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# Minnesota Negligence Law and the Restatement (Third) of Torts: Liability for Physical and Emotional Harms

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# Minnesota Negligence Law and the Restatement (Third) of Torts: Liability for Physical and Emotional Harms

## **Abstract**

The purpose of this article is to provide a foundation for judges and lawyers, primarily in Minnesota, who are seeking to understand how the Third Restatement's approach to negligence law fits with Minnesota negligence law. The first Part of the article examines the approach of the Third Restatement. Because decisions in other states applying the Third Restatement will be important for courts in Minnesota and elsewhere in deciding whether to apply the Third Restatement, the second Part examines early reports on the Third Restatement in Iowa, Nebraska, Arizona, Wisconsin, Tennessee, and Delaware.

## **Keywords**

torts, negligence, duty, breach of duty, proximate cause, "but-for", cause in fact

## **Disciplines**

Torts

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**MINNESOTA NEGLIGENCE LAW AND THE  
RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR  
PHYSICAL AND EMOTIONAL HARMS**

Mike Steenson<sup>†</sup>

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<sup>†</sup> Margaret H. and James E. Kelley Professor of Law, William Mitchell College of Law. The author thanks Maija Varda, Elizabeth Burns, Ryan Wahlund, and John Monnens for their research assistance.

1. The Appendix at the end of this article contains references to the Restatement (Third) of Torts by the Minnesota Supreme Court and the Minnesota Court of Appeals. An Appendix containing references to the Restatement (Second) of Torts by the Minnesota Supreme Court and the Minnesota Court of Appeals is available on the *William Mitchell Law Review* website and in the electronic version of this article on Westlaw and LexisNexis. Although paginated

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## I. INTRODUCTION

The restatements of torts have been used extensively by the Minnesota courts in cases covering a broad variety of issues.<sup>2</sup> The black letter statements, comments, illustrations, and reporters' notes frequently provide source authority for the courts in resolving those issues, although as Justice Anderson pointed out in his comments in the symposium, *Flying Trampolines and Falling Bookcases: Understanding the Third Restatement of Torts (Spring 2010)*, the restatements are considered with some degree of skepticism by the courts and their application is far from automatic.<sup>3</sup>

The Restatement (Third) of Torts: Liability for Physical and Emotional Harm (Third Restatement), recently published by the American Law Institute (ALI),<sup>4</sup> takes an approach to negligence law that is likely to prompt the same skepticism when Minnesota courts consider its application. In separating foreseeability from duty and scope of liability (proximate cause) determinations and adopting a but-for standard to determine causation, the Third Restatement will seem to step on settled law in a way that is unfamiliar to lawyers and judges who are used to dealing with negligence law that integrates foreseeability in both duty and proximate cause and rejects the but-for test for causation because of its apparent lack of limitation. The Third Restatement's approach to negligence cases is intended to achieve greater clarity in negligence law, avoid the inconsistencies that result when courts engage in detailed analysis of adjudicative facts in the resolution of duty and scope of liability issues, and to achieve an appropriate balance between the functions of judge and jury in negligence cases.

A skeptical supreme court considering whether to apply any part of the Third Restatement would have to be convinced that its

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within the issue, it is not contained in the hard copy of this publication. The pagination for the remainder of Volume 37 follows as if both appendices were included in the hard copy of this publication.

2. See Appendix.

3. Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205 (2007) (analyzing the criticism against the American Law Institute that it is stagnant and ignores contemporary practices of law in drafting the restatements); Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423 (2004) (analyzing the pros and cons of the U.S. Virgin Islands adopting the restatements of law as its de facto common law).

4. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (2010).

own approach to negligence law leads to inconsistencies serious enough to require clarification, or that it gives judges too much authority to resolve cases as a matter of law based on the lack of a foreseeable risk of injury. A detailed assessment of the law in any jurisdiction considering the Third Restatement is necessary for a court to make a reasoned judgment about its application.

Minnesota's negligence law is mainstream. It includes four elements: duty, breach, proximate cause, and damages.<sup>5</sup> Foreseeability is an important consideration in Minnesota negligence law, certainly when courts analyze duty issues, and sometimes in their analysis of the proximate cause element. The structure of that law encourages courts to aggressively police negligence cases to determine whether the plaintiff's evidence is sufficient to justify submission of the case to a jury. Detailed factual examination of the record often results in conclusions that the injury was not foreseeable. That sometimes results in no-duty determinations,<sup>6</sup> holdings that there is no breach of duty as a matter of law,<sup>7</sup> that there is no proximate cause as a matter of law,<sup>8</sup> or even that the label makes no difference if the injury is unforeseeable.<sup>9</sup>

A detailed understanding of how negligence law works in

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5. *E.g.*, *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001).

6. *E.g.*, *Foss v. Kincade*, 766 N.W.2d 317, 322–23 (Minn. 2009) (finding no duty because homeowners could not foresee visiting child would be injured climbing a bookcase).

7. *E.g.*, *Austin v. Metro. Life Ins. Co.*, 277 Minn. 214, 217, 152 N.W.2d 136, 138 (1967) (finding tenant could not foresee injury to maintenance person).

8. *E.g.*, *Lubbers v. Anderson*, 539 N.W.2d 398, 402 (Minn. 1995) (holding snowmobiler's conduct allegedly resulting in plaintiff driving his snowmobile into open water on a river and getting rear-ended by another snowmobile not a proximate cause of plaintiff's injuries). Primary assumption of risk also plays an important role as courts determine that even if there is a duty, the plaintiff effectively consented to relieve the defendant of that duty. For a detailed examination of the Minnesota cases involving primary assumption of risk, see Michael K. Steenson, *The Role of Primary Assumption of Risk in Civil Litigation in Minnesota*, 30 WM. MITCHELL L. REV. 115 (2003).

9. *Marshall v. Esco Indus., Inc.*, No. A08-2046, 2009 WL 2927474, at \*3 (Minn. Ct. App. Sept. 15, 2009) (citations omitted) (holding that injury to security system maintenance worker injured while using a ladder found at defendant's facility during course of servicing the security system was not reasonably foreseeable and stating that “[t]he issue of whether an injury was foreseeable to the defendant under the existing circumstances is sometimes examined as a proximate-cause issue, rather than an issue of negligence. But ‘[i]n contemporary law, the terminology distinction has become unimportant.’ However the issue is characterized, courts agree that a defendant is not liable for unforeseeable harms.”).

Minnesota, or any other jurisdiction considering the Third Restatement for that matter, is only the first step. Understanding how negligence law really works in a particular state and what impact the Third Restatement would have on the law may lead a court to conclude that negligence law works the way it is intended, that the role of foreseeability gives courts appropriate gatekeeping responsibilities consistent with the traditions and policy of negligence law, and that it is a familiar system to judges and lawyers who understand it and know how to apply it. If so, a court may ask, as did the Wisconsin Court of Appeals in a recent decision apparently rejecting the Third Restatement's position on the role of foreseeability in duty determinations, "Why mess with success?"<sup>10</sup>

The purpose of this article is to provide a foundation for judges and lawyers, primarily in Minnesota, who are seeking to understand how the Third Restatement's approach to negligence law fits with Minnesota negligence law. The first Part of the article examines the approach of the Third Restatement. Because decisions in other states applying the Third Restatement will be important for courts in Minnesota and elsewhere in deciding whether to apply the Third Restatement, the second Part examines early reports on the Third Restatement in Iowa, Nebraska, Arizona, Wisconsin, Tennessee, and Delaware.

While the terms of acceptance of the Third Restatement have varied in those states, the decisions are good illustrations as to how the Third Restatement fits with developed bodies of negligence case law. In particular, *Thompson v. Kaczinski*,<sup>11</sup> decided last year by the Iowa Supreme Court, provides the most comprehensive acceptance of the Third Restatement's approach and a mirror for courts curious about what the law would look like if it followed that approach. The third Part analyzes Minnesota negligence law in detail. The fourth Part compares Minnesota negligence law to the Third Restatement's approach. The fifth Part is the conclusion.

## II. THE THIRD RESTATEMENT OF TORTS

The Third Restatement models a negligence theory intended to clarify negligence law, avoid inconsistencies in its application, and achieve an appropriate judge-jury balance in the resolution of negligence claims. It seeks to do so by uncoupling foreseeability

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10. *Tesar v. Anderson*, 789 N.W.2d 351, 357 n.13 (Wis. Ct. App. 2010).

11. 774 N.W.2d 829 (Iowa 2009).

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from the duty and scope of liability determinations and adopting a but-for standard for causation.

The elements of a negligence case under the Third Restatement's approach include (1) the duty issue and four factual elements, (2) failure to exercise reasonable care (the breach of duty issue), (3) factual cause, (4) physical harm, and (5) harm within the scope of liability (historically called proximate cause).<sup>12</sup>

The basic duty standard is set out in section 7 of the Third Restatement:

(a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.

(b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

The Third Restatement position is that a duty exists whenever the actor's conduct "creates a risk of physical harm,"<sup>13</sup> without regard to whether the injury or harm that occurred was foreseeable. There may be exceptions, however, in cases where a court determines that duty does not exist as a categorical matter (perhaps in cases involving recovery by a bystander in a negligent infliction of emotional distress case) or where the duty of reasonable care requires modification (perhaps in a case involving injury in competitive sports where a recklessness standard may be more appropriate than a general reasonable care standard).<sup>14</sup>

Comment j to section 7 explains the absence of foreseeability in the duty determination:

Foreseeable risk is an element in the determination of negligence. In order to determine whether appropriate care was exercised, the factfinder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is

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12. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 6 cmt. b (2010).

13. There is no duty if the actor has not created a risk of physical harm. *Id.* § 7(a).

14. *See id.* § 7(b).

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foreseeable. Thus, for reasons explained in Comment *i*, courts should leave such determinations to juries unless no reasonable person could differ on the matter.

A no-duty ruling represents a determination, a purely legal question, that no liability should be imposed on actors in a category of cases. Such a ruling should be explained and justified based on articulated policies or principles that justify exempting these actors from liability or modifying the ordinary duty of reasonable care. These reasons of policy and principle do not depend on the foreseeability of harm based on the specific facts of a case. They should be articulated directly without obscuring references to foreseeability.

Courts do appropriately rule that the defendant has not breached a duty of reasonable care when reasonable minds cannot differ on that question. See Comment *i*. These determinations are based on the specific facts of the case, are applicable only to that case, and are appropriately cognizant of the role of the jury in factual determinations. A lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination. Rather, it is a determination that no reasonable person could find that the defendant has breached the duty of reasonable care.

Despite widespread use of foreseeability in no-duty determinations, this Restatement disapproves that practice and limits no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder.<sup>15</sup>

While not relevant to the duty determination, foreseeability *is* relevant in determining breach. Section 3 of the Third Restatement covering breach reads as follows:

A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk

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15. *Id.* § 7 cmt. j.



of harm.<sup>16</sup>

Section 8, governing the judge-jury relationship on the reasonable care (breach) issue, emphasizes that the breach issue is generally a question of fact for the jury:

(a) When, in light of all the evidence, reasonable minds can differ as to the facts relating to the actor's conduct, it is the function of the jury to determine those facts.

(b) When, in light of all the facts relating to the actor's conduct, reasonable minds can differ as to whether the conduct lacks reasonable care, it is the function of the jury to make that determination.<sup>17</sup>

The Third Restatement adopts a but-for standard for determining cause in fact. Section 26 states that “[c]onduct is a factual cause of harm when the harm would not have occurred absent the conduct.”<sup>18</sup> The Third Restatement rejects the substantial factor test in part because of the qualitative judgments it invites, even when factual cause is otherwise established.<sup>19</sup>

Foreseeability is also absent from the scope of liability determination. Section 29 limits an actor's liability to “harms that result from the risks that made the actor's conduct tortious.”<sup>20</sup> The Third Restatement rejects the term “proximate cause” to avoid confusion and to separate the scope of liability issue from factual cause.<sup>21</sup> The Third Restatement takes the position that scope of liability issues are generally issues of fact for the factfinder to resolve.<sup>22</sup> A foreseeability standard for resolving scope of liability issues is not inconsistent with the Third Restatement position, but the comments explain that the scope of liability standard is preferable because it is a clearer standard that will facilitate analysis in given cases and provides a better understanding of the reasons for the rule “by appealing to the intuition that it is fair for an actor's liability to be limited to those risks that made the conduct wrongful.”<sup>23</sup> As framed in one of the instructions suggested by the reporters for resolving scope of liability issues, a jury would be asked to determine “whether the plaintiff's harm was of the same

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16. *Id.* § 3.

17. *Id.* § 8.

18. *Id.* § 26.

19. *Id.* at cmt. j.

20. *Id.* § 29.

21. *Id.* at cmt. b.

22. *Id.* at cmt. f.

23. *Id.* at cmt. j.

general type of harm that the defendant should have acted to avoid.”<sup>24</sup>

Intervening/superseding cause issues are folded into the scope of liability analysis. In many jurisdictions, foreseeability is a component of the superseding cause determination.<sup>25</sup> Section 34 of the Third Restatement says that “[w]hen a force of nature or an independent act is also a factual cause of harm, an actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious.”<sup>26</sup> The advent of comparative fault and limitations on joint and several liability rules have undermined one of the primary justifications for superseding cause rules, which is to avoid imposing liability on a modestly negligent tortfeasor for the entire liability.<sup>27</sup>

### III. STATE APPLICATIONS OF THE THIRD RESTATEMENT

State encounters with the Third Restatement approach to negligence cases have varied widely, from open acceptance to tight-lipped rejection. The Iowa Supreme Court accepted the Third Restatement’s approach to duty, scope of liability, and cause in fact.<sup>28</sup> Relying on section 7 of the Third Restatement, the Arizona Supreme Court purged foreseeability from duty determinations.<sup>29</sup> Nebraska relied on the finally approved section 7 in doing the same.<sup>30</sup> Wisconsin has not adopted section 7, but the supreme court has used the comments to support its conclusion that foreseeability is not part of the duty determination.<sup>31</sup>

The Tennessee Supreme Court adopted the Third Restatement’s approach in section 37 for risk creation in a take-home asbestosis case, but the court specifically decided that foreseeability is pivotal in the resolution of duty issues without directly considering section 7.<sup>32</sup> Justice Holder’s dissenting

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24. *Id.* at cmt. b reporters’ note.

25. Minnesota’s version is set out in *Canada By & Through Landy v. McCarthy*, 567 N.W.2d 496, 507 (Minn.1997).

26. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 34 (2010).

27. *Id.* at cmt. a.

28. *Thompson v. Kaczinski*, 774 N.W.2d 829, 834–39 (Iowa 2009).

29. *Gipson v. Kasey*, 150 P.3d 228, 231 (Ariz. 2007).

30. *A.W. v. Lancaster Cnty. Sch. Dist.*, 784 N.W.2d 907, 914–18 (Neb. 2010).

31. *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568, 575–76 (Wis. 2009).

32. *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 362–63 (Tenn.

position, however, was that the Third Restatement's approach should be followed and foreseeability should not be part of the duty consideration.<sup>33</sup> Delaware considered but rejected the Third Restatement, also in a take-home asbestosis case.<sup>34</sup> This section takes a close look at why the courts reached those conclusions.

A. *Iowa*

In *Thompson v. Kaczinski*,<sup>35</sup> the Iowa Supreme Court specifically adopted the Third Restatement's position on duty and scope of liability.<sup>36</sup> Thompson, a minister, was driving down a rural gravel road in Iowa on a Sunday morning, traveling from one of his churches to another, when he swerved to avoid the top of a trampoline that wind gusts had blown from adjacent property onto the road.<sup>37</sup> The residents who owned the trampoline had disassembled it a few weeks earlier but had failed to secure the top.<sup>38</sup> Thompson lost control of his car and was injured in the ensuing accident.<sup>39</sup> He and his wife brought suit against the owners of the trampoline.<sup>40</sup> The defendants moved for summary judgment on the basis that the defendants owed no duty to the plaintiffs because the accident was unforeseeable.<sup>41</sup> The trial court granted the motion.<sup>42</sup> The Iowa Court of Appeals affirmed.<sup>43</sup>

On appeal to the Iowa Supreme Court, the Thompsons argued that the trial court erred in holding that the defendants-appellees owed them no duty. They relied on Iowa cases that established a statutory and common law duty of an owner of property adjacent to a roadway to use reasonable care not to obstruct the roadway.<sup>44</sup> The Thompsons then argued that the breach and proximate cause issues were for the jury.<sup>45</sup> The brief for the defendants-appellees

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2008).

33. *Id.* at 375–77 (Holder, J., concurring and dissenting).

34. *Riedel v. ICI Ams. Inc.*, 968 A.2d 17, 20–21 (Del. 2009).

35. 774 N.W.2d 829 (Iowa 2009).

36. *Id.* at 835–39.

37. *Id.* at 831.

38. *Id.*

39. *Id.* at 832.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Thompson v. Kaczinski*, 760 N.W.2d 211 (Iowa Ct. App. 2008).

44. Appellants' Brief at 10–14, *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) (No. 08-0647).

45. *Id.* at 15–18.

argued that there was no duty as a matter of law.<sup>46</sup> No foreseeability, no duty, no liability.<sup>47</sup> Given the structure of the arguments, the Iowa Supreme Court could easily have decided the case based upon prevailing authority, but the court instead took advantage of the opportunity to clarify Iowa negligence law by adopting the Third Restatement approach.

In deciding duty issues, the court noted that the Iowa cases have suggested that duty is a function of “the relationship between the parties,” “reasonable foreseeability of harm to the person who is injured,” and “public policy considerations.”<sup>48</sup> The court viewed those factors as considerations in a balancing process rather than distinct and necessary elements in establishing duty.<sup>49</sup>

The court accepted the Third Restatement’s view of duty and excised foreseeability from Iowa’s duty standards, leaving the issue to the trier of fact in connection with the breach issue, except in cases where the breach issue can be decided as a matter of law by the court.<sup>50</sup> Tracking the Third Restatement’s reasons, the court concluded that the change would provide for more transparent duty determinations and better protect the traditional function of the jury as factfinder.<sup>51</sup>

Removal of the foreseeability issue left only the question of whether “a principle or strong policy consideration” justified exempting the defendants “as part of a class of defendants from the duty to exercise reasonable care.”<sup>52</sup> The court concluded that there was no such principle that would justify refusing to impose a duty.<sup>53</sup> On the contrary, the court said, there is a public interest in keeping roadways clear of dangerous obstructions.<sup>54</sup>

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46. Appellees’ Brief at 6–13, *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) (No. 08-0647).

47. *Id.* at 11. The primary case the appellees relied on was an Iowa Court of Appeals case, *Bain v. Gillespie*, 357 N.W.2d 47 (Iowa Ct. App. 1984).

48. *Thompson*, 774 N.W.2d at 834 (quoting *Stotts v. Eveleth*, 688 N.W.2d 803, 810 (Iowa 2004)) (internal quotation marks omitted).

49. *Id.*

50. *Id.* at 835.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 835–36.

The trial court in the case also held that there was no causal connection between the plaintiff's injuries and the defendants' conduct as a matter of law because of the lack of foreseeability.<sup>55</sup> As with the duty issue, the supreme court noted the uncertainty and confusion surrounding its proximate cause formulations.<sup>56</sup>

Previous Iowa Supreme Court decisions had separated causation into two components: cause in fact and legal cause.<sup>57</sup> The plaintiff was required to prove both.<sup>58</sup> Cause in fact was determined by a but-for standard.<sup>59</sup> Legal cause required a showing that a defendant's negligent conduct was "a substantial factor in bringing about the harm" and that "there is no rule of law relieving the actor from liability."<sup>60</sup>

In determining whether a defendant's conduct is a substantial factor in causing the harm, the supreme court has "considered the proximity between the breach and the injury based largely on the concept of foreseeability."<sup>61</sup> "Substantial" expressed the idea that the "defendant's conduct has such an effect in producing the harm as to lead reasonable minds to regard it as a cause."<sup>62</sup>

The *Thompson* court noted that one of the problems with the formulation had been inconsistency in its application and also confusion of factual determinations with policy judgments about the scope of liability.<sup>63</sup> The court adopted the Third Restatement's approach to scope of liability as a means of clarifying Iowa law, but in a way that it hoped would satisfactorily separate cause in fact from scope of liability while providing a manageable and understandable means of resolving scope of liability issues.<sup>64</sup>

The court noted that "[t]he scope-of-liability issue is fact-intensive as it requires consideration of the risks that made the

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55. *Id.* at 836.

56. *Id.* at 836-37.

57. *Id.* at 836.

58. *Id.*

59. *Yates v. Iowa W. Racing Ass'n*, 721 N.W.2d 762, 774 (Iowa 2006); *Berte v. Bode*, 692 N.W.2d 368, 372 (Iowa 2005); *City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*, 617 N.W.2d 11, 17 (Iowa 2000).

60. *Thompson*, 774 N.W.2d at 836.

61. *Id.* (quoting *Estate of Long ex rel. Smith v. Broadlawns Med. Ctr.*, 656 N.W.2d 71, 83 (Iowa 2002)) (internal quotation marks omitted).

62. *Id.* (quoting *Sumpter v. City of Moulton*, 519 N.W.2d 427, 434 (Iowa Ct. App. 1994)) (internal quotation marks omitted).

63. *Id.* at 836-37.

64. *See id.* at 837-38 (stating that resolving scope of liability issues no longer involves cause in fact determinations).

actor's conduct tortious and a determination of whether the harm at issue is a result of any of those risks."<sup>65</sup> The supreme court noted that a court considering the scope of liability issue in a pretrial motion to dismiss will initially have to consider the full range of harms the defendant's conduct risked and that a jury might find as a basis for determining the defendant's conduct was tortious.<sup>66</sup> Then, "the court can compare the plaintiff's harm with the range of harms risked by the defendant to determine whether a reasonable jury might find the former among the latter."<sup>67</sup>

The *Thompson* court did not specifically discuss the standard for determining cause in fact in routine negligence cases, but it has previously applied a but-for test to resolve that issue.<sup>68</sup> The court did indicate approval of section 27 of the Third Restatement for resolving cases in which there are multiple sufficient causes.<sup>69</sup>

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65. *Id.* at 838 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. d (Proposed Final Draft No. 1, 2005)).

66. *Id.*

67. *Id.*

68. *E.g.*, *Berte v. Bode*, 692 N.W.2d 368, 372 (Iowa 2005).

69. *Thompson*, 774 N.W.2d at 837–38. The Iowa Supreme Court has recognized that in addition to but-for causation, the plaintiff must establish that the risk is within the scope of the defendant's liability and that the defendant's conduct actually increased the risk of injury to the plaintiff. *Id.* at 838. In *Royal Indemnity Co. v. Factory Mutual Insurance Co.*, 786 N.W.2d 839 (Iowa 2010), the supreme court considered the scope of liability issue in a case involving a subrogated insurer's claim for property damage due to fire against an insurer that allegedly failed to perform proper inspection of the property where the fire occurred. While the case was tried before the supreme court's decision in *Thompson*, the court applied the analysis under section 30 of the Third Restatement, with the understanding that its analysis would have been the same under the Restatement (Second) of Torts, which the court had previously adopted. *Id.* at 849–50.

The fire resulted in the complete destruction of the warehouse inventory. *Id.* at 844. On the day of the fire, the water pressure was insufficient to permit the fire department to extinguish the fire. *Id.* Neither the cause of the fire nor the origin of the inadequate water pressure was explained. *Id.* John Deere, the warehouse owner, argued that it would not have moved into the warehouse had Factory Mutual conducted a proper inspection. *Id.* at 848. In that sense, inadequate inspection was the but-for cause of the fire, but the court concluded that Factory Mutual's conduct in no way increased the risk to John Deere because there was no showing that an inspection would have revealed problems with the water pressure or the source of the fire that caused the damage. *Id.* at 851–52.

The supreme court applied section 30 of the Third Restatement, which provides that "[a]n actor is not liable for harm when the tortious aspect of the actor's conduct was of a type that does not generally increase the risk of that harm." *Id.* at 850 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 30 (2010)). The court found illustration one on point:

Gordie is driving 35 miles per hour on a city street with a speed limit of

Section 27 provides that “[i]f multiple acts occur, each of which under section 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm.”<sup>70</sup>

The court did not specifically consider the standards to be applied to the breach issue. The Iowa pattern instruction on breach reads as follows:

“Negligence” means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. “Negligence” is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.<sup>71</sup>

The pattern instruction, like that in many other states, does not specifically instruct the jury to consider the foreseeability of the harm in determining whether the defendant was negligent, but it is implicit in the breach determination in any event. While the Third Restatement frames the negligence issue in terms of a risk-benefit approach,<sup>72</sup> it is “agnostic” on the issue of how juries should be instructed on that issue,<sup>73</sup> a recognition of the fact that many jurisdictions instruct in terms similar to those used in the Iowa instruction.

In the wake of *Thompson*, the Iowa State Bar Association amended its pattern negligence instructions. At the time *Thompson*

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25 miles per hour with Nathan as his passenger. Without warning, a tree crashes on Gordie’s car, injuring Nathan. Gordie’s speeding is a factual cause of Nathan’s harm because, if Gordie had not been traveling at 35 miles per hour, he would not have arrived at the location where the tree fell at the precise time that it fell. Gordie is not liable to Nathan because Gordie’s speeding did not increase the risk of the type of harm suffered by Nathan. The speeding merely put Gordie at the place and time at which the tree fell. This is true even if the type of harm suffered by Nathan might be found to be one of the risks arising from speeding in an automobile.

*Id.* at 850–51 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 30 cmt. a, illus. 1 (2010)).

70. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 (2010).

71. IOWA CIVIL JURY INSTRUCTIONS § 700.2 (2008).

72. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 cmt. e (2010).

73. *Id.* at cmt. d reporters’ note.

was decided the pattern instruction on proximate cause read as follows:

700.3 Proximate Cause—Defined. The conduct of a party is a proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct.

“Substantial” means the party’s conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.<sup>74</sup>

Post-*Thompson*, the amended instruction eliminated the word “proximate” from the heading and the body of the instruction to include only but-for causation:

700.3 Cause—Defined

The conduct of a party is a cause of damage when the damage would not have happened except for the conduct.<sup>75</sup>

A new instruction was added for the resolution of scope of liability issues:

700.3A Scope of Liability—Defined

You must decide whether the claimed harm to plaintiff is within the scope of defendant’s liability. The plaintiff’s claimed harm is within the scope of a defendant’s liability if that harm arises from the same general types of danger that the defendant should have taken reasonable steps [or other tort obligation] to avoid.

Consider whether repetition of defendant’s conduct makes it more likely harm of the type plaintiff claims to have suffered would happen to another. If not, the harm is not within the scope of liability.<sup>76</sup>

The Iowa Supreme Court applied section 7’s categorical approach to duty in *Van Fossen v. MidAmerican Energy Co.*,<sup>77</sup> a wrongful death take-home asbestos case. The plaintiff, an employee of an independent contractor, did work over a period of years at the defendant’s power plant and was regularly exposed to asbestos during the course of his work.<sup>78</sup> His wife contracted

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74. IOWA CIVIL JURY INSTRUCTIONS § 700.3 (2008).

75. IOWA CIVIL JURY INSTRUCTIONS § 700.3(A) (2010).

76. *Id.* § 700.3A. The comment to the instruction notes that scope of liability will not be in issue in most cases and that the instruction should be given only in cases where there is a jury issue concerning scope of liability. *Id.* at cmt.

77. 777 N.W.2d 689 (Iowa 2009).

78. *Id.* at 692.



mesothelioma because of her regular exposure to asbestos dust while laundering his clothes.<sup>79</sup> Noting section 7(b) of the Third Restatement, the court concluded that it was appropriate to modify the general duty of reasonable care by holding that an employer “owes no general duty of reasonable care to a member of the household of an employee of the independent contractor.”<sup>80</sup>

*B. Nebraska*

In *A.W. v. Lancaster County School District 0001*,<sup>81</sup> the Nebraska Supreme Court adopted the Third Restatement position in making foreseeability an element of breach but not duty.<sup>82</sup> The case arose out of a sexual assault of C.B., a kindergarten student at an elementary school, by an intruder during school hours.<sup>83</sup> The

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79. *Id.*

80. *Id.* at 696. In another case, *Brokaw v. Winfield-Mt. Union Community School District*, 788 N.W.2d 386 (Iowa 2010), the supreme court applied the Third Restatement in a case involving the issue of a school district’s liability for failing to guard against an assault committed by a basketball player. Brokaw was injured in a basketball game when a player with an opposing team hit him, causing a concussion. *Id.* at 388. Brokaw and his parents sued the player for assault and battery and the school district for negligent supervision of the player. *Id.* at 388. The case was tried to the court, which found assault and battery, but that the school district could not reasonably foresee the attack by the player against Brokaw. *Id.* at 387. The supreme court affirmed. *Id.* at 387–88. While the case was decided before *Thompson*, the trial court considered the foreseeability issue in connection with the breach issue, so the supreme court thought it appropriate to analyze the case under the Third Restatement approach. *Id.* at 391. The court concluded that the result was consistent with the Third Restatement, sections 3 and 19. *Id.* at 391–93. Section 19 provides that “[t]he conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §19 (2010).

In a more recent case, *Feld v. Borkowski*, 790 N.W.2d 72 (Iowa 2010), the supreme court declined to consider the application of the Third Restatement in a sports injury case in which a softball player’s released bat hit the first baseman during an intramural high school softball practice. The case turned on the application of the contact-sports exception, which bars recovery for injury sustained during the course of a contact sport unless the injury is caused recklessly. *Id.* at 77–78. The parties in the case did not dispute the contact-sports exception, but only its application to softball. *Id.* at 78. The court held that the exception applied. *Id.* at 79. Three of the justices, Justices Wiggins, Appel, and Hecht, would have reached the issue of whether the contact sports exception is consistent with the Third Restatement. *See id.* at 81 (Wiggins, J., concurring) (noting that the court should have addressed the issue now and avoided a terrible dilemma).

81. 784 N.W.2d 907 (Neb. 2010).

82. *Id.* at 918.

83. *Id.* at 911–13.

district court granted the school district's motion for summary judgment, concluding that the assault was not foreseeable.<sup>84</sup>

The Nebraska Supreme Court recognized that the detailed, fact-specific analysis of the foreseeability of the injury in the case is typical of the no-duty determinations courts regularly reach in negligence cases.<sup>85</sup> But the court concluded that it was just exactly that sort of analysis that justifies making the foreseeability issue the jury's province in deciding breach, rather than the court's, and in deciding whether there was a duty in the first place.<sup>86</sup>

The court's decision to purge foreseeability from the duty determination in Nebraska negligence cases was based primarily on two factors. The first was that foreseeability determinations "are not particularly 'legal,' in the sense that they do not require special training, expertise, or instruction, nor do they require considering far-reaching policy concerns."<sup>87</sup> Foreseeability determinations involve the application of "common sense, common experience, and application of the standards and behavioral norms of the community—matters that have long been understood to be uniquely the province of the finder of fact."<sup>88</sup> The second was that purging foreseeability from duty would require courts to be clear in

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84. *Id.* at 911.

85. *See id.* at 917.

86. *Id.* The court summarized its observations:

Under the Restatement (Third), foreseeable risk is an element in the determination of negligence, not legal duty. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. Thus, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter. And if the court takes the question of negligence away from the trier of fact because reasonable minds could not differ about whether an actor exercised reasonable care (for example, because the injury was not reasonably foreseeable), then the court's decision merely reflects the one-sidedness of the facts bearing on negligence and should not be misrepresented or misunderstood as involving exemption from the ordinary duty of reasonable care.

*Id.* (footnote omitted) (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmts. i–j (2010)).

87. *Lancaster*, 784 N.W.2d at 914 (citing W. Jonathan Card, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 799 (2005)).

88. *Id.* (quoting Card, *supra* note 85) (citing *Gipson v. Kasey*, 150 P.3d 288 (Ariz. 2007)).

articulating the reasons for their no-duty determinations.<sup>89</sup>

The court's specific focus in *A.W.* was on the relationship of foreseeability to the duty determination, although the other elements of Nebraska negligence law are not inconsistent with the Third Restatement's approach.<sup>90</sup> Nebraska applies a but-for standard for determining causation,<sup>91</sup> which is consistent with the Third Restatement's approach to cause in fact.<sup>92</sup> Proximate cause requires, in addition, that the injury be "the natural and probable result of the negligence," and that there be no "efficient intervening cause."<sup>93</sup> That standard is not consistent with the Third Restatement's approach to scope of liability issues and it fails to capture the essence of that inquiry.<sup>94</sup>

### C. *Arizona*

In *Gipson v. Kasey*,<sup>95</sup> the Arizona Supreme Court applied the Third Restatement approach in eliminating foreseeability from the duty determination. The issue was whether a coworker of the decedent, who provided prescription drugs to the decedent's girlfriend at an employee party, owed a duty of reasonable care to the decedent who took the pills and died from the combined toxicity of the pills and alcohol he had ingested throughout the course of the evening.<sup>96</sup> Arizona adopts the standard four elements for negligence: "(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages."<sup>97</sup>

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89. *Id.* at 917.

90. *See id.* at 917–18.

91. *Zeller v. Howard Cnty.*, 419 N.W.2d 654, 671–72 (Neb. 1988).

92. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. b (2010).

93. *Malolepszy v. State*, 729 N.W.2d 669, 675 (Neb. 2007); *Willet v. Cnty. of Lancaster*, 713 N.W.2d 483, 571 (Neb. 2006); *Zeller*, 419 N.W.2d at 672.

94. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. b reporters' note (2010) ("Proximate cause' is an old term with a murky history and a large amount of cumbersome baggage. In the notes and questions in this book we try to avoid the term 'proximate cause' in favor of [using cause in fact and legal cause]." (alteration in original) (quoting DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 169 (3d ed. 2004)).

95. 150 P.3d 228 (Ariz. 2007).

96. *Id.* at 229–30.

97. *Id.* at 230 (citing *Ontiveros v. Borak*, 667 P.2d 200, 204 (1983)).

Although duty is a question of law for the court, the other elements are typically for the jury.<sup>98</sup> Concerned that allowing courts to consider foreseeability as a threshold matter could undermine the jury's fact-finding role and obscure other factors that should be considered in resolving duty issues, the court clarified Arizona law by expressly holding "that foreseeability is not a factor to be considered by courts when making determinations of duty."<sup>99</sup> In taking that position, the court relied on a law review article by Jonathan Cardi and one of the comments to section 7 of the then-proposed final draft section of the Third Restatement.<sup>100</sup> The court emphasized the distinction between the duty issue, which involves generalizations about categories of cases, and breach, which is fact-specific.<sup>101</sup>

The supreme court noted that a duty could also "arise from special relationships based on contract, family relations, or conduct undertaken by the defendant," but that making those sorts of determinations based upon a fact-specific analysis of the relationship between the parties is "a problematic basis for determining if a duty of care exists."<sup>102</sup> The dispute over the facts concerning the relationship between Kasey and the decedent prompted the court to conclude that no special relationship duty could be established.<sup>103</sup>

Noting that duty does not necessarily turn on the existence of a preexisting or direct relationship between the parties, the court saw an erosion of formal relationship as a prerequisite for duty when public policy otherwise supports finding a duty.<sup>104</sup> Kasey argued that imposing a duty on him would effectively mean that a duty would be imposed on all persons to exercise reasonable care for the protection of all other persons at all times, a result that he argued would be at odds with Arizona precedent.<sup>105</sup>

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98. *Id.*

99. *Id.* at 231.

100. *Id.* (citing Cardi, *supra* note 87, at 801; RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. j (Proposed Final Draft No. 1, 2005)).

101. *Gipson*, 150 P.3d at 231.

102. *Id.* at 232.

103. *Id.*

104. *Id.* (citing *Stanley v. McCarver*, 92 P.3d 849, 851–52 (Ariz. 2004)).

105. *Id.* at 233. The court cited two court of appeals cases, both of which contained language supporting Kasey's argument: *Wertheim v. Pima County*, 122 P.3d 1, 5 (Ariz. Ct. App. 2005) and *Bloxham v. Glock Inc.*, 53 P.3d 196, 200 (Ariz. Ct. App. 2002).

In response, the supreme court noted its own prior decisions recognizing that “every person is under a duty to avoid creating situations which pose an unreasonable risk of harm to others” and that the position taken in the Third Restatement is that duty generally exists when an actor creates a risk of physical harm, subject to policy exceptions.<sup>106</sup> The court found it unnecessary to resolve the scope of duty issue, however, because it held that a duty existed based upon Arizona statutes criminalizing the distribution of prescription drugs to persons lacking a valid prescription.<sup>107</sup>

While the supreme court jettisoned foreseeability as a factor in the duty determination, the court did say it is relevant to the breach and causation issues.<sup>108</sup> As in Iowa and other states,<sup>109</sup> foreseeability is not a factor in the pattern instruction on negligence in Arizona: “Negligence is the failure to use reasonable care. Negligence may consist of action or inaction. Negligence is the failure to act as a reasonably careful person would act under the circumstances.”<sup>110</sup> Nothing in the instruction impedes arguments on the foreseeability and other risk-benefit factors, of course.

Foreseeability remains a factor in the causation analysis, however, when intervening/superseding cause issues are raised.<sup>111</sup> This injects some of the same potential confusion into the issue that the court avoided by removing foreseeability from the duty consideration. The Third Restatement avoids the problem of foreseeability in intervening/superseding cause cases by simply folding the analysis into the scope of liability issue.<sup>112</sup>

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106. *Gipson*, 150 P.3d at 233 n.4 (quoting *Ontiveros v. Borak*, 667 P.2d 200, 209 (Ariz. 1983) (internal quotation marks omitted)).

107. *Id.* at 233–34.

108. *Id.* at 231.

109. *See supra* notes 71–73 and accompanying text.

110. REVISED ARIZONA JURY INSTRUCTIONS (CIVIL) FAULT 1 (4th ed. Jan. 2005).

111. *See Robertson v. Sixpence Inns of Am., Inc.*, 789 P.2d 1040, 1047 (Ariz. 1990) (“A superseding cause, sufficient to become the proximate cause of the final result and relieve defendant of liability for his original negligence, arises only when an intervening force was unforeseeable and may be described, with the benefit of hindsight, as extraordinary.” (citations omitted)).

112. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 34 (2010).

*D. Wisconsin*

The Wisconsin Supreme Court considered the Third Restatement's position on the role of foreseeability in negligence law in *Behrendt v. Gulf Underwriters Insurance Co.*<sup>113</sup> Behrendt was injured while using a ten-year-old, custom-made tank fabricated by two employees of Silvan Industries, which was in the business of manufacturing pressure tanks.<sup>114</sup> The employees did the work as a side job and favor to Behrendt's employer, who needed a storage tank for use in his oil changing business.<sup>115</sup> After the tank was fabricated, the plaintiff's employer modified the oil collection system over a period of weeks, including plugging some holes in the side of the tank, fitting the tank with valves at the top and bottom to allow for the collection and drainage of oil, and adding a fitting for connection of an air hose to facilitate drainage of the tank.<sup>116</sup> Behrendt was injured when the tank exploded while he was using it with air pressure.<sup>117</sup>

He brought suit against Silvan, Gulf Underwriters and its insurer, and one of the Silvan employees who fabricated the tank.<sup>118</sup> Silvan and Gulf moved for summary judgment.<sup>119</sup> The circuit court granted the motion "because the negligence was too remote from the injury and because allowing recovery would open the door to fraudulent claims and would have no sensible or just stopping point."<sup>120</sup> The court of appeals affirmed on the basis that any harm the employee caused was not foreseeable and that the "lack of foreseeability and absurdly attenuated chain of events . . . supports the circuit court's ruling . . ."<sup>121</sup>

The Wisconsin Supreme Court affirmed, but on the basis that Silvan did not breach its duty to Behrendt.<sup>122</sup> The court noted that Wisconsin follows Judge Andrews's view in *Palsgraf v. Long Island Railroad* that "[e]very one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the

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113. 768 N.W.2d 568 (Wis. 2009).

114. *Id.* at 571-72.

115. *Id.* at 571.

116. *Id.* at 571-72.

117. *Id.* at 572.

118. *Behrendt v. Gulf Underwriters Ins. Co.*, 747 N.W.2d 527 (Wis. Ct. App. 2008).

119. *Id.*

120. *Behrendt*, 768 N.W.2d at 572-73.

121. *Behrendt*, 747 N.W.2d at 527.

122. *Behrendt*, 768 N.W.2d at 579-80.

safety of others.”<sup>123</sup> The duty of ordinary care depends on what is reasonable under the circumstances.<sup>124</sup> The majority opinion couched its analysis in terms of its recent case law on negligence in which it examined whether a defendant exercised reasonable care, instead of whether the defendant had a duty to a specific act.<sup>125</sup>

While not adopting section 7 of the Third Restatement,<sup>126</sup> the court in *Behrendt* found comments i and j to section 7 of the Third Restatement<sup>127</sup> to be helpful in explaining the court’s position on the role of foreseeability in negligence law and in clearly distinguishing between the determinations for duty and breach.<sup>128</sup> Those comments state that while courts sometimes take cases away from juries on the basis of no duty due to a lack of foreseeability, what courts really are doing is ruling that there is no breach as a matter of law and that lack of foreseeability is not a basis for making a no duty determination. The supreme court said that while language in some of its prior opinions invoked foreseeability in connection with the duty issue, it found that the approach taken by the Third Restatement in those comments to be most consistent with the court’s approach to duty in the vast majority of its cases.<sup>129</sup>

The court said that there are occasional “cases where a negligence claim fails because the duty of care does not encompass the acts or omissions that caused the harm, but this is not one of them.”<sup>130</sup> Turning to the breach issue, the court emphasized that the issue is for the jury except in “rare” cases.<sup>131</sup> The court held that

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123. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (1928) (Andrews, J., concurring); *see also* *Alvarado v. Sersch*, 662 N.W.2d 350, 353 (Wis. 2003) (“Wisconsin has long followed the minority view of duty set forth in the dissent of *Palsgraf*. . .”).

124. *Behrendt*, 768 N.W.2d at 574–75 (citing *Hoida, Inc. v. M & I Midstate Bank*, 717 N.W.2d 17, 28–29 (Wis. 2006)).

125. *Id.* at 574 (quoting *Gritzner v. Michael R.*, 611 N.W.2d 906, 913 (Wis. 2000)) (citing *Nichols v. Progressive N. Ins. Co.*, 746 N.W.2d 220, 233 (Wis. 2008)).

126. The court noted that its “long-standing practice has been to review and decide whether to adopt sections from the Restatements on a case-by-case basis as we deem it necessary” and that it has “previously noted, without finding it necessary to adopt, helpful language from sections in the Restatements where it provides further support for the rationale for a holding.” *Id.* at 575 n.7 (citations omitted).

127. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmts. i–j (2010).

128. *Behrendt*, 768 N.W.2d at 575–76.

129. *Id.*

130. *Id.* at 576.

131. *Id.*

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*Behrendt* was such a case,<sup>132</sup> emphasizing again the Third Restatement's position in comment j to section 7 and finding no breach as a matter of law.<sup>133</sup>

Although the supreme court determined that summary judgment was appropriately granted on the negligence issue, it nonetheless commented on other fact-dependent lines of analysis it had previously utilized, including determinations that a defendant's duty "did not extend to the alleged acts or omissions" and that the defendant owed no duty to the plaintiff based upon public policy grounds.<sup>134</sup> The court pointed out that *Behrendt* could have been legitimately resolved on public policy grounds.<sup>135</sup> The court recognized six policy factors from past decisions: (1) remoteness of the injury from the negligence; (2) disproportion between the recovery and the tortfeasor's negligence; (3) whether the harm is highly extraordinary as compared to the negligent act; (4) whether recovery would impose an unreasonable burden on the tortfeasor; (5) whether recovery would open the door to fraudulent claims; and (6) whether allowing recovery in the area would mean that there is no sensible or just stopping point.<sup>136</sup>

The court found that remoteness would be a consideration, but having said that, the court reiterated its conclusion "that an analysis which clarifies that foreseeability is properly taken into consideration as to breach is the better approach here because it makes clear that we are not deviating from the *Palsgraf* minority position that we have adhered to in the vast majority of our cases."<sup>137</sup> Uncoupling foreseeability from the duty analysis resolves part of the problem under the Third Restatement view, but the Wisconsin approach still gives courts considerable latitude in applying a loose network of case-specific factors, rather than categorical considerations, in determining whether duty exists in a particular case. To that extent, it is inconsistent with the Third Restatement's approach to the duty issue.<sup>138</sup>

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132. *Id.*

133. *Id.* at 577.

134. *Id.*

135. *Id.*

136. *Id.* The policy factors were drawn from *Colla v. Mandella*, 85 N.W.2d 345, 348 (Wis. 1957). See also *Stephenson v. Universal Metrics, Inc.*, 641 N.W.2d 158, 169 (Wis. 2002).

137. *Behrendt*, 768 N.W.2d at 578.

138. See Aaron D. Twerski, *The Cleaver, the Violin, and the Scalpel: Duty and the Restatement (Third) of Torts*, 60 HASTINGS L.J. 1, 23-24 (2008).



In lengthy dueling concurring opinions, Chief Justice Abrahamson and Justice Roggensack disagreed about the role of foreseeability in cases involving nonfeasance and, more broadly, about the role of duty in Wisconsin negligence law.<sup>139</sup> Chief Justice Abrahamson disagreed with Justice Roggensack's concurrence because it applied separate standards to misfeasance and nonfeasance.<sup>140</sup> As she characterized Justice Roggensack's approach, if the alleged negligence of a defendant is an omission, rather than an affirmative act, the court would first have to decide whether the defendant's general duty to use reasonable and ordinary care implies a more specific duty to do an act that the defendant omitted.<sup>141</sup> If the general duty does not imply a more specific duty to act, the defendant is not negligent as a matter of law.<sup>142</sup> If the defendant acted affirmatively, the issue is simply whether the defendant acted reasonably under the circumstances.<sup>143</sup>

In response, Justice Roggensack observed that in her opinion, Chief Justice Abrahamson took "the unusual tac[k] of attacking a concurring opinion in her ongoing mission of attempting to eliminate the element of duty from common law negligence claims in Wisconsin" and "in so doing, she only strengthens the black letter law that a negligence claim in Wisconsin has duty as an element."<sup>144</sup> She also disagreed with the Chief Justice's "lament" that her analysis was inconsistent with Wisconsin case law, noting that the primary Wisconsin cases involving duty issues establish that "[d]uty remains a highly nuanced element of negligence; it has not been gobbled up by the dissenting opinion in *Palsgraf*."<sup>145</sup>

#### E. Tennessee

Tennessee adheres to the view that foreseeability is an integral part of the duty determination. The majority's opinions in two cases, *Satterfield v. Breeding Insulation Co.*<sup>146</sup> and *Giggers v. Memphis*

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139. *Behrendt*, 768 N.W.2d at 580–83 (Abrahamson, J., concurring); *id.* at 589–595 (Roggensack, J., concurring).

140. *Id.* at 581.

141. *Id.* at 580.

142. *Id.*

143. *Id.* at 580–81.

144. *Id.* at 594 (citations omitted).

145. *Id.*

146. 266 S.W.3d 347 (Tenn. 2008).

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*Housing Authority*,<sup>147</sup> establish the intensively fact-specific analysis necessary in a duty analysis under Tennessee law. Justice Holder has been alone in consistently urging the adoption of the Third Restatement position on duty, however. Her views are established in two concurring and dissenting opinions, one involving a take-home asbestos case and the other the failure of a Housing Authority to prevent a shooting.<sup>148</sup>

*Satterfield* concerned the liability of an employer for the death from mesothelioma of an employee's daughter because of her repeated exposure to asbestos-contaminated work clothing he wore home from work.<sup>149</sup> The suit alleged that the employer was negligent in permitting him to wear the work clothing home.<sup>150</sup> The supreme court held that the employer owed a duty to the daughter.<sup>151</sup> As framed by the court,

[t]he underlying dispute . . . is fundamentally one of characterization and classification. Has Alcoa engaged in an affirmative act that created an unreasonable and foreseeable risk of harm to Ms. Satterfield? If Alcoa did create such a risk of harm, are there countervailing legal principles or policy considerations that warrant determining that Alcoa nevertheless owed no duty [to] Ms. Satterfield? Or, alternatively, does this case involve an omission by Alcoa in failing to control the actions of Mr. Satterfield, its employee? If so, then does Alcoa have the sort of special relationship with either Mr. Satterfield or Ms. Satterfield that gives rise to a duty to restrain Mr. Satterfield or to protect Ms. Satterfield? The answers to these questions emerge from considerations of precedent and public policy, as well as the basic foundations of Tennessee's tort law.<sup>152</sup>

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147. 277 S.W.3d 359 (Tenn. 2009).

148. See *id.* at 372 (Holder, J., concurring and dissenting); *Satterfield*, 266 S.W.3d at 375 (Holder, J., concurring and dissenting).

149. *Satterfield*, 266 S.W.3d at 351-52.

150. *Id.* at 351.

151. *Id.* at 352 (“[U]nder the facts alleged in the complaint, the employer owed a duty to those who regularly and for extended periods of time came into close contact with the asbestos-contaminated work clothes of its employees to prevent them from being exposed to a foreseeable and unreasonable risk of harm.”).

152. *Id.* at 355.

Before concluding that the special relationship issue was irrelevant because Alcoa affirmatively created a risk of injury,<sup>153</sup> the court spent a substantial amount of time analyzing the distinction between misfeasance and nonfeasance and the importance of establishing a special relationship in cases involving nonfeasance.<sup>154</sup> The court relied in part on section 37 of the Third Restatement in so characterizing Alcoa's conduct.<sup>155</sup> Following section 37, the court concluded that the important factor was not the relationship between the parties but conduct creating a risk.<sup>156</sup>

Finding the creation of the risk insufficient by itself to establish a duty,<sup>157</sup> however, the court proceeded to consider in detail the issue of whether Alcoa owed a duty to Ms. Satterfield.<sup>158</sup> The Tennessee Supreme Court's conception of duty as an expression of public policy involves a consideration of a variety of factors:

- (1) the foreseeable probability of the harm or injury occurring;
- (2) the possible magnitude of the potential harm or injury;
- (3) the importance or social value of the activity engaged in by the defendant;
- (4) the usefulness of the conduct to the defendant;
- (5) the feasibility of alternative conduct that is safer;
- (6) the relative costs and burdens associated with that safer conduct;
- (7) the relative usefulness of the safer conduct; and
- (8) the relative safety of alternative conduct.<sup>159</sup>

Keeping the list "firmly in mind," said the court, "Tennessee's courts use a balancing approach to determine whether the particular risk should give rise to a duty of reasonable care."<sup>160</sup>

Under the Tennessee approach "duty arises when the degree of foreseeability of the risk and the gravity of the harm outweigh the burden that would be imposed if the defendant were required to engage in an alternative course of conduct that would have

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153. *Id.* at 364.

154. *Id.* at 355–61.

155. *Id.* at 356–57. nn. 8, 10–11.

156. *Id.* at 362–63.

157. *Id.* at 364.

158. *Id.* at 364–69.

159. *Id.* at 365.

160. *Id.* Some of these factors are factors for consideration by the trier of fact in deciding the breach issue in the Third Restatement view. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (2010) (factors to consider on the breach issue include "the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm").

prevented the harm.”<sup>161</sup> The foreseeability and gravity of the harm are connected. The degree of foreseeability necessary for duty is inversely proportional to the magnitude of the foreseeable harm.<sup>162</sup> Finally, Tennessee courts are permitted “to consider the contemporary values of Tennessee’s citizens.”<sup>163</sup>

Lest this all seem rather amorphous, the court said in its introduction to the duty analysis that “[i]t would be erroneous . . . to assume that the concept of duty is a freefloating application of public policy, drifting on the prevailing winds like the seeds of a dandelion.”<sup>164</sup> The court then said, reassuringly, and mixing metaphors, that the courts in Tennessee “have not become so intoxicated on the liquor of public policy analysis” that they have lost their “appreciation for the moderating and sobering influences of the well-tested principles regarding the imposition of duty.”<sup>165</sup>

Foreseeability is a factor of paramount importance in the duty determination.<sup>166</sup> The court carefully evaluated the role of foreseeability in negligence cases, concluding that while there are difficulties with it, “the experience of most courts has been that maintaining a role for foreseeability when addressing questions regarding the existence and scope of duty assists—more than it impedes—the application and development of the law of negligence.”<sup>167</sup>

Foreseeability is important in determining whether there is a serious enough probability or likelihood of harm that would prompt a reasonable person to take precautions to avoid the harm.<sup>168</sup> The court had no problem in concluding that the harm to Ms. Satterfield was foreseeable.<sup>169</sup> Having done so, the court proceeded to consider the balancing factors, but with the cautionary note that courts should be careful not to invade the province of the jury in performing their gatekeeping function.<sup>170</sup>

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161. *Satterfield*, 266 S.W.3d at 365.

162. *Id.*

163. *Id.* at 366.

164. *Id.* at 365.

165. *Id.*

166. *Id.* at 366.

167. *Id.*

168. *Id.* at 367.

169. *Id.*

170. *Id.* at 367–68.

After disposing of additional policy arguments by Alcoa emphasizing the adverse impact of a decision imposing a duty in take-home exposure cases,<sup>171</sup> and considering and rejecting adverse authority from other jurisdictions,<sup>172</sup> the court concluded that the duty it recognized “extends to those who regularly and repeatedly come into close contact with an employee’s contaminated work clothes over an extended period of time, regardless of whether they live in the employee’s home or are a family member.”<sup>173</sup>

Justice Holder, concurring and dissenting, agreed with the majority that Alcoa owed Ms. Satterfield a duty to use reasonable care to prevent her from injury because of risks created at Alcoa’s facility.<sup>174</sup> She wrote separately to emphasize her belief that foreseeability plays no role in deciding the duty issue but is more appropriately reserved for the breach of duty or proximate cause determinations.<sup>175</sup>

In her opinion, the relationship of the parties is relevant only in cases involving nonfeasance.<sup>176</sup> Her reasons are the standard ones. Foreseeability is an issue more properly reserved for the jury. Incorporation of foreseeability in the duty determination expands the authority of judges at the expense of juries. Leave it to the jury, because “[a] collection of twelve people representing a cross-section of the public is better suited than any judge to make the common-sense and experience-based judgment of foreseeability.”<sup>177</sup> In addition, she takes the position that “reliance on foreseeability reduces the clarity and certainty of negligence law and gives judges such broad discretion that similarly situated parties may often be treated differently,” and that the use of foreseeability may actually obscure the policy considerations that motivate courts’ duty decisions.<sup>178</sup>

The disagreement was replayed in *Giggers v. Memphis Housing Authority*,<sup>179</sup> a wrongful death action against the Housing Authority for negligently failing to prevent the shooting death of one tenant

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171. *Id.* at 369–72.

172. *Id.* at 371–73.

173. *Id.* at 374.

174. *Id.* (Holder, J., concurring and dissenting).

175. *Id.* at 375–76.

176. *Id.* at 375.

177. *Id.* at 376 (citing *Cardi*, *supra* note 87, at 799–800).

178. *Id.* at 378 (citing *Cardi*, *supra* note 87 at 740–41, 792–93).

179. 277 S.W.3d 359 (Tenn. 2009).

by another.<sup>180</sup> The court classified the case as one of nonfeasance, but concluded that the landlord-tenant relationship is a special relationship that imposes on landlords an obligation to use reasonable care for the protection of their tenants against unreasonable risks of foreseeable harms.<sup>181</sup> The court first considered whether the risk was foreseeable and then applied a balancing test to determine whether the risk was unreasonable.<sup>182</sup>

The court first concluded that the Housing Authority's general knowledge of criminal activity in the housing project, along with its particular knowledge of the shooter's prior altercation with another tenant, justified a conclusion that the authority could reasonably have foreseen the probability of another violent attack.<sup>183</sup> The first of the balancing factors, specific foreseeability, was established because of the authority's knowledge of the shooter's prior conduct.<sup>184</sup> The second factor, magnitude of the harm, also supported the existence of a duty because of the prior violent threats.<sup>185</sup> The third factor, the social value of public housing, favored the authority.<sup>186</sup> The court found the fourth factor, the usefulness of stricter, alternative conduct, to be neutral.<sup>187</sup> The fifth factor, the feasibility of safer, alternative conduct, favored by a small margin the imposition of a duty on the authority because simply evicting the shooter after his prior attack on a tenant would have been feasible.<sup>188</sup> The court found that the sixth factor, the costs and burdens of safer conduct, favored the plaintiffs, but that because of the range of options available to the Housing Authority, the factor favored submission of the liability issue to the jury.<sup>189</sup> Factors seven and eight, the usefulness and safety of the alternative conduct, did not cut one way or the other, in the court's opinion.<sup>190</sup> The facts show that while evicting tenants after violent confrontations could increase the safety of other tenants, it might simply transport the risk from one venue to

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180. *Id.* at 360.

181. *Id.* at 364–65, 71.

182. *Id.* at 366–71.

183. *Id.* at 366–67.

184. *Id.* at 367.

185. *Id.*

186. *Id.* at 367–68.

187. *Id.* at 369.

188. *Id.* at 370.

189. *Id.*

190. *Id.* at 370–71.

another.<sup>191</sup> The need for safety and the need to provide housing for low-income tenants are competing forces.<sup>192</sup> The court concluded that on balance, closer monitoring of tenants with prior criminal records or using a recertification or other process did not appear to be overly burdensome.<sup>193</sup>

In explaining its conclusion on the duty issue, the court emphasized that the defendant's conduct has to create a recognizable risk, either to a plaintiff or a class of persons, which would include the tenants of an apartment building.<sup>194</sup> Viewing the facts in the light most favorable to the plaintiff, the court concluded that it was reasonably foreseeable that the tenants of the apartments would be exposed to the risk of violent attacks and that the authority failed to offer an explanation as to why imposition of a duty would have an impermissible impact on the authority's ability to provide low-income tenants affordable housing.<sup>195</sup>

Justice Holder again concurred and dissented.<sup>196</sup> She concurred in the court's conclusion that the Housing Authority owed a duty to its tenants to take reasonable measures to prevent them from suffering harm, but she disagreed with the court's approach to the duty issue.<sup>197</sup> Without a discussion of the misfeasance/nonfeasance distinction, she concluded that the Third Restatement's approach to the duty issue should be followed.<sup>198</sup> The issue of whether it was foreseeable to the Housing Authority that the shooter would harm other tenants should be relevant only to the breach and proximate cause issues, in her opinion.<sup>199</sup> In her view, the majority's balancing test incorporating foreseeability obscured the policy determinations relevant to the duty decision.<sup>200</sup>

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191. *Id.* at 370–71.

192. *Id.* at 371.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 372 (Holder, J., concurring and dissenting).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

*F. Delaware*

In *Riedel v. ICI Americas Inc.*,<sup>201</sup> the Delaware Supreme Court considered the same take-home asbestos issue as in *Satterfield v. Breeding Insulation Co.* The plaintiff, wife of an employee of the defendant, alleged that she contracted asbestosis as a result of her exposure to asbestos fibers and dust on her husband's clothing.<sup>202</sup> The superior court granted the employer's motion for summary judgment and the plaintiff appealed to the supreme court.<sup>203</sup> There was no mention of the Third Restatement in the parties' initial briefs in *Riedel*; but because *Satterfield* was decided on the eve of the oral argument and because the court in *Satterfield* considered and applied the Third Restatement, at least in part, in a similar case, the supreme court in *Riedel* asked the parties for supplemental briefs on the issue of whether it should adopt certain provisions of the Third Restatement, and if so, how those provisions should apply to the case.<sup>204</sup>

The plaintiff-appellant in *Riedel* argued that the court should adopt sections 6, 7, 37, and 38 of the Third Restatement, attempting to persuade the court that the defendant affirmatively created a risk of injury, which would take the case out of the nonfeasance category and avoid any need to argue that a special relationship existed between the defendant and plaintiff. Plaintiff-appellant also argued that acceptance of the Third Restatement positions would be consistent with Delaware law.<sup>205</sup> The defendant-

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201. 968 A.2d 17 (Del. 2009).

202. *Id.* at 18.

203. *Id.*

204. *See id.* at 20. The first question was whether the supreme court should adopt certain provisions of the Third Restatement as the principles of law that should govern the case. *See id.* The court specifically asked about: sections 6 (Liability for Negligence Causing Physical Harm); 7 (Duty); 37 (No Duty of Care with Respect to Risks Not Created by Actor); 38 (Duty Based on Prior Conduct Creating a Risk of Physical Harm); 39 (Duty Based on Prior Conduct Creating a Risk of Physical Harm Duty to Third Persons Based on Special Relationship with Person Posing Risks); 40 (Duty Based on Special Relationship with Another); and 41 (Duty to Third Persons Based on Special Relationship with Person Posing Risks). *Id.* at 20 n.8. Assuming the adoption of the Third Restatement provisions, the second question the court asked was regarding the parties' views about the application of those provisions. *Id.* Assuming that there should be "a duty of some scope under Section 6," the court asked whether there is a "countervailing principle of policy" that the court should apply to the case or whether the court should defer to the legislature. *Id.*

205. *See* Appellant Lillian Riedel's Supplemental Reply Brief at 2, *Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009) (No. 156), 2008 WL 5069609, at \*2.



appellee argued that adoption of the Third Restatement provisions would be a radical departure from long-established principles of Delaware tort law governing personal injury and property damage cases; that at the time no jurisdiction had adopted the Third Restatement's duty framework, including the court's decision in *Satterfield*; and that adoption of the Third Restatement's duty concept "would open the floodgates of plaintiffs' suits in the already expansive Delaware Asbestos Litigation and diminish the Superior Court's control over its own docket."<sup>206</sup> The court summarized the plaintiff's argument by stating that "[t]here simply is no sound reason to abandon the duty analysis utilized for decades by Delaware courts, which requires that some legally significant relationship exist between the parties for a duty of care to flow between them, in favor of the Third Restatement's novel, untested and impractical approach."<sup>207</sup>

The supreme court characterized the plaintiff's claim as one of misfeasance as to the defendant's actions with respect to her husband, but one of nonfeasance in her own claim against the defendant, and held that the plaintiff was locked into her nonfeasance theory as alleged and argued in the trial court.<sup>208</sup> The court held that she was not entitled to raise the misfeasance issue on appeal without having raised it in the trial court.<sup>209</sup>

The court also declined to adopt any of the provisions of the Third Restatement.<sup>210</sup> The court concluded that the Third Restatement redefined the duty concept "in a way that is inconsistent with th[e] Court's precedents and traditions."<sup>211</sup> The court perceived the Third Restatement as creating duties in areas of the law where the court previously found no duty and deferred to the legislature as to whether a duty should be created.<sup>212</sup> As an example—in fact, the only example—the court pointed out the Third Restatement's discussion of the duties of tavern owners and social hosts who negligently provided alcohol to patrons or guests

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206. Supplemental Answering Brief of Defendant-Below, Appellee ICI Americas Inc. at 2, *Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009) (No. 156), 2008 WL 5069608, at \*2.

207. *Id.*

208. *Riedel*, 968 A.2d at 23–24.

209. *Id.* at 19, 23–25.

210. *Id.* at 20.

211. *Id.*

212. *Id.*

who then injured third parties.<sup>213</sup>

The comments to section 7 of the Third Restatement covering duty recognize that many courts, while holding that commercial sellers of alcohol have a duty to avoid injury to others caused by providing alcohol to guests, do not impose the same duty on social hosts for injuries caused by their intoxicated guests, justifying the result by reference to prevailing social norms about responsibility.<sup>214</sup> The comments make it clear that the Third Restatement neither endorses nor rejects that set of rules, but that “[i]t does support a court’s deciding this issue as a categorical matter under the rubric of duty, and a court’s articulating general social norms of responsibility as the basis for this determination.”<sup>215</sup>

The supreme court in *Riedel* noted that for the past twenty-five years, it has taken the position that the issue of dram shop liability is a social policy issue for the legislature.<sup>216</sup> Given its history of deference to the legislative distaste for dram shop liability, the court said it would be incongruous for the court to adopt the Third Restatement, “thereby creating a common law duty that directly contravenes the primacy of the legislative branch in resolving this question.”<sup>217</sup> The court’s concern about the impact the Third Restatement would have on dram shop liability seemed to have driven its decision on the take-home asbestos issue, even though adopting the Third Restatement’s approach to duty would not have required acceptance of the Third Restatement comments. In any event, it seems clear that the relevant Third Restatement comment does not take the position that a court should adopt social host liability, but only the position that the issue could be decided as a categorical matter and that general social norms could be the basis for finding such a duty.

### G. Summary

The acceptance of the Third Restatement by the courts that have considered it to date has been varied, as would be expected. Four of the six state supreme courts that have considered it accepted the separation of foreseeability from the duty

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213. *See id.* at 20–21.

214. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmts. a, c (2010).

215. *Id.* § 7 cmt. c.

216. *Riedel*, 968 A.2d at 21.

217. *Id.*

determination, although doing so does not mean acceptance of the Third Restatement's "categorical" approach to duty in section 7(b). Courts may decide to eliminate foreseeability from the duty determination, but they may prefer to continue to apply a multifactor duty analysis because of the flexibility it gives them in making policy judgments. Or they may eliminate foreseeability from duty but continue to make it a factor in proximate cause determinations. The cautious approach is understandable, but it is also important to understand that the approach to negligence in the Third Restatement is not significantly different from that in the Restatement (Second) of Torts and that it is arguable that adoption of the Third Restatement would not result in any significant change in outcome in most cases.<sup>218</sup>

*Thompson v. Kaczinski* reshaped Iowa negligence law in the vision of the Third Restatement. It will change the way lawyers and judges approach cases. The briefs in *Thompson* are a good indicator. No one would have expected the lawyers in the case to brief and argue the impact of the Third Restatement, and the supreme court did not indicate to the lawyers its intent to consider the application of the Third Restatement, at least prior to oral argument.<sup>219</sup>

The appellant argued that the trial court erred in holding that the defendant owed no duty to the plaintiff, relying on Iowa cases establishing a statutory and common law duty of owners of property adjacent to roadways to use reasonable care not to obstruct the roadway,<sup>220</sup> and that the breach and proximate cause issues were for the jury.<sup>221</sup> The brief for the appellees focused on standard legal arguments: that there was no duty as a matter of law, no foreseeability, no duty, and no liability.<sup>222</sup> Given the structure of the arguments, the Iowa Supreme Court could easily have decided the

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218. See *Cardi*, *supra* note 87, at 804–08; W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 691–95 (2008).

219. See Appellants' Brief, *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) (No. 08-0647); Appellees' Brief, *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) (No. 08-0647).

220. Appellants' Brief at 10–14, *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) (No. 08-0647).

221. *Id.* at 15–18.

222. Appellees' Brief, *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) (No. 08-0647). The primary case the Appellees relied on was an Iowa Court of Appeals case, *Bain v. Gillispie*, 357 N.W.2d 47, 49 (Iowa Ct. App. 1984). See Appellees' Brief at 7–8, *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) (No. 08-0647).

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case based upon prevailing authority, but the court took advantage of the opportunity to clarify negligence law by adopting the Third Restatement approach.

The Iowa bar quickly adapted to the change. The Iowa State Bar Association adopted new jury instructions intended to implement *Thompson's* approach with simple instructions on but-for causation and scope of liability.<sup>223</sup> The court's demonstrated approach to duty still gives it latitude to make judgments about duty on a categorical basis, just not on the basis of a lack of foreseeability. Even focusing on breach, courts still have the obvious authority to determine in appropriate cases that there is no negligence as a matter of law.<sup>224</sup> Iowa's experience establishes that adoption of the Third Restatement will not result in radical changes in the law, and although there is likely to be argument on this, the court's subsequent decisions applying *Thompson* on the duty issue have been doctrinally clear.

At the other extreme, Tennessee's failure to embrace the Third Restatement's position on duty and foreseeability and Delaware's rejection of the Third Restatement are understandable. The Tennessee Supreme Court's fact-intensive analysis of the duty issues in *Satterfield* and *Griggs* illustrates the court's commitment to its traditional duty analysis, but it also highlights the need to simplify the duty determination, as Justice Holder pointed out in her opinions in the cases.<sup>225</sup> The Delaware Supreme Court in *Riedel* was obviously concerned that adoption of the Third Restatement's position on duty would establish a precedent that would not only extend liability in asbestosis cases, but also that it would give Delaware courts inappropriate latitude to decide duty issues in a way that would conflict with the state's traditions and history.

Other decisions in between have accepted the common sense approach of separating foreseeability from duty, recognizing that the fact-intensive nature of the foreseeability analysis makes the

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223. See *supra* notes 73–76 and accompanying text.

224. See *Mitchell v. Hess*, No. 08-C-847, 2010 WL 1212080, at \*5 (E.D. Wis. Mar. 23, 2010). Following *Behrendt*, the court noted that in rare cases the court can hold that there is no breach of duty as a matter of law because of the unforeseeability of the plaintiff's injury. The court held that *Mitchell* was such a case and held that the Boy Scouts of America Council could not be held liable for a ski accident that occurred during the course of a boy scout troop outing. *Id.*

225. *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 371–72 (Tenn. 2009) (Holder, C.J., concurring and dissenting); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 375–77 (Tenn. 2008) (Holder, J., concurring and dissenting).

issue appropriate for resolution by juries rather than courts. The approach clarifies in one important respect the judge-jury relationship. Along the way, it will avoid some of the inconsistencies inherent in case-by-case foreseeability determinations by the courts.

#### IV. MINNESOTA NEGLIGENCE LAW

There are four basic elements in a negligence case in Minnesota: duty, breach of duty, injury, and proximate cause.<sup>226</sup> In applying the elements, courts in Minnesota have traditionally acted as gatekeepers as they screen cases to determine whether the injuries were sufficiently foreseeable to create a jury issue.<sup>227</sup> Courts may hold as a matter of law that there is no duty because the risk created by the defendant's conduct was not foreseeable as a matter of law.<sup>228</sup> Even if there is a duty, primary assumption of risk may be applied to bar recovery.<sup>229</sup>

Foreseeability is also often noted as a factor in determining whether a defendant's negligence is the proximate cause of a particular injury,<sup>230</sup> although proximate cause in Minnesota parlance is sometimes reduced to just the substantial factor test through the conflation of cause in fact and proximate cause standards.<sup>231</sup> Foreseeability also relates to the breach issue<sup>232</sup>—although decisions holding that there is no breach as a matter of law are less common, a reflection perhaps of the general understanding that the breach issue is quintessentially a jury

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226. *E.g.*, Gradjelick v. Hance, 646 N.W.2d 225, 230 (Minn. 2002); Louis v. Louis, 636 N.W.2d 314, 318 (Minn. 2001); Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995); Hudson v. Snyder Body, Inc., 326 N.W.2d 149, 157 (Minn. 1982); Schmanski v. Church of St. Casimir of Wells, 243 Minn. 289, 292, 67 N.W.2d 644, 646 (1954).

227. *E.g.*, Foss v. Kincade, 766 N.W.2d 317, 322–23 (Minn. 2009).

228. *Id.*

229. *See generally* Michael K. Steenson, *The Role of Primary Assumption of Risk in Civil Litigation in Minnesota*, 30 WM. MITCHELL L. REV. 115 (2003) [hereinafter Steenson, *Role of Primary Assumption of Risk*]. Courts also limit liability in cases where a danger is obvious, particularly in cases involving landowners' duties cases. *See generally* Mike Steenson, Peterson v. Balach, *Obvious Dangers, and the Duty of Possessors of Land in Minnesota*, 34 WM. MITCHELL L. REV. 1281 (2008).

230. *E.g.*, Lietz v. N. States Power Co., 718 N.W.2d 865, 872 (Minn. 2006).

231. *See, e.g., id.* (citing Canada *ex rel.* Landy v. McCarthy, 567 N.W.2d 496, 506 (Minn. 1997)).

232. *See* Peterson v. Balach, 294 Minn. 161, 175 n.7, 199 N.W.2d 639, 648 n.7 (1972) (listing foreseeability among factors to consider in determining landowner liability).

question.<sup>233</sup> Cause in fact is generally, but not universally, framed in terms of the substantial factor standard rather than the but-for standard,<sup>234</sup> although the but-for standard is routinely used in professional liability cases.<sup>235</sup>

While the basic elements of a negligence claim have not changed, Minnesota negligence law today does not look exactly the same way it looked at the turn of or even the middle of the twentieth century.<sup>236</sup> As the supreme court has noted, the common law in Minnesota “is the result of accumulated experience”<sup>237</sup> and “[i]t is composed of rules carefully crafted both to reflect our traditions as a state and to address emerging societal needs.”<sup>238</sup> Sometimes the court’s decisions are responsive to changing social conditions<sup>239</sup> and sometimes perhaps the result of unintended turns in the law.<sup>240</sup> The cumulative result is a legal culture in which courts have significant power as gatekeepers to determine which negligence cases are appropriate for jury resolution and which will fail for lack of a duty or proximate cause.<sup>241</sup> Foreseeability plays a dominant role in those decisions.

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233. *Hedlund v. Hedlund*, 371 N.W.2d 232, 236 (Minn. Ct. App. 1985) (“[Q]uestions of [breach] are usually inappropriate for summary judgment, since standards of reasonableness and causation are uniquely jury functions.”). Courts do sometimes find no breach as a matter of law, however, based upon the lack of foreseeability of an injury. *E.g.*, *Austin v. Metro. Life Ins. Co.*, 277 Minn. 214, 217, 152 N.W.2d 136, 138 (1967) (holding no negligence as a matter of law because tenant could not foresee injury to maintenance person).

234. BRENT A. OLSON, MINNESOTA PRAC. BUSINESS LAW DESKBOOK § 33:1 (2009–2010 ed.).

235. See 4A MINN. PRACTICE SERIES, JURY INSTRUCTION GUIDES—CIVIL, CIVJIG 80 Introductory Note (Michael K. Steenson & Peter B. Knapp, 5th ed. 2006).

236. See generally Mike Steenson, *The Character of the Minnesota Tort System*, 33 WM. MITCHELL L. REV. 239 (2006) (describing the evolution of the common law of torts in Minnesota as it has been structured by the Minnesota Supreme Court and modifications of the common law of torts by the Minnesota State Legislature).

237. *Vaughn v. Nw. Airlines, Inc.*, 558 N.W.2d 736, 744 (Minn. 1997).

238. *Id.* (holding that an airline owed a duty to a disabled passenger to assist passenger with luggage).

239. *E.g.*, *Salin v. Kloempken*, 322 N.W.2d 736, 741 (Minn. 1982) (“We are aware that courts should not shirk their duty to overturn unsound precedent and should strive continually to develop the common law in accordance with our own changing society.”).

240. See generally Steenson, *The Character of the Minnesota Tort System*, *supra* note 236.

241. Even assuming the existence of a duty, courts regularly conclude that claims fail on the basis of primary assumption of risk. See generally Steenson, *Role of Primary Assumption of Risk*, *supra* note 229.

### A. *Duty*

Sometimes duty determinations are made on a categorical basis, as when the supreme court determined that bystanders are not entitled to recover for negligent infliction of emotional distress,<sup>242</sup> recognized a claim for negligent credentialing of a physician,<sup>243</sup> or held that a physician's liability for negligent genetic counseling extends to a child's parents.<sup>244</sup> Duty determinations may also turn on the foreseeability or risk of injury. One might look at the Minnesota Supreme Court's recent decision in *Foss v. Kincade*,<sup>245</sup> for example, and conclude that objective foreseeability of a specific injury is a predicate to a finding of duty. For the most part, it would be an accurate depiction of Minnesota law, although the story of how the law came to this point is complicated and cautions against automatic assumptions about the relationship between foreseeability and duty.

Over a century ago, the Minnesota Supreme Court worked out its basic theory of negligence, including the role of duty, in the long privity shadow of *Winterbottom v. Wright*.<sup>246</sup> In *Moon v. Northern Pacific Railroad Co.*,<sup>247</sup> a late nineteenth century Minnesota Supreme Court case, the plaintiff's decedent, a brakeman employed by the St. Paul, Minneapolis & Manitoba Company, was killed while he was attempting to set a brake on a loaded freight car of the defendant, Northern Pacific.<sup>248</sup> The car had been transferred by Northern Pacific to the decedent's employer pursuant to a traffic arrangement.<sup>249</sup> The plaintiff brought suit against both railroads but received a verdict only as to Northern Pacific.<sup>250</sup> The issue was whether the relationship of the decedent to Northern Pacific was sufficient to impose a duty on that defendant to exercise reasonable care for the safety of the decedent.<sup>251</sup>

While company rules required Northern Pacific to inspect the cars delivered to it by Manitoba, the court noted that the duty was not owed to the company alone, but that Northern Pacific had the

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242. *Stadler v. Cross*, 295 N.W.2d 552, 554–55 (Minn. 1980).

243. *Larson v. Wasemiller*, 738 N.W.2d 300, 313 (Minn. 2007).

244. *See Molloy v. Meier*, 679 N.W.2d 711, 723 (Minn. 2004).

245. 766 N.W.2d 317 (Minn. 2009).

246. (1842) 152 Eng. Rep. 402 (Exch.).

247. 46 Minn. 106, 48 N.W. 679 (1891).

248. *Id.* at 107, 48 N.W. at 679.

249. *Id.*, 48 N.W. at 679.

250. *Id.* at 108, 48 N.W. at 680.

251. *Id.*, 48 N.W. at 680.

primary duty to ensure the safety of the cars for the protection of Manitoba employees.<sup>252</sup> Neither company would be obligated to draw the cars of the other over its line.<sup>253</sup> The court noted that the duty was also owed to the servants who would have to handle the cars and who would be exposed to danger arising from the unsafe or defective condition of the cars.<sup>254</sup> The court explained that one may owe two duties with respect to the same thing, "one of a special character to one person, growing out of special relations to him; and another of a general character, to those who would necessarily be exposed to risk and danger from the negligent discharge of such duty."<sup>255</sup>

The court also noted that any negligence on the part of Manitoba would not excuse negligence on the part of Northern Pacific.<sup>256</sup> Neither company could excuse its liability because of the default of the other.<sup>257</sup>

The duty owed was one of reasonable care. Relying in part on *Heaven v. Pender*,<sup>258</sup> the court stated the following:

Subject to proper limitations, the rule generally stated is that if a reasonable man must see that, if he did not use due care in the circumstances, he might cause injury to the person or property of another entitled to repose confidence in his diligence, a duty arises to use such care.<sup>259</sup>

*Akers v. Chicago, St. P., M. & O. Ry. Co.*,<sup>260</sup> established that duty is relational.<sup>261</sup> The plaintiff's decedent was killed in an accident in the defendant's yard, after the decedent had quit his job at the railroad earlier that day.<sup>262</sup> He was trespassing in the yard when he was hit by railroad cars which then dragged him along to an improperly blocked switch.<sup>263</sup> The court held that he was a trespasser and that the defendant owed him no duty.<sup>264</sup> Duty was

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252. *Id.* at 108–09, 48 N.W. at 680.

253. *Id.* at 108, 48 N.W. at 680.

254. *Id.* at 109, 48 N.W. at 680.

255. *Id.*, 48 N.W. at 680.

256. *Id.* at 110, 48 N.W. at 680.

257. *Id.* at 110, 48 N.W. at 681.

258. (1883) 11 Q.B.D. 503 (Eng.).

259. *Moon*, 46 Minn. at 109, 48 N.W. at 680.

260. 58 Minn. 540, 60 N.W. 669 (1894).

261. *See id.* at 544, 60 N.W. at 670.

262. *Id.* at 543, 60 N.W. at 670.

263. *Id.* at 544, 60 N.W. at 670.

264. *Id.*, 60 N.W. at 670.



specific to the injured person:

Actionable negligence is the failure to discharge a legal duty to the person injured. If there is no duty, there is no negligence. Even if a defendant owes a duty to some one else, but does not owe it to the person injured, no action will lie. The duty must be due to the person injured. These principles are elementary, and are equally applicable whether the duty is imposed by positive statute or is founded on general common-law principles.<sup>265</sup>

In the 1892 case of *Schubert v. J.R. Clark Co.*,<sup>266</sup> a seminal products liability case in Minnesota and nationally, the court took the position that a seller furnishing a dangerous instrumentality with knowledge of the defects and knowledge that such defects would not be discovered is subject to liability without regard to privity.<sup>267</sup>

In *O'Brien v. American Bridge Co.*<sup>268</sup>—a case decided eighteen years after *Schubert* in a didactic opinion by Justice Jaggard—the plaintiff and others were injured when a bridge collapsed as they were traveling over it.<sup>269</sup> The defendant was responsible for the construction of the bridge pursuant to a contract with the county.<sup>270</sup> The county was responsible for the construction of the approaches to the bridge and connecting the bridge to the approaches.<sup>271</sup>

The case presented potential problems because the bridge company contracted with the county and not the injured plaintiff.<sup>272</sup> On the other hand, the potential danger of a defective bridge could make any potential contract limitation irrelevant. Notwithstanding the court's earlier decision in *Schubert*, the court was still concerned about the potential for contract law to frame tort remedies.<sup>273</sup>

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265. *Id.*, 60 N.W. at 670.

266. 49 Minn. 331, 51 N.W. 1103 (1892).

267. *Id.* at 336, 51 N.W. at 1104.

268. 110 Minn. 364, 125 N.W. 1012 (1910).

269. *Id.* at 366, 125 N.W. at 1012.

270. *Id.*, 125 N.W. at 1012.

271. *Id.*, 125 N.W. at 1012.

272. *See id.*, 125 N.W. at 1012.

273. *See id.* at 368–71, 125 N.W. 1013–15 (discussing whether the lack of privity denies a third-party's ability to recover for injuries caused by defects in the construction built under another contract).

Although the court had previously limited the scope of *Winterbottom*<sup>274</sup> in *Schubert*, Justice Jaggard, law professor that he was,<sup>275</sup> supported his conclusions in *O'Brien* partly in terms of English precedent, concluding that *Winterbottom* and *Langridge v. Levy*<sup>276</sup> were most applicable. In each case, the Court of Exchequer had held that privity was not a bar to recovery by plaintiffs injured by dangerous instrumentalities.<sup>277</sup> In *Langridge v. Levy*, the court held that a gun seller who misrepresented the quality of a gun to the purchaser could be held liable to the son of the purchaser who was injured when the gun exploded.<sup>278</sup>

The court in *O'Brien* read the cases as stating that there are two primary requirements for the creation of a duty to strangers of a contract.<sup>279</sup> One is that the thing causing injury has to “be of a noxious or dangerous kind,” and the second “that the builder, manufacturer, or contractor had actual knowledge of its being in such a state of danger as would amount to concealed danger to persons using it in ordinary manner and with ordinary care.”<sup>280</sup>

The court read *Schubert*, the leading case in the area, to say the following:

It was there held that if one engaged in the business of manufacturing goods not ordinarily of a dangerous nature, to be put upon the market for sale and for ultimate use, so negligently constructs an article that by reason of such negligence it will obviously endanger the life or limb of any one who may use it, and if the manufacturer, knowing such defects, and knowing that the same are so concealed that they are not likely to be

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274. (1842) 152 Eng. Rep. 402 (Exch.).

275. TESTIMONY, REMEMBERING MINNESOTA'S SUPREME COURT JUSTICES 193 (2008).

276. (1837) 150 Eng. Rep. 863, 868 (Exch.).

277. In *Langridge*, the Court of Exchequer held that liability attached because “[t]here is a false representation made by the defendant, with a view that the plaintiff should use the instrument in a dangerous way, and, unless the representation had been made, the dangerous act would never have been done.” *Langridge*, 150 Eng. Rep. at 869. In *Winterbottom*, the Court of Exchequer distinguished the factual scenario over *Langridge* to hold that liability did not attach because “[in *Langridge*] the cause of injury was a weapon of a dangerous nature, and the defendant was alleged to have had notice of the defect in its construction. Nothing of that sort appears upon this declaration.” *Winterbottom*, 152 Eng. Rep. at 405.

278. *Langridge*, 150 Eng. Rep. at 868.

279. *O'Brien v. Am. Bridge Co.* 110 Minn. 364, 368, 125 N.W. 1012, 1013 (1910).

280. *Id.* (citing FREDERICK POLLOCK, THE LAW OF TORTS 515 (8th ed. 1908)).

discovered, puts the article in his stock of goods for sale, he is liable for injuries caused by such negligence to one into whose hands the dangerous implement comes for use in the usual course of business, even though there be no contract relation between the latter and the manufacturer.<sup>281</sup>

*Heaven v. Pender* continued to hold sway after the turn of the century. In *Depue v. Flateau*,<sup>282</sup> for example, the plaintiff was a cattle buyer who stopped by the defendants' farm to inspect some cattle late on a very cold January afternoon.<sup>283</sup> It was too late to inspect the cattle, so he asked permission to stay at the defendant's house for the evening.<sup>284</sup> The request was refused, but he was asked to stay for dinner, during which he became violently ill.<sup>285</sup> He again asked to stay but the defendant instead assisted him to his cutter to make the trip to his home, some seven miles away.<sup>286</sup> He was found nearly frozen in the morning, three-quarters of a mile from the defendants' farm.<sup>287</sup>

With *Heaven v. Pender* as primary source authority,<sup>288</sup> the supreme court affirmed the following as the applicable principle:

[W]henever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger; and a negligent failure to perform the duty renders him liable for the consequences of his neglect.<sup>289</sup>

By 1913, the supreme court was able to say in *Farrell v. Minneapolis & R.R. Ry. Co.*<sup>290</sup> that "it is now generally recognized that each member of society owes a legal duty, as well as a moral

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281. *Id.* at 371, 125 N.W. at 1014 (internal quotation marks omitted).

282. 100 Minn. 299, 111 N.W. 1 (1907).

283. *Id.* at 300-01, 111 N.W. at 1.

284. *Id.* at 301, 111 N.W. at 1.

285. *Id.* at 301, 111 N.W. at 1-2.

286. *Id.* at 301-02, 111 N.W. at 1-2.

287. *Id.* at 302, 111 N.W. at 2.

288. *See id.* at 303-04, 111 N.W. at 2-3.

289. *Id.* at 303, 111 N.W. at 2. The supreme court subsequently distinguished *Depue* in *Gilbertson v. Leininger*, 599 N.W.2d 127, 131 (Minn. 1999), in which the defendants failed to assist the plaintiff, a dinner guest, who was injured after a night of heavy drinking, on the basis that the plaintiff's condition was not *obvious* to the defendants.

290. 121 Minn. 357, 141 N.W. 491 (1913).

obligation, to his fellows. He must so use his own property as not to injure that of others.”<sup>291</sup>

*Palsgraf* makes its appearance in *Connolly v. Nicollet Hotel*,<sup>292</sup> in which a pedestrian walking down the sidewalk around midnight was hit in the eye by a mud-like substance that fell from somewhere in the hotel during the course of a raucous Junior Chamber of Commerce convention.<sup>293</sup> The pedestrian lost sight in her left eye.<sup>294</sup>

The supreme court noted the following:

It is generally agreed that a hotel owner or innkeeper owes a duty to the public to protect it against foreseeable risk of danger attendant upon the maintenance and operation of his property and to keep it in such condition that it will not be of danger to pedestrians using streets adjacent thereto.

The failure of a hotel owner and operator to take reasonable precautions to eliminate or prevent conditions of which he is or should be aware and which might reasonably be expected to be dangerous to the public may constitute negligence.<sup>295</sup>

While the statements might be read to impose a categorical duty of reasonable care on an innkeeper, with the reasonable precautions question to the breach issue, the court also stated that “[t]he common-law test of duty is the probability or foreseeability of injury to the plaintiff,” with a first-time reference to Chief Judge Cardozo’s statement in *Palsgraf v. Long Island Railroad Co.* that “[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.”<sup>296</sup>

*Austin v. Metropolitan Life Insurance Co.*<sup>297</sup> reinforces foreseeability’s relation to the duty issue. The plaintiff in the case was a cleaning lady in the employ of a building management firm to clean a specific building.<sup>298</sup> The defendant was a tenant in the

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291. *Id.* at 361, 141 N.W. at 492.

292. 254 Minn. 373, 95 N.W.2d 657 (1959) (citing *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 100 (N.Y. 1928)).

293. *Id.* at 377–78, 95 N.W.2d at 661–62.

294. *Id.*, 95 N.W.2d at 661–62.

295. *Id.* at 380, 95 N.W.2d at 663 (citations omitted).

296. *Id.* at 381, 95 N.W.2d at 664 (quoting *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 100 (N.Y. 1928)).

297. 277 Minn. 214, 152 N.W.2d 136 (1967).

298. *Id.* at 215, 152 N.W.2d at 137.

building, and the plaintiff's duties included cleaning the office space of the tenant.<sup>299</sup> On the day of the accident, the plaintiff found a pile of papers in the hallway opposite the defendant's offices.<sup>300</sup> The tenant had previously been asked by the management company not to pile discarded material in the hallway.<sup>301</sup> The plaintiff fell while picking up a small box on top of the pile.<sup>302</sup> The plaintiff alleged that the defendant was negligent in creating a dangerous condition in the hallway.<sup>303</sup> Following *Palsgraf* and *Connolly*, the supreme court concluded that the harm to the plaintiff could not have been anticipated by the defendant and affirmed the trial court's grant of summary judgment for the defendant.<sup>304</sup> *Austin* and *Connolly* are consistently taken, either individually or together, to link duty and foreseeability.<sup>305</sup>

Because foreseeability is linked to duty, courts, as gatekeepers, decide whether duty is triggered by the foreseeability of injury. The supreme court has, however, taken different, potentially inconsistent, positions on whether or when duty is supposed to be a jury issue. In *Szyplinski v. Midwest Mobile Home Supply Co.*,<sup>306</sup> the court stated that given the choice of resolving the foreseeability issue on summary judgment or submitting the issue to the jury, "generally the better rule is to submit the issue of foreseeability to the jury."<sup>307</sup>

In *Lundgren v. Fultz*,<sup>308</sup> the court held that "[c]lose questions on foreseeability should be given to the jury."<sup>309</sup> In *Larson v. Larson*,<sup>310</sup> the court, citing *Lundgren*, stated "that in close cases foreseeability may be for jury resolution."<sup>311</sup> In *Bjerke v. Johnson*,<sup>312</sup> the standard was

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299. *Id.*, 152 N.W.2d at 137.

300. *Id.*, 152 N.W.2d at 137.

301. *Id.*, 152 N.W.2d at 137.

302. *Id.* at 215–16, 152 N.W.2d at 137.

303. *Id.* at 216, 152 N.W.2d at 138.

304. *Id.* at 217, 152 N.W.2d at 138.

305. See *Bjerke v. Johnson*, 742 N.W.2d 660, 667 (Minn. 2007); *Molloy v. Meier*, 679 N.W.2d 711, 719–20 (Minn. 2004); *Quinn v. Winkel's, Inc.*, 279 N.W.2d 65, 68 (Minn. 1979); *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 813 (Minn. 1979) (Scott, J., dissenting); *Vogt v. Johnson*, 278 Minn. 153, 158, 153 N.W.2d 247, 251 (1967).

306. 308 Minn. 152, 241 N.W.2d 306 (1976).

307. *Id.* at 156, 241 N.W.2d at 309 (emphasis added).

308. 354 N.W.2d 25 (Minn. 1984).

309. *Id.* at 28 (emphasis added).

310. 373 N.W.2d 287 (Minn. 1985).

311. *Id.* at 289 (emphasis added).

312. 742 N.W.2d 660 (Minn. 2007).

that “[w]hen it is clear whether an incident was foreseeable, the courts decide the issue as a matter of law, but in close cases, foreseeability is reserved for the jury.”<sup>313</sup> In *Foss v. Kincade*,<sup>314</sup> the supreme court rephrased *Lundgren* in stating that “[a]lthough in most cases the question of foreseeability is an issue for the jury, the foreseeability of harm can be decided by the court as a matter of law when the issue is clear.”<sup>315</sup> The statement in *Foss* is close to the court’s position in *Szyplinski*. *Foss* is the latest supreme court case setting out a standard for determining when foreseeability is for the jury. The differences are perhaps slight, but the signal in *Foss* is stronger that foreseeability should generally be decided by the jury.

The differences in how the standard is framed may send conflicting signals to the lower courts as to how they should approach motions for summary judgment based upon lack of duty. This could create confusion and influence whether or not cases are decided on summary judgment. In *Kay v. Fairview Riverside Hospital*,<sup>316</sup> the court of appeals followed *Larson* in stating that “[t]he issue of foreseeability is generally decided by the court as a matter of law,” although “in close cases . . . the issue may be decided by the jury.”<sup>317</sup> A little over a year later, in *Howard v. Mackenhausen*,<sup>318</sup> the court of appeals followed *Szyplinski* in deciding that the foreseeability issue is best resolved by a jury rather than on summary judgment.<sup>319</sup>

At the other extreme is *Alholm v. Wilt*,<sup>320</sup> an innkeeper’s liability case decided in 1986, two years after *Lundgren*, in which the supreme court indicated its concern over jury resolution of the foreseeability issue.<sup>321</sup> There are four elements in an innkeeper’s liability case in Minnesota: First, there has to be some act or threat that puts the proprietor on notice of the offending party’s vicious or dangerous propensities.<sup>322</sup> Second, the proprietor has to have

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313. *Id.* at 667–68 (emphasis added).

314. 766 N.W.2d 317 (Minn. 2009).

315. *Id.* at 322–23 (emphasis added).

316. 531 N.W.2d 517 (Minn. Ct. App. 1995) (affirming the trial court’s grant of summary judgment for the defendant), *pet. for rev. denied* (Minn. July 20, 1995).

317. *Id.* at 519.

318. 553 N.W.2d 435 (Minn. Ct. App. 1996) (reversing the trial court’s grant of summary judgment), *pet. for rev. denied* (Minn. Oct. 29, 1996).

319. *Id.* at 439.

320. 394 N.W.2d 488 (Minn. 1986).

321. *Id.* at 491 n.5.

322. *Id.* at 490 n.3.

adequate opportunity to protect the patron who is injured.<sup>323</sup> Third, the proprietor must have failed to take reasonable measures to protect the injured patron.<sup>324</sup> Fourth, the injury to the patron must have been foreseeable.<sup>325</sup>

In a footnote, the supreme court took the opportunity to express its concern over the treatment of the foreseeability issue:

Although not raised on this appeal, we are troubled by the practice of placing foreseeability within the jury's domain. The foreseeability issue, as a threshold issue, is more properly decided by the court prior to submitting the case to the jury. If the trial court concludes that the innkeeper did not have notice of the person's dangerous propensities, then it must find that the injury would not have been foreseeable to a reasonable innkeeper and thus, no duty to protect arose. Because foreseeability has nothing to do with proximate cause, we do not believe that the jury should be instructed on the issue. To the extent our prior case law speaks of "foreseeability" as an element of the cause of action, we were only discussing foreseeability in the context of whether a legal duty arises, not as something on which the jury should be instructed.<sup>326</sup>

The footnote has been influential in shaping the approach to innkeeper's liability cases,<sup>327</sup> but it has not been limited to just those cases.<sup>328</sup> One way to read *Alholm* is that courts, not juries, decide foreseeability issues in all circumstances, particularly as to the duty issue.

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323. *Id.*

324. *Id.*

325. *Id.*; see also *Boone v. Martinez*, 567 N.W.2d 508, 510 (Minn. 1997) (reaffirming the basic elements of innkeeper liability). This statement of the elements does not square readily with other cases establishing the innkeeper liability standard, in particular, *Connolly v. Nicollet Hotel*, 254 Minn. 373, 382, 95 N.W.2d 657, 664 (1959).

326. *Alholm*, 394 N.W.2d at 491 n.5 (citation omitted).

327. See, e.g., *Boone*, 567 N.W.2d at 510; *Minks v. Cherry*, No. A06-1166, 2007 WL 1053501, at \*2 (Minn. Ct. App. Apr. 10, 2007); *Roy v. Banana Joes of Minn., Inc.*, No. A04-54, 2004 WL 2220995, at \*3 (Minn. Ct. App. Oct. 5, 2004); *Clemens v. Comm., Inc.*, No. A03-252, 2004 WL 117536, at \*3 (Minn. Ct. App. Jan. 27, 2004); *Brickey v. D & R Props., Inc.*, No. C3-97-1961, 1998 WL 88604, at \*1 (Minn. Ct. App. Mar. 3, 1998).

328. See, e.g., *Watkins v. Greyhound Bus Lines, Inc.*, No. A04-150, 2004 WL 2049977, at \*3 (Minn. Ct. App. Sept. 14, 2004) (bus station murder); *Knaack v. Holstad*, No. CX-95-222, 1995 WL 333864, at \*1 (Minn. Ct. App. June 6, 1995) (products liability).

In *Cooney v. Hooks*,<sup>329</sup> a case involving sexual assault of a jailed prisoner by another prisoner, the supreme court seemed to use *Alholm's* “we are troubled by the practice of placing foreseeability within the jury’s domain” language to trump *Lundgren's* “[c]lose questions on foreseeability should be given to the jury” language.<sup>330</sup> The plaintiff was jailed after his arrest for driving while intoxicated and, while incapacitated, was sexually assaulted by another detainee.<sup>331</sup> The case went to trial.<sup>332</sup> The jury found the County 54.1% at fault and the plaintiff 45.9% at fault.<sup>333</sup> The trial court granted the defendant’s motion for judgment notwithstanding the verdict on the basis that there was insufficient evidence of breach of duty.<sup>334</sup> The court of appeals affirmed, holding that the evidence was insufficient to establish that the County owed a duty to the plaintiff under the circumstances.<sup>335</sup>

On appeal, the supreme court noted that the County conceded it owed a duty to use reasonable care to protect its prisoners from assaults by other prisoners.<sup>336</sup> Notwithstanding the concession, the court said that the County was not a guarantor of the safety of prisoners, seemingly taking the position that the County owed no duty to the plaintiff under the circumstances.<sup>337</sup> The plaintiff argued *Lundgren* and that the foreseeability issue should be for the jury.<sup>338</sup> The court countered with *Alholm* and concluded that the assault on the plaintiff was not foreseeable as a matter of law.<sup>339</sup> *Cooney* has been cited for the proposition that “[f]oreseeability is generally a threshold legal question for the court to decide.”<sup>340</sup>

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329. 535 N.W.2d 609 (Minn. 1995).

330. *See id.* at 612.

331. *Id.* at 610.

332. *Id.*

333. *Id.* at 611.

334. *Id.*

335. *Cooney v. Hooks*, No. C4-93-1877, 1994 WL 246083, at \*2 (Minn. Ct. App. June 7, 1994).

336. 535 N.W.2d at 611.

337. *Id.*

338. *Id.* at 612.

339. *Id.*

340. *D.E.L. v. Blue Earth Cnty. ex rel. Dep’t of Human Servs.*, No. A03-1114, 2004 WL 728090, at \*3 (Minn. Ct. App. Apr. 6, 2004); *Davidson ex rel. Heirs of David v. S. Metro Human Servs.*, No. C7-01-656, 2001 WL 1569054, at \*1 (Minn. Ct. App. Dec. 11, 2001) (citing *Cooney v. Hooks*, 535 N.W.2d 609, 612 (Minn.1995)).



While there is some inconsistency in the supreme court's decisions concerning the role of foreseeability in determining duty and under what circumstances the foreseeability issue is for the court or jury, the weight and currency of the decisions seem to follow some variation of *Lundgren*, rather than *Alholm*, at least on the issue of whether foreseeability is an issue for the jury to decide.<sup>341</sup> If foreseeability is a requirement, another issue is how specifically foreseeable the plaintiff's injury has to be.

In *Whiteford v. Yamaha Motor Corp.*,<sup>342</sup> a products liability case, the court noted the manufacturer's duty to protect users of its products from foreseeable dangers, but it stated that in deciding "whether a danger is foreseeable, courts look at whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility" and that a danger that "is not objectively reasonable to expect is too remote to create liability on the part of the manufacturer."<sup>343</sup> The exact meaning of the statement is not clear, but it appears to tighten the standard for determining foreseeability, giving courts an additional tool for scrutinizing the foreseeability of an injury as a predicate to a finding of duty.

The origin of the court's test is not clear, however. The court relied on a 1963 Missouri Supreme Court case, *Kettler v. Hampton*,<sup>344</sup> for its authority, but that case did not frame the foreseeability issue in the same terms as the court did in *Whiteford*.<sup>345</sup> Following a jury verdict for the plaintiff in *Kettler*, the defendant appealed, arguing that the verdict-directing instruction requested by the plaintiff and given by the trial judge was in error because it did not include the element of foreseeability.<sup>346</sup> The Missouri Supreme Court said that "[o]rdinarily, the duties imposed by the law of negligence arise out of circumstances and are based on for[e]seeability or reasonable anticipation that harm or injury is a likely result of acts or

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341. See *Foss v. Kincade*, 766 N.W.2d 317, 322–23 (Minn. 2009).

342. 582 N.W.2d 916 (Minn. 1998).

343. *Id.* at 918 (emphasis added).

344. 365 S.W.2d 518 (Mo. 1963). The plaintiff, a garage customer, brought suit against a service station operator for injuries he sustained when his car lurched forward while it was being serviced. *Id.* at 519. The plaintiff claimed that the defendant left the car in gear. *Id.* The defendant claimed that the plaintiff did. *Id.* The plaintiff received a judgment against the defendant, who appealed to the Missouri Supreme Court. *Id.*

345. *Id.* at 522–23.

346. *Id.* at 521–22.

omissions.”<sup>347</sup> Subsequent cases citing *Kettler* bear out the conclusion that the court is simply concerned about the reasonable foreseeability of injury, not the specific injury that occurred in the case.<sup>348</sup> The potentially more restrictive language noted by the court in *Whiteford* does not appear in *Kettler*.<sup>349</sup>

The “objectively reasonable to expect” concept quickly worked its way into Minnesota negligence law, providing yet another means of tightening the relationship between duty and foreseeability and strengthening the role of the courts in the resolution of the duty issue. Most of the appellate decisions applying the *Whiteford* standard have resulted in judgments for the defendants, whether pre- or post-trial.<sup>350</sup> The standard seems to be tighter than the general foreseeability standard from other cases, such as *Connolly*,

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347. *Id.* at 522.

348. See *Helming v. Dulle*, 441 S.W.2d 350, 353 (Mo. 1969) (“The duties imposed by the law of negligence arise out of circumstances and are based on foreseeability or reasonable anticipation that harm or injury is a likely result of acts or omissions”); *Price v. Seidler*, 408 S.W.2d 815, 822 (Mo. 1966) (“All that is necessary to establish foreseeability is knowledge, actual or constructive, on the part of the defendant that there is some probability of injury sufficiently serious that the ordinary person would take precautions to avoid it.”).

349. Compare *Kettler*, 365 S.W.2d at 522, with *Whiteford v. Yamaha Motor Corp.*, 582 N.W.2d 916, 918 (Minn. 1998).

350. *E.g.*, *Foss v. Kincade*, 766 N.W.2d 317, 319 (Minn. 2009) (no duty to child injured by falling bookcase); *Whiteford*, 582 N.W.2d at 919 (no duty to child injured sliding under snowmobile with sharp bracket on the underside); *Czech v. Little Falls Area Chamber of Commerce*, No. A10-269, 2010 WL 3396989, at \*1 (Minn. Ct. App. Aug. 31, 2010) (no duty to employee of contractor hired to clear pigeons from historic building); *Garrett v. Reuben*, No. A09-1804, 2010 WL 2266401, at \*1 (Minn. Ct. App. June 8, 2010) (no duty to decedent who suffered fatal heart attack several hours after triggering incident); *Doe v. Indep. Sch. Dist.* No. 152, No. A06-611, 2007 WL 92904, at \*7 (Minn. Ct. App. Jan. 16, 2007) (no duty to protect minor from criminal sexual contact at school district controlled sports center); *Stuedemann v. Nose*, 713 N.W.2d 79, 84–86 (Minn. Ct. App. 2006) (no duty for foster home owner or psychologist to prevent resident from sexually assaulting and murdering another person); *Robb v. Funorama, Inc.*, No. A04-1711, 2005 WL 1331265, at \*5–6 (Minn. Ct. App. June 7, 2005) (no duty to prevent third-person, in an unknown conflict with the plaintiff, from injuring plaintiff); *Watkins v. Greyhound Bus Lines, Inc.*, No. A04-150, 2004 WL 2049977, at \*1 (Minn. Ct. App. Sept. 14, 2004) (no duty to prevent unforeseeable murder of bus passenger); *D.E.L. v. Blue Earth Cnty. ex rel. Dep’t of Human Servs.*, No. A03-1114, 2004 WL 728090, at \*1 (Minn. Ct. App. Apr. 6, 2004) (no duty to warn foster parents of danger of sexual abuse by foster child); *Kuhl v. Heinen*, 672 N.W.2d 590, 594 (Minn. Ct. App. 2003) (no duty to prevent children in driveway from distracting passing motorist and thereby causing accidents). The court of appeals held that the foreseeability issue was a jury issue in *Laska v. Anoka County*, 696 N.W.2d 133, 140 (Minn. Ct. App. 2005) (death of infant under care of daycare provider).

and thus inviting more discerning and nuanced judgments about the foreseeability of particular injuries.<sup>351</sup>

On the other hand, if *Whiteford* is simply reaffirming the notion that injury has to be foreseeable in order for a defendant to be negligent, it does not state, nor should it be read as stating, a more restrictive principle. If *Whiteford* is read as establishing a more severe standard for resolution of the foreseeability issue, it arguably conflicts with other supreme court decisions that specifically avoid any conclusion that the specific danger has to be objectively foreseeable.

In *Ponticas v. K.M.S. Investments*,<sup>352</sup> for example, the supreme court said that “[w]e have often held that negligence is not to be determined by whether the particular injury was foreseeable.”<sup>353</sup> The cases go back over a century to *Christianson v. Chicago, St. P., M. & O. Ry. Co.*, where the court said that “[i]f a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all . . . .”<sup>354</sup> The issue concerns foreseeability of any injury, not the specific injury.<sup>355</sup> The most recent word on the issue is *Foss v. Kincade*,<sup>356</sup> which incorporated the *Whiteford* standard in its analysis.<sup>357</sup>

Irrespective of whether the courts continue to view the statement in *Whiteford* as the standard to be applied in negligence cases, there are other cases in which the duty determination has

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351. See *Connolly v. Nicollet Hotel*, 254 Minn. 373, 381–84, 95 N.W.2d 657, 664–65 (1959).

352. 331 N.W.2d 907 (Minn. 1983) (finding apartment complex negligent for hiring caretaker with criminal history).

353. *Id.* at 912 (citing *Connolly*, 254 Minn. at 381–82, 95 N.W.2d at 664) (exemplifying innkeeper’s liability); *Albertson v. Chi., Minneapolis, St. Paul & Pac. R.R. Co.*, 242 Minn. 50, 64 N.W.2d 175 (1954)). The court went on to say that [t]he jury, as finder of fact, could have found, as it did, that it was reasonably foreseeable that a person with a history of offenses of violence could commit another violent crime, notwithstanding the history would not have shown him to ever have committed the particular type of offense. Moreover, the risk of injury being foreseeable, it is clear the tenants of an apartment complex, including Mrs. Ponticas, were foreseeable plaintiffs.

*Ponticas*, 331 N.W.2d at 912 (citing *Austin v. Metro. Life Ins. Co.*, 277 Minn. 214, 152 N.W.2d 136 (1967)).

354. 67 Minn. 94, 97, 69 N.W. 640, 641 (1896).

355. See *id.*

356. 766 N.W.2d 317 (Minn. 2009).

357. *Id.* at 322–23. Somewhat ironically, the dissenting justice in *Foss* wrote the opinion for the court in *Whiteford*.

been made on a categorical basis, with foreseeability left to the breach issue. *Erickson v. Curtis Investment Co.*<sup>358</sup> is a good example. The case involved an assault and rape of the plaintiff in a downtown Minneapolis parking ramp.<sup>359</sup> She brought suit against the owner and operator of the ramp and the security firm that had been hired to patrol the ramp.<sup>360</sup> In general terms, the court noted that

[i]f the law is to impose a duty on A to protect B from C's criminal acts, the law usually looks for a special relationship between A and B, a situation where B has in some way entrusted his or her safety to A and A has accepted that entrustment. This special relationship also assumes that the harm represented by C is something that A is in a position to protect against and should be expected to protect against.<sup>361</sup>

As illustrations, the court noted that a duty to protect could be found in common carrier-passenger or innkeeper-guest relationships.<sup>362</sup> The court thought the hospital-patient relationship was analogous to the innkeeper-guest relationship.<sup>363</sup>

The court initially said that the decision of whether a duty is imposed depends on "the relationship of the parties and the foreseeable risk involved," but that the question is ultimately one of policy.<sup>364</sup> The defendants argued that the prevention of crime should be a governmental function, not the responsibility of the private sector, and that imposing a duty would not lead to the application of an ascertainable standard of care.<sup>365</sup> The court added a third policy consideration, a cost-benefit consideration, which it viewed as an issue of how much risk is acceptable for members of the public.<sup>366</sup>

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358. 447 N.W.2d 165 (Minn. 1989).

359. *Id.* at 166.

360. *Id.*

361. *Id.* at 168.

362. *Id.* (citing *Sylvester v. Nw. Hosp. of Minneapolis*, 236 Minn. 384, 386-87, 53 N.W.2d 17, 19 (1952); *Roettger v. United Hosps. of St. Paul, Inc.*, 380 N.W.2d 856, 859-60 (Minn. Ct. App. 1986)).

363. *Erickson*, 447 N.W.2d. at 168. As an additional example, the court noted that while there might be a close relationship between a nurse companion and homeowner, a private homeowner is generally not in a position to guard against the criminal activity of a third party. See *Pietila v. Congdon*, 362 N.W.2d 328, 333 (Minn.1985).

364. *Erickson*, 447 N.W.2d at 168-69.

365. *Id.* at 169.

366. *Id.*

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The court concluded that the circumstances of the case, including a large parking ramp in a downtown metropolitan area that provided opportunities for crime, did not justify a conclusion that the parking ramp operator owed no duty to protect its customers.<sup>367</sup> The court held that the parking ramp operator owed a duty, explaining it in these terms:

These general characteristics of a parking ramp facility, it seems to us, present a particular focus or unique opportunity for criminals and their criminal activities, an opportunity which to some degree is different from that presented out on the street and in the neighborhood generally. We do not think the law should say the operator of a parking ramp owes no duty to protect its customers. Some duty is owed.<sup>368</sup>

The court then suggested that the duty should be defined and explained to the jury in these terms:

The operator or owner of a parking ramp facility has a duty to use reasonable care to deter criminal activity on its premises which may cause personal harm to customers. The care to be provided is that care which a reasonably prudent operator or owner would provide under like circumstances. Among the circumstances to be considered are the location and construction of the ramp, the practical feasibility and cost of various security measures, and the risk of personal harm to customers which the owner or operator knows, or in the exercise of due care should know, presents a reasonable likelihood of happening. In this connection, the owner or operator is not an insurer or guarantor of the safety of its premises and cannot be expected to prevent all criminal activity. The fact that a criminal assault occurs on the premises, standing alone, is not evidence that the duty to deter criminal acts has been breached.<sup>369</sup>

The court thought that casting the operator's duty in terms of an obligation to use reasonable care to deter criminal activity and requiring the jury to weigh the likelihood of risk against the financial and practical means to meet the risk provided for the implementation of the policy considerations important to the

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367. *Id.* 169–70.

368. *Id.* at 169.

369. *Id.* at 169–70.

case.<sup>370</sup> The court also noted that there would be some cases in which a trial court would find that the duty to use reasonable care was discharged as a matter of law, but it is clear that the court is referring to the breach rather than duty issue.<sup>371</sup>

*Erickson* might be read in different ways. Taken superficially, it could be read as holding that the duty determination depends on the relationship of the parties and the foreseeable risk involved. Initially, the court framed the issue in terms of the obligation to prevent the criminal misconduct of a third person.<sup>372</sup> While the special relationship is important, the court effectively determined that the nature of the relationship between parking ramp operator and patrons of the ramp justified a finding of duty.<sup>373</sup> To the extent that foreseeability is considered, it is in general and not in specific terms.<sup>374</sup> The court's supporting authority also supports the finding of a duty based upon the relationship, with the specific facts, including foreseeability, as factors for the jury.<sup>375</sup> The distinction is effectively between legislative and adjudicative facts.

*Erickson* might also be read as always requiring inquiry in the failure to protect cases into whether there is a special relationship and foreseeable risk, but also whether the specific risk in the case was foreseeable. The latter reading gives courts the green light to engage in a more detailed analysis of the specific facts, although *Erickson* seems to suggest to the contrary.

*Ponticas v. K.M.S. Investments*<sup>376</sup> raised the issue of whether the employer of an apartment manager who sexually assaulted a tenant could be held liable for negligent hiring. The court held that it could.<sup>377</sup>

The duty determination was made in clear, categorical terms. The court applied the standard from section 213 of the Restatement (Second) of Agency in holding that an employer has a duty to exercise reasonable care in hiring individuals who may, given the nature of the employment, create a risk of injury to

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370. *Id.* at 170.

371. *See id.*

372. *Id.* at 169.

373. *Id.*

374. *See id.*

375. *See, e.g.,* *Sylvester v. Nw. Hosp. of Minneapolis*, 236 Minn. 384, 386–87, 53 N.W.2d 17, 19 (1952).

376. 331 N.W.2d 907 (Minn. 1983).

377. *Id.* at 917.

members of the public.<sup>378</sup> Foreseeability, in the court's opinion, related to the breach issue.<sup>379</sup> The court concluded that the evidence was sufficient to establish breach of the duty and sustain the jury's finding of negligence.<sup>380</sup>

There are other examples, including cases involving landowners' duties. In *Peterson v. Balach*,<sup>381</sup> the supreme court eliminated the distinctions between invitees and licensees in favor of a general duty of reasonable care to entrants.<sup>382</sup> The categorical determination that landowners owe a duty to entrants on their property leaves the breach issue to the jury, which considers several factors, including the circumstances of the entry and the foreseeability of harm.<sup>383</sup> Applications of *Peterson* have been checkered in subsequent cases, however. While some decisions have recognized that the duty is established and that foreseeability is the jury's province, others have assumed that the *Peterson* factors apply to the duty determination.<sup>384</sup> If there is a duty and a court is reluctant to conclude as a matter of law that the defendant was not negligent, proximate cause may be an impediment to recovery based upon unforeseeability of the plaintiff's injury.

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378. *Id.* at 910–11 (quoting RESTATEMENT (SECOND) OF AGENCY § 213 (1958)). Section 213 of the Restatement (Second) of Agency reads in part as follows:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others . . . .

The court has previously recognized a claim for negligent retention. *Porter v. Grennan Bakeries*, 219 Minn. 14, 16 N.W.2d 906 (1945); *Travelers Indem. Co. v. Fawkes*, 120 Minn. 353, 139 N.W. 703 (1913); *Dean v. St. Paul Union Depot*, 41 Minn. 360, 43 N.W. 54 (1889).

379. *See Ponticas*, 331 N.W.2d. at 912 (“The most troublesome issue is whether these appellants-employers breached their duty by subjecting these foreseeable plaintiffs to a foreseeable injury by employing an incompetent person. If the employer ‘knew or should have known’ of the incompetence, and notwithstanding hired the employee, there would exist a breach of duty.”).

380. *Id.* at 912–13.

381. 294 Minn. 161, 199 N.W.2d 639 (1972).

382. *See id.* at 174 n.7, 199 N.W.2d at 648 n.7.

383. *Id.*

384. *See generally* Steenson, *supra* note 229. Most recently, in *Foss v. Kincade*, 766 N.W.2d 317 (Minn. 2009), the supreme court determined that an owner owed no duty because an injury sustained by a visiting three-year-old when a bookcase he was climbing tipped over on him was not foreseeable.

B. *Breach of Duty*

The law governing the breach issue is probably the clearest in Minnesota law. Minnesota's pattern instruction defines reasonable care as "the care a reasonable person would use in the same or similar circumstances" and negligence as "the failure to use reasonable care."<sup>385</sup> The pattern instruction does not include any specific reference to the foreseeability of a particular injury or class of injuries,<sup>386</sup> but foreseeability would be a focus in any attempt to prove negligence.<sup>387</sup> On occasion, the supreme court has suggested relevant factors for the trier of fact to consider in deciding the breach issue, including risk-utility factors,<sup>388</sup> but the primary standard is the general negligence standard. There is some inconsistency in the Minnesota cases concerning the propriety of general versus specific instructions in negligence cases.<sup>389</sup> The negligence issue is ordinarily for the jury.<sup>390</sup>

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385. 4 MINNESOTA PRACTICE SERIES, JURY INSTRUCTION GUIDES—CIVIL, CIVJIG 25.10 (Michael K. Steenson & Peter B. Knapp, 5th ed. 2006). The supreme court approved the predecessor of CIVJIG 25.10 in *Lommen v. Adolphson & Peterson Construction Co.*, 283 Minn. 451, 455, 168 N.W.2d 673, 677 (1969).

386. 4 MINNESOTA PRACTICE SERIES, JURY INSTRUCTION GUIDES—CIVIL, CIVJIG 25.10 (Minn. Dist. Judges Ass'n, 5th ed. 2006).

387. See David G. Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1277, 1277 (2009) ("Long recognized as providing tort, the law of wrongs, with principle and boundaries, foreseeability crucially defines the nature and scope of responsibility in tort—its internal meaning and proper limits—especially in negligence." (footnotes omitted)).

388. In *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972), the court rejected the distinctions between invitees and licensees in favor of a reasonable care balancing approach. The court set out several factors that a jury might consider in determining whether a possessor used reasonable care, including "the circumstances under which the entrant enters the land (licensee or invitee); foreseeability or possibility of harm; duty to inspect, repair, or warn; reasonableness of inspection or repair; and opportunity and ease of repair or correction." *Id.* at 175 n.7, 199 N.W.2d at 648 n.7. In *Erickson v. Curtis Investment Co.*, 447 N.W.2d 165 (Minn. 1989), the court set out several factors a jury should consider in determining whether a parking ramp facility is negligent in failing to prevent criminal activity on its premises, including "the location and construction of the ramp, the practical feasibility and cost of various security measures, and the risk of personal harm to customers which the owner or operator knows, or in the exercise of due care should know, presents a reasonable likelihood of happening." *Id.* at 170.

389. *Domagala v. Rolland*, 787 N.W.2d 662, 670 (Minn. Ct. App. 2010) (discussing the split in Minnesota case law on the issue of generalized jury instructions versus special instructions).

390. *E.g.*, *Peterson v. Pawelk*, 263 N.W.2d 634, 636 (Minn. 1978) (quoting *Bowe v. Fredlund*, 108 Minn. 103, 108, 203 N.W.2d 327, 331 (1972)); *Stenzel v. Bach*, 295 Minn. 257, 259–60, 203 N.W.2d 819, 821 (1973); *Teas v. Minneapolis St.*



### C. *Proximate Cause*

Traditional treatments break proximate cause into two elements, cause in fact and legal cause or scope of liability.<sup>391</sup> Minnesota has taken differing positions on proximate cause, sometimes conflating the elements by making the test for cause in fact the test for legal cause or scope of liability issues and sometimes splitting them.<sup>392</sup> The cases have also used differing standards for each element.<sup>393</sup>

#### 1. *Cause in Fact*

The Third Restatement adopts a but-for standard for determining cause in fact in negligence cases.<sup>394</sup> The Minnesota Supreme Court has at various times applied a but-for standard to determine causation,<sup>395</sup> rejected the but-for standard,<sup>396</sup> recognized that the but-for standard is a necessary but not sufficient condition to establish cause in fact,<sup>397</sup> and concluded that the predominant standard for determining cause in fact is the substantial factor test, even though the but-for standard is the accepted test for cause in fact issues in professional liability cases.<sup>398</sup> Minnesota's pattern jury

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Ry. Co., 244 Minn. 427, 434–35, 70 N.W.2d 358, 363 (1955); *Aubin v. Duluth St. Ry.*, 169 Minn. 342, 345–46, 211 N.W. 580, 582 (1926).

391. See DAN B. DOBBS, *THE LAW OF TORTS* 443 (2000); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER AND KEETON ON TORTS* 263–73 (5th ed. 1984); WILLIAM PROSSER, *PROSSER ON TORTS* 311 (1941). The Minnesota Supreme Court has equated proximate cause with legal cause. See *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 376 (Minn. 2008).

392. *E.g.*, *Johnson v. Evanski*, 221 Minn. 323, 328, 22 N.W.2d 213, 216 (1946) (stating that the proper test for determining legal cause, rather than cause in fact, is the substantial factor test). Compare *Staloch v. Belsaas*, 271 Minn. 315, 136 N.W.2d 92 (1965) (discussing proximate cause in terms of legal cause), with *Nees v. Minneapolis St. Ry. Co.*, 218 Minn. 532, 16 N.W.2d 758 (1944) (discussing proximate cause in terms of causes in fact).

393. See *supra* note 392.

394. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 (2010).

395. *E.g.*, *Raske v. Gavin*, 438 N.W.2d 704, 706 (Minn. Ct. App. 1989) (citing *Blue Water Corp. v. O'Toole*, 336 N.W.2d 279, 281 (Minn. 1983)) (applying the but-for standard without mention of the substantial factor test).

396. *Harpster v. Hetherington*, 512 N.W.2d 585, 586 (Minn. 1994) (*per curiam*).

397. *George v. Estate of Baker*, 724 N.W.2d 1, 10–11 (Minn. 2006).

398. *Fiedler v. Adams*, 466 N.W.2d 39, 42 (Minn. Ct. App. 1991) (“Generally, proof of proximate causation in a legal malpractice action is the same as in an ordinary negligence action. In some cases, however, where the attorney’s alleged negligence has caused the loss of or damage to the client’s existing cause of

instructions use the term “direct cause” rather than “proximate cause” to avoid confusion.<sup>399</sup> According to the pattern instruction, a cause is a “direct cause” if it “had a substantial part in bringing about the (collision) (accident) (event) (harm) (injury).”<sup>400</sup>

The Minnesota Supreme Court adopted the substantial factor test in *Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.*,<sup>401</sup> a case concerning the liability of a railroad for a fire that joined with another to burn out the plaintiff’s land, but where either fire would have been sufficient to cause the damage.<sup>402</sup> The but-for standard would have negated liability on the part of the railroad for the fire it started. Instead, the supreme court held that the trial court was correct in instructing the jury that

[i]f you find that other fires not set by one of defendant’s engines mingled with one that was set by one of defendant’s engines, there may be difficulty in determining whether you should find that the fire set by the engine was a material or substantial element in causing plaintiff’s damage. If it was, the defendant is liable; otherwise, it is not.<sup>403</sup>

*Anderson* is generally credited as the first case to adopt the substantial factor test, but as a solution to issues of legal cause in cases where either of two or more causes would have been sufficient to cause the harm.<sup>404</sup> Notwithstanding that context, the

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action, the client asserting malpractice must also prove that but for the attorney’s negligence, ‘he had a meritorious cause of action originally.’ In essence, this ‘case-within-a-case’ element *describes* the proximate cause element unique to malpractice cases alleging destruction of the client’s cause of action.” (citations omitted)).

399. 4 MINNESOTA PRACTICE SERIES, JURY INSTRUCTION GUIDES—CIVIL, CIVJIG 27.10 (Minn. Dist. Judges Ass’n, 5th ed. 2006).

400. *Id.*

401. 146 Minn. 430, 179 N.W. 45 (1920).

402. *Id.* at 440–41, 179 N.W. at 49.

403. *Id.* at 434, 179 N.W. at 46. (internal quotations marks omitted).

404. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. j reporters’ note (2010). The reporters’ note further explains the following:

[*Anderson*] employed it to deal with an overdetermined-outcome situation: two separate fires joined together and burned the plaintiff’s property; either fire alone would have been sufficient to cause the same harm. Thus, it is not surprising that some courts and commentators have understood “substantial factor” to bear on factual cause while others have interpreted it to address proximate cause. The confusion has been exacerbated, no doubt, by the first two Restatements’ use of the umbrella term “legal cause,” to include both factual cause and proximate cause. *Id.* (citations omitted).

substantial factor test has become the preferred standard for determining cause in fact in negligence cases,<sup>405</sup> although in doing so the court often conflates cause in fact with scope of liability.<sup>406</sup>

*a. “But-for” Rejected*

The ostensible curse of the but-for test is that it is potentially unlimited, a concern the Minnesota Supreme Court has raised on more than one occasion. Two cases illustrate the court’s problem with the but-for standard. In *Kryzer v. Champlin American Legion No. 600*,<sup>407</sup> a Civil Damages Act case, the plaintiffs sued the American Legion post for damages arising out of a wrist injury sustained by Mrs. Kryzer when she became intoxicated at the post and was removed from the bar by a post employee.<sup>408</sup> The trial court held that the connection between her intoxication and injury was too remote and “dismiss[ed] plaintiffs’ complaint for failure to state a cause of action . . . .”<sup>409</sup> The court of appeals reversed, applying a but-for standard as the appropriate test for determining the causal link between Kryzer’s intoxication and injury.<sup>410</sup> The supreme court reversed the court of appeals, chiding the lower court for adopting a but-for standard in Civil Damages Act cases in the face of settled Minnesota law requiring that the intoxication be the proximate cause of the injury.<sup>411</sup> The supreme court held that “Mrs. Kryzer’s intoxication may have been the occasion for her ejection from the legion club, but it did not cause either her injury or that sustained by the plaintiff.”<sup>412</sup>

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405. See *George v. Estate of Baker*, 724 N.W.2d 1, 10–11 (Minn. 2006).

406. See *supra* note 392. See also *Dellow v. Pearson*, 259 Minn. 452, 453–54, 107 N.W.2d 859, 860–61 (1961) (discussing the confusion raised by issues of proximate cause and noting that “there is no simple formula for defining proximate cause, but this is assumed to be a difficulty peculiar to the law, which distinguishes between ‘proximate cause’ and ‘cause in fact’” (footnote omitted)).

407. 494 N.W.2d 35 (Minn. 1992).

408. *Id.* at 36.

409. *Id.*

410. *Kryzer v. Champlin Am. Legion No. 600*, 481 N.W.2d 98, 103 (Minn. Ct. App. 1992).

411. *Kryzer*, 494 N.W.2d at 37. For a more detailed analysis of the causation issues in Civil Damage Act cases see Mike Steenson, *Proximate Cause in Civil Damages Act Cases*, 2 WM. MITCHELL J.L. & PRAC. 6 (2009), available at <http://lawandpractice.wordpress.com/2009/03/01/proximate-cause-in-civil-damages-act-cases/>.

412. 494 N.W.2d at 37.

The second case is *Harpster v. Hetherington*.<sup>413</sup> The plaintiff and defendants in the case were neighbors and friends who looked after each other's dogs as needed.<sup>414</sup> The plaintiff had gone to her neighbors' house to look after their dog.<sup>415</sup> She let the dog out into the fenced-in backyard while she prepared food for the dog.<sup>416</sup> In the meantime, the dog escaped through a broken gate in the fence.<sup>417</sup> Not seeing the dog, she went out the front to call for the dog and slipped on the steps, which had become icy due to recent precipitation.<sup>418</sup> Because there was no possibility of establishing any negligence on the part of the defendants in maintaining the steps, the plaintiff sued on the basis that they were negligent in the maintenance of the gate,<sup>419</sup> "that this negligence caused her to fall off the front stoop,"<sup>420</sup> and that negligence led to the dog's escape and then to the plaintiff's injury.<sup>421</sup> The case was tried to a conclusion before a jury, which found the defendants sixty percent negligent and the plaintiff forty percent negligent.<sup>422</sup> The trial court entered judgment for the plaintiff.<sup>423</sup>

The defendants argued in the Minnesota Court of Appeals that there was no proximate cause as a matter of law and that the trial court erred in refusing to give their requested instruction on superseding cause.<sup>424</sup> The court of appeals affirmed in a split opinion.<sup>425</sup>

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413. 512 N.W.2d 585 (Minn. 1994).

414. *Id.* at 585.

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.* at 586.

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.*

424. *Harpster v. Hetherington*, No. C9-93-787, 1993 WL 469153, at \*1 (Minn. Ct. App. Nov. 16, 1993).

425. *Id.* at \*2. Judge Davies, dissenting, concluded that the "[f]ailure to repair the back gate—whether negligent or not—is not a proximate cause of the kindly neighbor's slip and fall on the front stoop—no matter what the little dog did," and furthermore, relying on *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928), that "the appellant had no duty, as repair of the back gate was neglected, to protect against a fall on the front stoop—again, no matter what the little dog *might* do." *Id.* (Davies, J., dissenting).

The defendants renewed their proximate cause and superseding cause arguments on their appeal to the supreme court.<sup>426</sup> The brief relied on somewhat limited authority, but the first argument focused on the lack of a sufficient causal relationship between the defendants' negligence and the plaintiff's injuries, arguing both that the gate was a remote cause of the injury and that the plaintiff's conduct in slipping on the front steps was a superseding cause.<sup>427</sup>

In Minnesota, an intervening cause becomes a superseding cause if four elements are satisfied.<sup>428</sup> The first is that the harmful effects said to constitute the superseding cause must have occurred

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426. *Harpster v. Hetherington*, 512 N.W.2d 585 (Minn. 1994). The respondents' brief relied on three cases in arguing that there was no proximate cause as a matter of law. Appellants' Brief and Appendix at 7-9, *Harpster v. Hetherington*, 512 N.W.2d 585 (Minn. 1994) (No. C9-93-787) [hereinafter *Harpster Appellate Brief*]. One of the cases, *Medved v. Doolittle*, defined a proximate cause as "the act or omission which causes it directly or immediately, or through a natural sequence of events, without the intervention of another independent and efficient cause." 220 Minn. 352, 356-57, 19 N.W.2d 788, 790 (1945), *overruled in part on other grounds by* *Strobel v. Chicago, Rock Island & Pac. R.R. Co.*, 255 Minn. 201, 207-08 n.5, 96 N.W.2d 195, 200 n.5 (1959) (cause need not be predominant cause to be a proximate cause). The respondents placed primary reliance on two other cases. See *Harpster Appellate Brief*, *supra* note 424, at 7-9. The brief relied on *Erickson v. Van Web Equip. Co.*, 270 Minn. 42, 49, 132 N.W.2d 814, 820 (1965), in arguing that "[a] proximate cause is one in which is involved the idea of necessity." *Harpster Appellate Brief*, *supra* note 426, at 7. The notion of "necessity" is not one that caught on in the Minnesota cases, but in context, the supreme court's concern in *Erickson* appears to be that there was simply no causal connection between the defendants' negligence, if any, and the plaintiff's injuries. *Id.* at 7-8. The lack of clear evidence of negligence and the plaintiff's assumption of the risk clouded the court's opinion on the proximate cause issue. The other case, *Hamilton v. Vare*, 184 Minn. 580, 239 N.W. 659 (1931), was an automobile accident case involving, among other things, a question concerning the liability of the City of Saint Paul for negligently allowing sand and gravel on a city street. *Harpster Appellate. Brief*, *supra* note 424, at 8-9. The problem as it appears from the facts is that the street condition had nothing to do with causing the accident. *Id.* The supreme court thought that the sand and gravel were "a condition, perhaps a remote cause, but not a direct or proximate cause." *Hamilton*, 184 Minn. at 583, 239 N.W. at 660. The brief argued that the injury to the plaintiff in *Harpster* was simply more remote even than the one in *Hamilton*. *Harpster Appellate Brief*, *supra* note 426, at 9.

425. Respondent's Brief at 4-12, *Harpster v. Hetherington*, 512 N.W.2d 585 (Minn. 1994) (No. C9-93-787) [hereinafter *Harpster Respondent's Brief*].

428. *Canada ex rel. Landy v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997); *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 113 (Minn. 1992); *Rieger v. Zackoski*, 321 N.W.2d 16, 21 (Minn. 1982); *Kroeger v. Lee*, 270 Minn. 75, 78, 132 N.W.2d 727, 729-30 (1965).

after the original negligence.<sup>429</sup> The second is that the intervening cause must not have been brought about by the original negligence.<sup>430</sup> The third is that the intervening cause must have worked actively to bring about a result that would not have otherwise followed from the original negligence.<sup>431</sup> The fourth is that the intervening cause must have been reasonably foreseeable to the original wrongdoer.<sup>432</sup> Superseding cause concedes cause in fact.<sup>433</sup> The focus on the remoteness of the cause and superseding cause in *Hetherington* really seems to be a proxy for a scope of liability argument.

The supreme court reversed the court of appeals in a per curiam opinion.<sup>434</sup> The court did not directly address the defendants' arguments, concluding instead that the case had been decided on a but-for theory of causation, a theory long-discredited in Minnesota and recently rejected by the court just two years earlier in *Kryzer*.<sup>435</sup> Applying the but-for approach to causation, the court said, "is much like arguing that if one had not got up in the morning, the accident would not have happened."<sup>436</sup> The court proceeded to give but-for both barrels:

The problem with the "but for" test, as this case illustrates, is that with a little ingenuity it converts events both near and far, which merely set the stage for an accident, into a

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429. See cases cited *supra* note 428.

430. See cases cited *supra* note 428.

431. See cases cited *supra* note 428.

432. See cases cited *supra* note 428.

433. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 34 cmt. b.

434. *Harpster v. Hetherington*, 512 N.W.2d 585, 586 (Minn. 1994)

435. *Id.* (citing *Kryzer v. Champlin* Am. Legion No. 600, 494 N.W.2d 35 (Minn. 1992)).

436. *Id.* at 586. In *George v. Estate of Baker*, the court rejected the but-for standard as the proximate cause standard "because [i]n a philosophical sense, the causes of an accident go back to the birth of the parties and the discovery of America." 724 N.W.2d 1, 11 (Minn. 2006) (alteration in original) (quoting William L. Prosser, *The Minnesota Court on Proximate Cause*, 21 MINN. L. REV. 19, 22 (1936)) (internal quotation marks omitted). In *Johnson v. Chi. G. W. R. Co.*, the court in an FELA case, further stretching the abuse of the but-for standard, observed that "[b]ut for the initial appearance of man on this planet the collision would not have occurred, but that fact alone cannot place any direct causal responsibility upon Adam." 242 Minn. 130, 136, 64 N.W.2d 372, 377 (1954). Putting aside any potential theological problem with that conclusion based upon original sin, it would be difficult to conclude that a collision in the 1950s would be within the bundle of risks created by Adam's appearance. Thanks to Judge Magruder in *Marshall v. Nugent*, for the "bundle of risks" concept. 222 F.2d 604, 611 (1st Cir. 1955).

convoluted series of “causes” of the accident. This can lead, as it did in this case, to a spirited but irrelevant argument over whether plaintiff’s failure to check the front stoop was a superseding, intervening cause. Not only does the “but for” test obfuscate the legal doctrine of causation, but it distorts the basic tort concept of duty. Thus in our case here, as the dissenting judge on the court of appeals panel noted, it can also be said that, as plaintiff stepped out the front entrance of the house, the defendants owed no duty to plaintiff at that time to repair the backyard gate.<sup>437</sup>

Somewhat ironically, the jury was instructed on causation not on the basis of the but-for standard, but rather on the basis of the pattern jury instruction on direct cause.<sup>438</sup> The instruction, JIG 140, stated that “[a] direct cause is a cause which had a substantial part in bringing about the (harm) (accident) (injury) (collision) (occurrence) [either immediately or through happenings which follow one after another].”<sup>439</sup> The jury concluded in its answers to the special verdict questions that the defendants were negligent and that their negligence was the direct cause of the plaintiff’s injuries,<sup>440</sup> and it did so by concluding that the defendants’ negligence played a substantial part in bringing about the injuries sustained by the plaintiff.<sup>441</sup>

What that means, of course, is that the same criticism the court leveled at the but-for standard might also apply to the substantial factor test the jury used in answering “yes” to the direct cause question on the special verdict form. The substantial factor test certainly did not discourage the jury from finding a causal connection between the defendants’ negligence and the plaintiff’s injuries. Lack of a causal relationship is not the problem in the case. The problem is that any risk of injury created by the

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437. *Harpster*, 512 N.W.2d at 586.

438. See Harpster Respondent’s Brief, *supra* note 427, at 5.

439. MINNESOTA PRACTICE SERIES, JURY INSTRUCTION GUIDES—CIVIL, CIVJIG 140 (Minn. Dist. Judges Ass’n, 3d ed. 1986).

440. Findings of Fact, Conclusions of Law and Order for Judgment at 1, *Harpster v. Hetherington*, 512 N.W.2d 585 (Minn. 1994) (No. C9-93-787). The appellants argued that there was no proximate cause, including an argument effectively claiming no cause in fact, in addition to arguing that the respondent’s conduct constituted a superseding cause. Harpster Appellate Brief, *supra* note 425, at 6–10.

441. Findings of Fact, Conclusions of Law and Order for Judgment, *supra* note 440, at 1.

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negligence of the defendants in failing to repair the gate did not encompass an injury to the plaintiff in slipping on the icy front steps of the house as she tried to find the errant dog.

In summary, *Kryzer's* denunciation of the but-for standard does not provide a clear basis for resolving cases where there seem to be real questions about making a person legally responsible for causes that seemed to have little to do with the injury the plaintiff sustained. The comments to section 26, the causation section in the Third Restatement, note that courts have tried to distinguish events deemed unimportant or inappropriate for the imposition of liability, labeling them "conditions" rather than causes.<sup>442</sup> The comment notes that "providing criteria to distinguish causes from conditions, which inevitably entails ambiguity and uncertainty, is unnecessary for legal purposes."<sup>443</sup> *Kryzer* illustrates the reasons for that concern.

*Harpster's* concern over the lack of limits on liability if but-for causation is used is understandable, but only if but-for causation is asked to carry too much freight in a negligence analysis. There are other ways of eliminating any potential for liability for that cause. Duty arises when the defendant creates a risk of injury. The act of getting up in the morning does not create a risk of injury, at least for most people. Even if it creates some risks, injury occurring later in the day by some affirmative conduct by the defendant, negligent driving, for example, would not be the type of risk that would have made the initial conduct of getting up in the morning negligent.

This is not meant as a criticism of the outcome of those cases. The results reached by the court in both *Kryzer* and *Harpster* may be justifiable, but resolution on alternative grounds would make the rationale for rejecting the claims more comprehensible. Lawyers and judges have to work with in-house authority. One of the problems is that there is not a clear analytical path for resolving cases where there seems to be a causal connection between conduct and injury but the injury is just too far removed from the original negligent action.

Condemning the "but-for" standard does not provide a clear answer as to why there should not be liability in the hard cases. *Harpster* is an excellent illustration of the problem. The court

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442. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. d (2010).

443. *Id.*



criticized the result under a but-for analysis,<sup>444</sup> but it was the substantial factor test that the jury applied in finding a causal connection between the negligence of the defendants and the plaintiff's injuries.<sup>445</sup> Something more is needed to explain why the defendants should not be liable. The same with *Kryzer*. The key to both is to answer the question of whether the injuries were within the scope of risk—the intoxication in *Kryzer* and the negligent gate repair in *Harpster*. If the injury is not within the scope of liability there is no liability, even if factual causation is established.

b. “But-for” Accepted

The decisions rejecting the but-for standard do not tell the complete story, however. There are cases where the supreme court has specifically adopted the but-for standard as the appropriate test for cause in fact.

The but-for standard is the accepted means of establishing cause in fact in professional liability cases.<sup>446</sup> In legal malpractice cases, the plaintiff must establish that but-for the defendant's conduct, the plaintiff would have either “obtained a more favorable result in the underlying transaction than the result obtained”<sup>447</sup> or where there is loss of or injury to a cause of action, that the loss or

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444. *Harpster v. Hetherington*, 512 N.W.2d 585 (Minn. 1994).

445. See Findings of Fact, Conclusions of Law and Order for Judgment, *supra* note 440, at 1.

446. *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 218 n.4 (Minn. 2007); *Vernon J. Rockler & Co. v. Glickman, Isenberg, Lurie & Co.*, 273 N.W.2d 647, 650 (Minn. 1978). In *Vernon J. Rockler*, the court made it clear that the same standards applicable to legal malpractice actions apply to other professionals, including accountants:

Accountants are held to the same standard of reasonable care as lawyers, doctors, architects, and other professional people engaged in furnishing skilled services for compensation. Plaintiff in an accounting malpractice action must prove the elements delineated for a legal malpractice action . . . Thus, to recover in this case plaintiff would need to prove a duty (the existence of an accountant-client relationship), the breach of that duty (the failure of the accountants to discharge their duty of reasonable care), factual causation (that “but for” the advice plaintiff would not have made transfers), proximate causation (that plaintiff's increased tax liability was a foreseeable consequence of defendants' advice), and damages (that plaintiff actually suffered increased tax liability due to defendants' advice).

*Id.* (citation omitted).

447. *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 819 (Minn. 2006) (legal malpractice action arising from transactional matters).

injury would not have occurred but-for the conduct of the defendant.<sup>448</sup>

Medical negligence cases are somewhat of a mystery. The causation issue in those cases is often framed in terms of whether the injury “resulted from” the negligence of the physician.<sup>449</sup> The ordinary meaning of the word “result” is “[t]o come about as a consequence” or “[t]he consequence of a particular action, operation, or course . . . .”<sup>450</sup> Perhaps there would be more play in the definition, as opposed to asking whether a particular action would not have occurred but-for the negligence of the defendant, but “resulting from” does not seem to invite the sort of potentially qualitative judgment that the substantial factor test does.

Application of the but-for standard in the professional liability cases might be explained on the basis that those cases just do not present the sorts of remote cause problems the court faced in cases such as *Kryzer* and *Harpster*.<sup>451</sup> That does not explain away the root problem of how to deal with cases where the defendant’s negligence seems to be only remotely related to the plaintiff’s injury, however. The but-for standard works to establish cause in fact. The remote cause problem can more clearly be resolved by focusing on the standards for determining scope of liability issues.

## 2. *Scope of Liability*

In 1896, the Minnesota Supreme Court decided *Christianson v. Chicago, Saint Paul, Minneapolis & Omaha Railway Co.*<sup>452</sup> The plaintiff was riding on a one hand car while a second car followed behind him.<sup>453</sup> It was the plaintiff’s contention that when he looked behind and noticed how closely the second car was following, he

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448. *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 695 (Minn. 1980).

449. *Fabio v. Bellomo*, 504 N.W.2d 758, 762 (Minn. 1993); *Harvey v. Fridley Med. Ctr., P.A.*, 315 N.W.2d 225, 227 (Minn. 1982); *Smith v. Knowles*, 281 N.W.2d 653, 656 (Minn. 1979).

450. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1487 (4th ed. 2009).

451. In legal malpractice cases, undue extensions of liability may be limited, for example, by categorical determinations concerning the scope of liability. *See, e.g., McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 547 (Minn. 2008) (limiting law firm’s liability to third parties to direct and intended beneficiaries of the legal services).

452. 67 Minn. 94, 69 N.W. 640 (1896).

453. *Id.* at 94–95, 69 N.W. at 640.

became dizzy, lost his balance, and fell off the car.<sup>454</sup> The driver of the second car was not able to stop in time and hit the plaintiff, causing severe injuries.<sup>455</sup> The defendants argued that the plaintiff's injuries were not the proximate cause of their negligence because it was not reasonable to anticipate that the injuries would occur.<sup>456</sup>

Justice Mitchell quickly dissolved this argument. He stated that “[w]hat a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues.”<sup>457</sup> In his opinion, “[c]onsequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow.”<sup>458</sup> The court held that the defendants' negligence was the proximate cause of the plaintiff's injuries.<sup>459</sup>

The supreme court reaffirmed *Christianson* in *Dellwo v. Pearson*<sup>460</sup> in 1961, specifically addressing the role of foreseeability in proximate cause.<sup>461</sup> The plaintiff and her husband were fishing off a boat when the defendant, a twelve-year-old boy operating a

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454. *Id.* at 95, 69 N.W. at 640.

455. *Id.*, 69 N.W. at 640.

456. *Id.* at 96, 69 N.W. at 641.

457. *Id.* at 97, 69 N.W. at 641.

458. *Id.*, 69 N.W. at 641.

459. *Id.* In one case, *Brown v. Murphy Transfer & Storage Co.*, the supreme court resisted the opportunity to add to *Christianson*'s understanding of proximate cause. 190 Minn. 81, 251 N.W. 5 (1933). The case involved injuries sustained by a truck driver who was hit by a car after he was flagged down by Murphy's truck driver to help him with repairs on his truck. *Id.* at 83, 251 N.W. at 6. The court, presented with arguments that the driver's conduct was only a “necessary antecedent” and not a “responsible cause” of the accident, or that the conduct did not have a natural tendency to produce the result complained of, held that as a matter of law it could not say that the driver's conduct was not a proximate cause of the plaintiff's injury. *Id.* at 85, 251 N.W.2d at 7. The court said that “[w]ith no regret we decline the invitation of the case to add to the already excessive literature of the law dealing, or attempting to deal, with the doctrine of proximate cause, much of which both ‘in case and in commentary is mystifying and futile.’” *Id.* at 86, 251 N.W. at 7 (quoting BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 85 (1928)).

460. 259 Minn. 452, 452, 107 N.W.2d 859, 859 (1961).

461. *Id.* at 453–54, 107 N.W.2d at 860.

second boat, drove closely by them.<sup>462</sup> The plaintiff's fishing line got tangled in the propeller of the defendant's outboard motor, causing the plaintiff's fishing rod to be pulled down on the side of the boat and the rod to snap apart.<sup>463</sup> A piece of the reel hit the plaintiff in the eye.<sup>464</sup>

The trial court instructed the jury that "[a] person guilty of negligence is liable for all consequences which might reasonably have been foreseen as likely to result from one's negligent act or omissions under the circumstances" and that "[a] wrongdoer is not responsible for a consequence which is merely possible according to occasional experience, but only for a consequence which is probable according to ordinary and usual experience . . . ."<sup>465</sup>

The jury found for the defendant.<sup>466</sup> The plaintiff appealed from the trial court's judgment for the defendant, arguing, among other things,<sup>467</sup> that the trial court's proximate cause instruction was in error.<sup>468</sup> The court went on to state that "[a]lthough a rigorous definition of proximate cause continues to elude us, nevertheless it is clear, in this state at least, *that it is not a matter of foreseeability.*"<sup>469</sup> Then, following a lengthy quoting of *Christianson*, the court said that "[i]t is enough to say that negligence is tested by foresight but proximate cause is determined by *hindsight.*"<sup>470</sup>

By 2006, however, the court's view of proximate cause appears to have changed. In *Lietz v. Northern States Power Co.*,<sup>471</sup> the plaintiff sued the power company over damages to its restaurant after a gas line explosion.<sup>472</sup> The court said that "[t]here is proximate cause between a negligent act and an injury when the act is 'one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injuries to others.'<sup>473</sup>

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462. *Id.* at 452, 107 N.W. 2d at 860.

463. *Id.* at 452-53, 107 N.W.2d at 860.

464. *Id.*, 107 N.W.2d at 860.

465. *Id.* at 453, 107 N.W.2d at 860.

466. *Id.*, 107 N.W.2d at 860.

467. The plaintiff also argued that it was error to instruct the jury according to the child's standard of care. *See id.* at 457, 107 N.W.2d at 863. The supreme court agreed, holding that children operating power boats, automobiles, and airplanes should be held to an adult standard of care. *Id.* at 459, 107 N.W.2d at 863-64.

468. *Id.* at 453, 107 N.W.2d at 860.

469. *Id.* at 454-55, 107 N.W.2d at 861 (emphasis added).

470. *Id.* at 456, 107 N.W.2d at 862 (emphasis added).

471. 718 N.W.2d 865 (Minn. 2006).

472. *Id.* at 868.

473. *Id.* at 872 (quoting *Canada ex rel. Landy v. McCarthy*, 576 N.W.2d 496, 506 (Minn. 1997)).

Foreseeability is now a part of the proximate cause formulation.<sup>474</sup>

This turn in Minnesota law is directly traceable to *Lubbers v. Anderson*,<sup>475</sup> in which the court said “that in order for a party’s negligence to be the proximate cause of an injury ‘the act [must be] one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, \* \* \* though he could not have anticipated the particular injury which did happen.’”<sup>476</sup> The issue in that case concerned the liability of a snowmobile driver ahead of the plaintiff who allegedly misled the plaintiff to driving into open water on a river where the plaintiff was then hit and injured by another snowmobile behind him.<sup>477</sup> Applying the proximate cause standard, the court held that there was no proximate cause between the first snowmobile driver’s conduct and the plaintiff’s injuries.<sup>478</sup>

Understanding this shift in the proximate cause formulation requires tracing the statement to its roots. *Lubbers* quoted *Wartnick v. Moss & Barnett*,<sup>479</sup> which in turn quoted *Ponticas v. K.M.S. Investments*,<sup>480</sup> in which the court had read *Christianson* to say that

[f]or negligence to be the proximate cause of an injury, it must appear that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then he is liable for any injury proximately resulting from it, even though he could not have anticipated the particular injury which did happen.<sup>481</sup>

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474. *See id.*

475. 539 N.W.2d 398 (Minn. 1995).

476. *Id.* at 401 (quoting *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 113 (Minn. 1992)).

477. *Id.* at 399–400.

478. *Id.* at 402.

479. *Id.* at 401 (quoting *Wartnick*, 490 N.W.2d at 113).

480. *Wartnick*, 490 N.W.2d at 113 (quoting *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 915 (Minn. 1983)).

481. *Ponticas*, 331 N.W.2d at 915 (citing *Christianson v. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 67 Minn. 94, 97, 69 N.W. 640, 641 (1896)).

This is faithful to *Christianson*. Foreseeability relates to the breach issue, not proximate cause.<sup>482</sup> There is negligence if the party should have anticipated likely injury to other.<sup>483</sup> In that event, the person is then “liable for any injury proximately resulting” from the negligence, even if “he could not have anticipated the particular injury which did happen.”<sup>484</sup>

But *Lubbers* changed that language. Instead of foreseeable risk being a test for negligence, with proximate cause (where foreseeability is irrelevant) following, the statement is that for negligence to be the proximate cause, the person should have “anticipated [that the act] was likely to result in injury to others.”<sup>485</sup> The shift in the use of foreseeability is from negligence (properly for the breach issue, according to *Christianson*<sup>486</sup>) to proximate cause.

To make it clearer, the following is the proximate cause formulation in *Ponticas* with the strikeout indicating the change made by the court in *Lubbers*:

For negligence to be the proximate cause of an injury, it must appear that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, ~~then he is liable for any injury proximately resulting from it, even though he could not have anticipated the particular injury which did~~ happen.<sup>487</sup>

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482. *Christianson*, 67 Minn. at 97, 69 N.W. at 641 (“What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not.”).

483. *Id.*, 69 N.W. at 641.

484. *Id.*, 69 N.W. at 641.

485. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995).

486. *Christianson*, 67 Minn. at 96–97, 69 N.W. at 641.

487. *Compare Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 915 (Minn. 1983) (“For negligence to be the proximate cause of an injury, it must appear that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then he is liable for any injury proximately resulting from it, even though he could not have anticipated the particular injury which did happen.”), *with Lubbers*, 539 N.W.2d at 401 (Minn. 1995) (“We have said that in order for a party’s negligence to be the proximate cause of an injury ‘the act [must be] one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, . . . though he could not have

After *Lubbers*, then, the statement is that negligence is the proximate cause of the injury if the act is “one the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others . . . .”<sup>488</sup> The party need not have anticipated the particular injury which did happen.<sup>489</sup> *Lubbers* then becomes the law, cited by the supreme court in cases from *Canada v. McCarthy*<sup>490</sup> to *Lietz*.<sup>491</sup> *Lubbers* also added the substantial factor test to its proximate cause formulation.<sup>492</sup>

The supreme court has also framed proximate cause as a solo requirement. In *Orwick v. Belshan*,<sup>493</sup> the plaintiff was injured while attempting to repair a farm machine owned by the defendant.<sup>494</sup> The trial court gave the following instruction on proximate cause to the jury:

[B]y proximate cause is meant the direct or immediate cause, or the natural sequence of events without the intervention of another independent and efficient cause. Proximate cause is that which in a natural and continuous sequence, unbroken by any efficient intervening cause produces the injuries and without which the result would not have occurred.<sup>495</sup>

Responding to a request by the jury for clarification, the trial court added the following: “consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow.”<sup>496</sup>

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anticipated the particular injury which did happen.” (quoting *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 113 (Minn. 1992)).

488. 539 N.W.2d at 401 (quoting *Wartnick*, 490 N.W.2d at 113) (internal quotation marks omitted).

489. *Id.*

490. 567 N.W.2d 496, 506 (Minn. 1997).

491. 718 N.W.2d 865, 872 (Minn. 2006).

492. 539 N.W.2d at 401–02 (citing *Flom v. Flom*, 291 N.W.2d 914, 917 (Minn. 1980)).

493. 304 Minn. 338, 231 N.W.2d 90 (1975).

494. *Id.* at 340–41, 231 N.W.2d at 93.

495. *Id.* at 349, 231 N.W.2d at 97.

496. *Id.*, 231 N.W.2d at 97 (internal quotation marks omitted).

The supreme court noted that the instruction was “technically” accurate and that *Christianson* had the court’s approval in the past<sup>497</sup> and continued to have its approval, but the court thought it preferable to instruct the jury in accordance with the pattern jury instructions on direct, concurring, and superseding cause, particularly in a case where there is no question concerning superseding cause.<sup>498</sup> The causation test is the substantial factor test, and thus the test for proximate cause in Minnesota. The court has reaffirmed that position in subsequent cases.<sup>499</sup>

The potential for reading the proximate cause requirement in Minnesota as incorporating the dual elements of foreseeability and substantial factor or only the substantial factor standard creates confusion. If the scope of liability issue is conflated with the cause in fact issue, the surviving standard is the substantial factor test. There are problems with that standard as a proximate cause standard<sup>500</sup> because there is nothing in the standard that provides courts or juries with a means of evaluating the critical issue of whether the risk that resulted in injury to the plaintiff was one of the risks that made the defendant’s conduct negligent.<sup>501</sup>

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497. *Id.* at 349, 349 n.10, 231 N.W.2d at 97, 97 n.10 (citing *Dellwo v. Pearson*, 259 Minn. 452, 107 N.W.2d 859 (1961); *Seward v. Minneapolis St. Ry. Co.*, 222 Minn. 454, 25 N.W.2d 221 (1946)); see cases cited *supra* notes 459–69.

498. 304 Minn. at 349–50, 231 N.W.2d at 98 (“Obviously, the jury had difficulty in trying to understand proximate cause on the basis of the trial court’s definition.”).

499. *E.g.*, *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 372–73 (Minn. 2008) (discussing a “material element or a substantial factor” as the necessary link between intoxication and injury in Minnesota dram shop actions); *George v. Estate of Baker*, 724 N.W.2d 1, 10 (Minn. 2006) (“Minnesota applies the substantial factor test for causation.”).

500. The conflation of factual and proximate cause has been criticized since its inception in the first and continuation in the Restatement Second. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM ch. 6, Special Note on Proximate Cause (2010) (“Instead, . . . prior Restatements employed the umbrella term ‘legal cause’ to include both factual cause and proximate cause. . . . [T]he term is . . . an especially poor one to describe the idea to which it is connected.”); see also *id.* §§ 26 cmt. a, 29 cmt. b.

501. Section 433 of the Restatement (First) of Torts (1934), for instance, sets out the following considerations to be used in determining whether an actor’s conduct is a substantial factor:

The following considerations are in themselves or in combination with one another important in determining whether the actor’s conduct is a substantial factor in bringing about harm to another:

- (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
- (b) whether after the event and looking back from the harm to the



The dual standard approach adopts the substantial factor test as the test for cause in fact and the reformatted *Christianson* inquiry for scope of liability. While many jurisdictions use a foreseeability standard for resolving scope of liability issues,<sup>502</sup> dealing with scope of liability issues without injecting foreseeability into the inquiry provides a clearer means of resolving those issues.<sup>503</sup> The *Christianson* standard was intended to provide limits on liability, and for a time in Minnesota it was deemed to be an appropriate standard for juries to apply in deciding scope of liability issues.<sup>504</sup> *Christianson* has been repeatedly affirmed by the supreme court, but it was also rejected in favor of the substantial factor standard in order to achieve clarity for jury resolution of the cause in fact issue.<sup>505</sup> *Christianson* seemed to fade until it was revived and reformed in *Lubbers*.<sup>506</sup>

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actor's negligent conduct it appears highly extraordinary that it should have brought about the harm;

(c) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;

(d) lapse of time.

502. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. j (2010).

503. *Id.* Comment j reads in part as follows:

Although the risk standard in this Section is comparable to the foreseeability standard in actions based on negligence, the risk standard contained in this Section is preferable because it provides greater clarity, facilitates clearer analysis in a given case, and better reveals the reason for its existence. The risk standard provides greater clarity and facilitates analysis because it focuses attention on the particular circumstances that existed at the time of the actor's conduct and the risks that were posed by that conduct. Risks may be foreseeable in context, as when an extraordinary storm is forecast, requiring precautions against the risks posed by it, that might otherwise be thought of, out of context, as exceedingly unlikely and therefore unforeseeable. The risk standard focuses on the appropriate context, although a foreseeability standard, properly explained, could do this also. The risk standard provides better understanding about the reasons for its existence by appealing to the intuition that it is fair for an actor's liability to be limited to those risks that made the conduct wrongful. Thus, factfinders can apply the risk standard with more sensitivity to the underlying rationale than they might muster with an unadorned foreseeable-harm standard.

504. *See supra* notes 458–68.

505. *See supra* notes 469–72.

506. *See supra* notes 473–76.

If, as *Lubbers* says, the proximate cause issue is usually for the jury,<sup>507</sup> yet another question arises: whether in cases where there is a dispute over scope of liability, a jury would be instructed according to the foreseeability standard set out in *Lubbers* or, if *Lubbers* inaccurately interpreted the *Christianson* proximate standard as set out in cases such as *Ponticas*, whether a jury would presumably be instructed according to that standard. Either way, it has not been the practice to instruct juries on the scope of liability issue in Minnesota. The substantial factor test has been the primary jury instruction governing causation and, in some opinions of the court, the standard for determining proximate cause. The lack of a clearly defined concept that applies to scope of liability issues in Minnesota has resulted in an overload of the substantial factor test.

There is no reason why a jury could not be instructed in cases where proximate cause is in issue, however. The question is what form the instruction might take. There is a significant variance in the form of pattern instructions on proximate cause in the states.<sup>508</sup>

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507. *Lubbers v. Anderson*, 539 N.W.2d 398, 402 (Minn. 1995).

508. Though civil jury instructions addressing causation vary from state to state, many do attempt to put some limit on liability as suggested in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 (2010). Vermont's jury instructions specifically limit liability in a separate cause instruction. VT. PLAIN ENGLISH CIVIL JURY INSTRUCTION COMM., VERMONT CIVIL JURY INSTRUCTIONS § 4-4.1 (LexisNexis 2008) ("The defendant is responsible for all the results of his negligence until the forces that his negligent act set in motion no longer have any effect."). New Jersey provides a definition of causation to the jury, but then cautions the jury in the last paragraph by attempting to impose a limit on liability. COMM. ON MODEL CIVIL JURY CHARGES, NEW JERSEY MODEL CIVIL JURY CHARGES 6.10 (LexisNexis 2009) ("The basic question for [the jury] to resolve is whether [the plaintiff's injury/loss/harm] is so connected with the negligent actions or inactions of [the defendant] that . . . it is reasonable . . . that [the defendant] should be held wholly or partially responsible for [the injury/loss/harm].").

Some states instruct the jury to limit liability using the concept of foreseeability. *E.g.*, COMM. ON PATTERN JURY INSTRUCTIONS ASS'N OF SUPREME COURT JUSTICES, NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL PJI 2:12 (Westlaw 2011) [hereinafter N.Y. JURY INSTRUCTIONS] ("A person is only responsible for the results of his or her conduct if the risk of injury is reasonably foreseeable."); MISS. JUDICIAL COLL., MISSISSIPPI MODEL JURY INSTRUCTIONS—CIVIL § 15:3 (Westlaw 2010–2011) [hereinafter MISSISSIPPI JURY INSTRUCTIONS] (stating that an "element or test of proximate cause is that an ordinarily prudent person should reasonably have foreseen that some injury might probably occur as a result of his negligence"); VIRGINIA JURY INSTRUCTIONS § 12:13 (Westlaw 2010–11) [hereinafter VIRGINIA JURY INSTRUCTIONS] (stating that the defendant "is not charged with foreseeing that which could not reasonably be expected to happen, nor for casualties which, though possible, were wholly improbable"); COLO. SUP. CT. COMM. ON CIVIL JURY INSTRUCTIONS, COLORADO JURY INSTRUCTIONS—CIVIL 9:21 (Westlaw 2010)

The reporters for the Third Restatement of Torts gave it a shot in suggesting four potential instructions.<sup>509</sup> This is one of the four:

[hereinafter COLORADO JURY INSTRUCTIONS] (stating that the defendant is not the cause of injury unless injury to a person in the plaintiff's position was "a reasonably foreseeable result of that negligence"); UTAH SUP. CT., ADVISORY COMM. ON CIVIL JURY INSTRUCTIONS], MODEL UTAH JURY INSTRUCTIONS—CIVIL CV209 (LexisNexis 2009) [hereinafter UTAH JURY INSTRUCTIONS] (stating that cause requires that the actor's conduct "could be foreseen by a reasonable person to produce a harm of the same general nature"); MASSACHUSETTS CIVIL JURY INSTRUCTIONS § 2.1.8 (Westlaw 2008) (stating that in order to establish causation "the plaintiff must show that the harm was reasonably foreseeable to a person in the defendant's position at the time of the defendant's negligence").

Many states utilize language from the Restatement (Second) of Torts § 433 (1965) when defining proximate cause in an attempt to limit liability. *E.g.*, JURY INSTRUCTIONS COMM. OF THE OHIO JUDICIAL CONFERENCE, OHIO JURY INSTRUCTIONS—CIVIL CV 405.1 (Westlaw 2011); WASHINGTON PATTERN JURY INSTRUCTIONS—CIVIL WPI 15.01 (Westlaw 2011); MISSISSIPPI JURY INSTRUCTIONS, *supra* note 508, §15:3; VIRGINIA JURY INSTRUCTIONS, *supra* note 508, § 12:13; ALA. PATTERN JURY INSTRUCTIONS COMM., ALABAMA PATTERN JURY INSTRUCTIONS: CIVIL, ALABAMA PATTERN JURY INSTRUCTIONS—CIVIL APJI 33.00 (Westlaw 2010); COLORADO JURY INSTRUCTION, *supra* note 508, § 9.18; FLA. SUP. CT. COMM. ON MODEL CIVIL JURY CHARGES, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 401.12 (Westlaw 2010); CIVIL INSTRUCTIONS COMM., INDIANA MODEL CIVIL JURY INSTRUCTIONS § 1117 (LexisNexis 2010); ARKANSAS MODEL JURY INSTRUCTIONS—CIVIL AMI 501 (Westlaw 2009); ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL 15.01 (Westlaw 2009); NEB. SUP. CT. COMM. ON CIVIL PRACTICE & PROCEDURE, NEBRASKA JURY INSTRUCTIONS—CIVIL NJ12d Civ. 3.41 (Westlaw 2009) (defining proximate cause as "a cause . . . that produces a result in a natural and continuous sequence"); NORTH DAKOTA PATTERN JURY INSTRUCTIONS: CIVIL C - 2.15 (2008); ANDERSON'S SOUTH CAROLINA REQUESTS TO CHARGE—CIVIL §20-2 (Westlaw 2009); UTAH JURY INSTRUCTIONS, *supra* note 508, § 209.

Other states apply the substantial factor test found in the Restatement (Second) of Torts § 431 (1965). *E.g.*, N.Y. JURY INSTRUCTIONS, *supra* note 508, § 2:70; CALIFORNIA CIVIL JURY INSTRUCTIONS BAJI 3.76 (Westlaw 2010); HON. DONALD G. ALEXANDER, MAINE JURY INSTRUCTION MANUAL § 7-80 (LexisNexis 2010); WIS. CIVIL JURY INSTRUCTIONS COMM., WISCONSIN JURY INSTRUCTIONS—CIVIL § 1500 (2010); ALASKA CT. SYS. CIVIL PATTERN JURY INSTRUCTIONS COMM., ALASKA CIVIL PATTERN JURY INSTRUCTIONS § 03.07 (LexisNexis 2008); MASSACHUSETTS CIVIL JURY INSTRUCTIONS, *supra* note 508, § 2.1.8; HAW. SUP. CT., HAWAII STANDARD CIVIL JURY INSTRUCTIONS No. 7.1 (LexisNexis 1999).

509. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. b reporters' note (2010). The first three suggested instructions are as follows:

- (1) You must decide whether the harm to the plaintiff is within the scope of the defendant's liability. To do that, you must first consider why you found the defendant negligent [or some other basis for tort liability]. You should consider all of the dangers that the defendant should have taken reasonable steps [or other tort obligation] to avoid. The defendant is liable for the plaintiff's harm if you find that the plaintiff's harm arose from the same general type of danger that was one of those that the defendant should have taken reasonable steps [or other tort obligation] to avoid. If the plaintiff's harm, however, did not arise from

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You must decide whether the plaintiff's harm was of the same general type of harm that the defendant should have acted to avoid. If you find that it is, you shall find for the plaintiff. If you find that it is not the same general type, you must find for the defendant.<sup>510</sup>

Elimination of the last two sentences would make the instruction, with an appropriate special verdict question, suitable for use in special verdict jurisdictions such as Minnesota.

*D. A Short Summary of Minnesota Law*

Foreseeability plays a prominent role in Minnesota tort law. It is an integral part of both the duty<sup>511</sup> and proximate cause<sup>512</sup> determinations. The supreme court has both rejected and accepted the but-for test for causation,<sup>513</sup> depending on the type of case, although the predominant standard for deciding causation issues is the substantial factor test.<sup>514</sup>

The emphasis on foreseeability as a primary determinant of duty, even without a focus on whether the specific harm could have been anticipated, gives courts significant latitude in determining whether they think a particular injury was foreseeable. They

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the same general dangers that the defendant failed to take reasonable steps [or other tort obligation] to avoid, then you must find that the defendant is not liable for the plaintiff's harm.

(2) You must decide whether the harm to the plaintiff is within the scope of the defendant's liability. The plaintiff's harm is within the scope of defendant's liability if that harm arose from the same general type of danger that was among the dangers that the defendant should have taken reasonable steps [or other tort obligation] to avoid. If you find that the plaintiff's harm arose from such a danger, you shall find the defendant liable for that harm. If you find the plaintiff's harm arose from some other danger, then you shall find for the defendant.

(3) To decide if the defendant is liable for the plaintiff's harm, think about the dangers you considered when you found the defendant negligent [or otherwise subject to tort liability]. Then consider the plaintiff's harm. You must find the defendant liable for the plaintiff's harm if it arose from one of the dangers that made the defendant negligent [or otherwise subject to tort liability]. You must find the defendant not liable for harm that arose from different dangers.

*Id.*

510. *Id.*

511. *See supra* Part IV.A.

512. *See supra* Part IV.C.

513. *See supra* Part IV.C.1.a–b.

514. *See supra* Part IV.C.2.

regularly engage in a fact-specific analysis of the foreseeability of an injury, holding that the lack of foreseeability mandates a conclusion that there is no duty in the case.<sup>515</sup>

The proximate cause issue has been framed in various ways by the supreme court, leaving open the question as to what the standard is for determining scope of liability issues. Using foreseeability as a workhorse in the duty determination means that decisions holding that there is no proximate cause as a matter of law are fewer in number. When cases arise where the duty is clear, however, and courts are bothered by the remoteness of an injury to the defendant's conduct, they do rely on proximate cause concepts to limit liability.

The outcome then depends on how the court defines proximate cause in a particular case. If it is conflated with the prevailing cause in fact standard and the substantial factor standard,<sup>516</sup> and cause in fact seems to be established, courts may have to resort to a conclusion that a defendant's conduct was simply the "occasion" for an injury.<sup>517</sup> Or the court may conclude that even though a jury found causation, it must have done so on the basis of a "but-for" analysis, which some cases say is taboo. It is also possible that a court may conclude that the prevailing proximate cause test is whether the injury is foreseeable and hold that there is no proximate cause because a particular injury is not foreseeable.

Lawyers argue cases in terms of existing precedent. They will argue that injuries are not foreseeable and that cases should be dismissed on summary judgment, either because of a lack of duty or proximate cause, or perhaps that there is no breach as a matter of law. The continuing emphasis will be on the foreseeability of

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515. *E.g.*, *Garrett v. Reuben*, No. A09-1804, 2010 WL 2266401, at \*3 (Minn. Ct. App. June 8, 2010) (no duty because heart attack suffered some time after the collapse of a wall on landowner's property was not foreseeable); *Jewell v. Backes*, No. A07-2358, 2008 WL 4133865, at \*2-3 (Minn. Ct. App. Sept. 9, 2008) (no duty because injury to plaintiff from horse bite not foreseeable); *Ransom v. Bethany Acad.*, No. A07-1769, 2008 WL 3289853, at \*2-3 (Minn. Ct. App. Aug. 12, 2008) (no duty because injury to student from thrown football during basketball practice not foreseeable); *Doe v. Indep. Sch. Dist. No. 152*, No. A06-611, 2007 WL 92904, at \*6-7 (Minn. Ct. App. Jan. 16, 2007) (no duty because sexual assault of student in sports center owned and operated by city not foreseeable); *Watkins v. Greyhound Bus Lines, Inc.*, No. A04-150, 2004 WL 2049977, at \*2-5 (Minn. Ct. App. Sept. 14, 2004) (no duty because assault in bus station not foreseeable).

516. *See supra* notes 399-04.

517. *See Harpster v. Hetherington*, 512 N.W.2d 585 (Minn. 1994).

risk.<sup>518</sup> Motions for summary judgment will be based on the lack of duty or the lack of proximate cause due to the unforeseeability of the injury. The emphasis has to be on a close analysis of the specific facts in the case to make those determinations. The Third Restatement of Tort's approach redirects judicial energy, taking away foreseeability as a determinant of duty and proximate cause and leaving it to the jury in many cases.<sup>519</sup> That does not mean that courts are powerless to decide in individual cases that there is no duty or that the injury is not within the scope of the defendant's responsibility, or even that there is no breach as a matter of law, but, particularly in the latter case, it will be with appropriate deference to civil juries.

## V. CONCLUSION

The Third Restatement of Torts offers to clarify negligence law and achieve an appropriate judge-jury balance by stripping foreseeability from the duty and scope of liability determinations.<sup>520</sup> No-duty determinations are exceptional and should be based upon an "articulated countervailing principle or policy" that "warrants denying or limiting liability in a particular class of cases."<sup>521</sup> The Third Restatement separates scope of liability from cause in fact and adopts but-for causation as the appropriate standard for resolving factual causation issues. Whether the Third Restatement's offer is accepted in any degree by a court depends on the court's perception of whether the law of negligence in its state poses any of the problems the Third Restatement formulation is intended to avoid.

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518. The briefs in *Foss v. Kincade*, 766 N.W.2d 317 (Minn. 2009), are an excellent example. The appellant argued that the defendants owed a duty to the minor plaintiff and that the exact manner of injury did not have to be foreseeable. Appellants' Reply Brief at 3-5, 12, *Foss v. Kincade* 766 N.W.2d 317 (Minn. 2009) (No. A07-0313), 2008 WL 6191415, at \*3-5, \*12. The respondent argued that there was no duty because the injury was not foreseeable, and that clear cases of foreseeability should be decided by the courts. Respondents' Brief, *Foss v. Kincade* 766 N.W.2d 317 (Minn. 2009) (No. A07-0313), 2008 WL 6191416, at \*7-11.

519. The way juries are instructed, then, becomes especially important. See *supra* notes 393-95 and accompanying text.

520. See *supra* Part II.

521. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) (2010).

Courts have greeted the Third Restatement with varying degrees of enthusiasm.<sup>522</sup> The courts that have followed it and removed foreseeability from the duty determination have done so because they have recognized that the fact-specific nature of the foreseeability analysis is more suited to a jury resolution and that removing foreseeability from duty determinations will clarify the reasons for no-duty findings.

Separating foreseeability from the duty determination does not mean that a court will accept the second part of the Third Restatement's duty provision, however. Courts may take a more cautious approach than did the Iowa Supreme Court in *Thompson v. Kaczinski*<sup>523</sup> and remove foreseeability from the duty determination but leave their approach to the other elements of negligence law intact, at least until issues concerning the application of those elements are directly presented to them. Courts may continue to adhere to their traditional multifactor standards for resolving duty decisions, even if they decide to remove foreseeability as a duty consideration. Or given its preference for its history and traditions in resolving duty disputes, a court may completely reject the Third Restatement's duty formulation, as did the Delaware Supreme Court in *Riedel*.<sup>524</sup>

As Minnesota lawyers and judges determine whether and how to use the Third Restatement, it becomes important to first understand the current structure of Minnesota negligence law.<sup>525</sup> Foreseeability in Minnesota negligence law has received varied treatment over the years. Foreseeability in current law relates to duty, breach, and proximate cause, with cause in fact usually determined according to the substantial factor test. The substantial factor is often advanced as the test for proximate cause, although some more recent statements of the proximate cause standard turn on the foreseeability of the injury. Negligence law is currently structured to give courts significant latitude in deciding that no duty exists or that there is no proximate cause, both based on the lack of foreseeability of a particular injury.

The Minnesota Supreme Court has seemingly accepted the substantial factor test as the preferred means for determining cause

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522. See *supra* Part III.

523. See case analysis *supra* notes 35–80.

524. See *supra* Part III.F.

525. See *supra* Part IV.

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in fact and rejected the but-for standard because of the lack of limits of that test. That criticism would be understandable if there were no other means of limiting liability, but limiting liability to the same general risks that made the defendant's conduct negligent in the first place ensures that liability will be subject to reasonable limits. In some cases, however, the but-for is the prevailing standard for cause in fact. Professional malpractice cases are good examples of this.<sup>526</sup> If the standard works there, it can work elsewhere in negligence law, but only if there are other limits to the scope of a defendant's liability.

Proximate cause has perhaps been the subject of the greatest uncertainty in Minnesota law.<sup>527</sup> The proximate cause standard has been formulated in various ways, more recently incorporating foreseeability as a key factor, although that is clearly inconsistent with prior precedent. The other problem is that conflating the proximate cause and cause in fact standards with the substantial factor standard as the test for both leaves courts with inadequate means of resolving scope of liability issues.

The reception of the Third Restatement in Minnesota will depend on whether the courts accept not only the Restatement's black letter, but also the policy justifications for the position it takes on negligence law. The supreme court would have to be convinced that incorporating foreseeability in its duty and proximate cause determinations has resulted in decisions that really are fact-specific and generally better suited for jury resolution and that removing the foreseeability issue from duty and proximate cause will avoid decisional inconsistency and result in a clearer explanation of the reasons for no-duty or no-proximate cause determinations. The court may conclude that it is perfectly appropriate for courts to carefully scrutinize the foreseeability of an injury, whether for duty or proximate cause purposes, and that Minnesota law appropriately balances the roles of judge and jury. If so, it will reject the Third Restatement's approach, at least in part.

The second part of the Third Restatement's duty formulation indicates the sorts of cases where no-duty determinations are appropriately made on a categorical basis. That would present nothing new for the court, which regularly makes those categorical determinations in resolving duty issues. While the courts may be

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526. See *supra* Part IV.C.1.b.

527. See *supra* Part IV.C.



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reluctant to deviate from what seems to be settled reliance on a substantial factor standard for determining cause in fact issues, the scope of liability issue remains problematic, given the lack of a clear standard for resolving that issue.

Favoring the substantial factor test over the but-for standard may present problems. Minnesota courts sometimes adopt the but-for standard for resolving factual causation issues, particularly in professional liability cases, and sometimes the courts adhere to the substantial factor test. Neither test is a guarantee that liability will be limited, however, as the Minnesota Supreme Court's decision in *Harpster v. Hetherington* indicates.<sup>528</sup>

Irrespective of how the factual causation issue is resolved, there still has to be a reasoned basis for resolving scope of liability issues. In Minnesota, reliance on the substantial factor test as the test for proximate cause has led to some awkward decisions where the court has concluded that a factual cause was just the "occasion" for an injury, but not the real cause.<sup>529</sup> A scope of liability standard appropriately applied gives courts a more direct way to deal with cases where the injury sustained by the plaintiff is beyond the scope of the risk that made the defendant's conduct negligent in the first place.

Whether or not courts choose to follow its approach, the Third Restatement performs a valuable function in inviting courts to evaluate their own negligence law to determine whether it is structured in a clear way that judges and lawyers can understand and apply with consistency and that achieves proper balance in the judge-jury relationship.

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528. See case analysis *supra* notes 412–44.

529. See *supra* note 411.



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