premises?

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133. See id. at 75 n.10 (emphasis added). The *Contreras* court makes this inference based on the *Alcaraz* court’s discussion of *Hamilton* where, according to the *Alcaraz* majority, the landowner was held to have no duty because he had no actual notice of a danger on an adjacent premises. Id.

134. See supra notes 54-111 and accompanying text. The link between “substantial control” and “benefit” does not have to be “and,” it could be “or.” Some courts will look at “substantial control” only and not require “benefit.” See supra notes 54-79.
(2) Was the injury which occurred on adjacent premises foreseeable and if the injury was foreseeable, did the landowner take any reasonable steps to reduce the chance of injury?
(3) Did the landowner create or aggravate the hazardous condition where the plaintiff was injured?\textsuperscript{135}

Applying the above analysis to the facts of \textit{Alcaraz v. Vece} leads to the following conclusions: Under the first part of the first test, mowing the lawn where the meter box was located would not rise to the level of substantial control. Putting up a fence after the injury would also not rise to the level of substantial control. Under the second part of the first test, Vece received no direct benefit or advantage from Alcaraz's use of the narrow strip of land in question or from the use of the water meter box. Therefore, utilizing the first rule, Vece would not be liable.

Under the second test, if Vece knew or should have known of the potential hazard on the adjacent land and took no reasonable steps to reduce the chance of an injury, then he would be subject to liability for Alcaraz's injuries.\textsuperscript{136} This analysis would require a determination that Vece was aware of the hazard and did not act.

The third test does not apply to the facts in this case since Vece did not create the hazard.

\textbf{IV. CONCLUSION}

The California Supreme Court in \textit{Alcaraz v. Vece} would have reached a more reasonable conclusion if it had applied the reliable traditional analysis for determining adjacent premises liability. Instead, what lower courts in California are left to deal with is an unnecessary and unpredictable expansion of premises liability. A portion of Justice Brown's dissenting opinion in \textit{Alcaraz} provides an appropriate summary: "This case should be governed by the venerable judicial maxim: 'If it ain't broke, don't fix it.' Unfortunately, the majority fails to heed this sensible advice . . . ."\textsuperscript{137}

The holding in \textit{Alcaraz} weakens the substantial control test, removes the benefit test, and disregards the foreseeability test for determining adjacent premises liability. Now landowners cannot rely on long-standing

\textsuperscript{135} As mentioned in footnote 8, this test is not at issue in \textit{Alcaraz} and is not discussed in this Note, but it is, nonetheless, an important test in determining adjacent premises liability generally.

\textsuperscript{136} The foreseeability of injury should be a question of fact for a jury to determine. \textit{Cf.} McDermott v. Midland Management, Inc., 997 F.2d 768 (10th Cir. 1993) (holding foreseeability is a question of fact for a jury); \textit{LeBlanc v. Am. Honda Motor Co., Inc.}, 688 A.2d 556 (N.H. 1997) (holding foreseeability is a question of fact for jury determination).

precedent to anticipate what acts could make them responsible for injuries occurring on neighboring land.

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