# CLOSE ENCOUNTERS OF THE THIRD KIND: THE THIRD RESTATEMENT, DUTY, AND FORESEEABILITY

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## INTRODUCTION

The *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (the "Third Restatement") was adopted by the

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American Law Institute in 2010.[1] The approach taken by the Third Restatement to negligence law excludes foreseeability from the duty determination[2] and places it squarely as a relevant factor in the breach issue;[3] it adopts the "but-for" standard for causation;[4] and rejects proximate cause terminology, instead utilizing a scope of liability approach in which the key question is whether the harms that occurred were of the same general type that made the actor's conduct tortious.[5] Removal of foreseeability from the duty determination is intended to provide a more principled approach to the duty issue, leaving policy decisions for the court and foreseeability issues for the jury.[6] The Third Restatement makes it clear that it is the jury's function to determine the facts[7] and that if "reasonable minds can differ as to whether the conduct lacks reasonable care, it is the function of the jury to make that determination."[8]

The Third Restatement's position on the relationship of foreseeability to the duty issue has had a varied reception in the states. In some states, the courts continue to apply duty rules that include foreseeability in the duty determination, either without mentioning the Third Restatement,[9] or perhaps obliquely mentioning it.[10] Some states have specifically rejected the Third Restatement's approach to duty issues.[11] Some states have excluded foreseeability from the duty determination, noting that

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[1] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (AM. L. INST. 2010).

[2] *See id.* § 7.

[3] *See id.* § 3.

[4] *See id.* § 26.

[5] *See id.* § 29.

[6] *Id.* § 7 cmt. j.

[7] *Id.* § 8(a).

[8] *Id.* § 8(b).

[9] *See* Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 366 (Tenn. 2008).

[10] *See* Blondin v. Milton Town Sch. Dist., 251 A.3d 959, 966 n.6 (Vt. 2021) (noting that "[t]his Court has not formally adopted § 7 of the Restatement (Third), and we are not asked to do so here.").

[11] *See, e.g.*, Riedel v. ICI Americas Inc., 968 A.2d 17, 21 (Del. 2009), *overruled on other grounds by* Ramsey v. Ga. S. Univ. Advanced Dev. Ctr., 189 A.3d 1255 (Del. 2018); Goodwin v. Yeakle's Sports Bar & Grill, Inc., 62 N.E.3d 384, 389 n.4 (Ind. 2016); Manley v. Hallbauer, 423 P.3d 480, 486 (Kan. 2018).

the Third Restatement is in accord.[12] Characterizing the negligence determination as an expression of community values, the Supreme Court of Oregon has noted that courts are not in a superior position to make that determination, and that the foreseeability issue should therefore be for the jury except in the most extreme cases.[13] Some states note that duty is contingent on foreseeability of the specific harm.[14] Minnesota requires foreseeability of the specific facts, but in a mitigating series of decisions has indicated that close cases should be for the jury, a result that nudges Minnesota law closer to the Third Restatement position without mentioning it.[15]

In an unusual expression of judicial angst, an appellate court judge in Kentucky warned of catastrophe if the Supreme Court of Kentucky fully adopted the Third Restatement's approach to foreseeability and permitted juries to usurp the judicial function,[16] while an intermediate appellate court in Tennessee implored the supreme court to adopt the Third Restatement to ameliorate the impossible position trial courts face when foreseeability is a key part of the duty determination.[17]

The judge-jury dilemma is nicely framed in *UDR Texas Properties, L.P. v. Petrie*, a case arising out of the assault and

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[12] *See, e.g.*, Kesner v. Superior Ct., 384 P.3d 283, 304 (Cal. 2016); Cabral v. Ralphs Grocery Co., 248 P.3d 1170, 1172, 1174 n.2 (Cal. 2011); Ipsen v. Diamond Tree Experts, Inc., 466 P.3d 190, 191-92 (Utah 2020) (quoting Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 993 (2019) (maritime law)); Mower v. Baird, 422 P.3d 837, 843 (Utah 2018) (therapist had duty to nonpatient parents not to create false memories of child sexual abuse in patient child) (quoting section 7(a) of the Third Restatement); Brenner v. Amerisure Mut. Ins. Co., 893 N.W.2d 193, 198-99 (Wis. 2017); Behrendt v. Gulf Underwriters Ins. Co., 768 N.W.2d 568, 575 (Wis. 2009); Alvarado v. Sersch, 662 N.W.2d 350, 354 n.2 (Wis. 2003).

[13] Piazza v. Kellim, 377 P.3d 492, 513 (Or. 2016).

[14] In *Vendrella v. Astriab Fam. Ltd. P'ship*, 87 A.3d 546, 549 n.6 (Conn. 2014) (quoting *Perodeau v. City of Hartford*, 792 A.2d 752, 767 (Conn. 2002)), the court recognized that the threshold inquiry is whether the specific harm the plaintiff alleges was foreseeable by the defendant.

[15] *See* Henson v. Uptown Drink, LLC, 922 N.W.2d 185, 192-93 (Minn. 2019); Warren v. Dinter, 926 N.W.2d 370, 378 (Minn. 2019); Fenrich v. The Blake Sch., 920 N.W.2d 195, 205 (Minn. 2018); Senogles v. Carlson, 902 N.W.2d 38, 43 (Minn. 2017); Montemayor v. Sebright Prods., Inc., 898 N.W.2d 623, 629 (Minn. 2017).

[16] *See* Carney v. Galt, 517 S.W.3d 507, 513-19 (Ky. Ct. App. 2017) (Acree, J., concurring).

[17] *See* Stockton v. Ford Motor Co., No. W2016-01175-COA-R3-CV, 2017 WL 2021760, at *14 & n.3 (Tenn. Ct. App. May 12, 2017).

robbery of a visitor at an apartment complex.[18] The plaintiff alleged that the defendant was negligent because he knew or should have known of the high crime rate on the premises and surrounding area and was negligent by failing to make the complex safe.[19] Following a two-day evidentiary hearing with dueling experts, the trial court held that the defendant owed no duty to the plaintiff.[20] The court of appeals reversed, holding that there was evidence of foreseeability of an unreasonable risk of harm to the plaintiff.[21] The supreme court reversed the court of appeals.[22] Under Texas law, risks must be foreseeable *and* unreasonable.[23] The court concluded that the plaintiff's evidence of unreasonableness was insufficient.[24]

Duty determinations in Texas turn on several factors, "including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant."[25] In reversing the court of appeals, the supreme court held that the plaintiff failed to present evidence on the burden issue.[26]

In a concurring lament, Justice Willett agreed with the court's conclusion but wrote separately to "flag something that has long vexed [him] in these cases: the allocation of responsibilities between the judge and jury, and the derivative and important question of how to correctly charge the jury."[27]

He noted the Third Restatement's position in Section 8 that the reasonableness of one's conduct is for the jury where reasonable minds might differ on the issue,[28] but that under Texas law, the

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[18] 517 S.W.3d 98, 99 (Tex. 2017).

[19] *Id.* at 100.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 105.

[23] *Id.* at 101.

[24] *Id.* at 105. More specifically, the plaintiff failed to present evidence on the burden of the defendant in preventing or reducing the risk of harm from a crime such as the one involved in the case. *Id.*

[25] *Id.* at 101 (quoting Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990)).

[26] *Id.* at 105.

[27] *Id.* (Willett, J., concurring).

[28] *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 8 (AM. L. INST. 2010)).

court's duty analysis "may be assigning determinations to the trial judge determinations that are usually left to the jury," as demonstrated by the two-day evidentiary hearing the trial court held to determine duty, in which the court effectively subsumed the negligence and proximate cause issues in its duty determination.[29] Justice Willett observed that those questions are generally for the jury under Texas law.[30] According to Justice Willett, asking the jury to consider the same factors as the court in deciding the duty issue means that the duty determination is really not much different from the negligence determination.[31]

He noted Section 3 of the Third Restatement and the Hand formula as supporting jury resolution of issues involving foreseeability and gravity of harm balanced against the burden of adequate precautions, noting, for probably the only time in a judicial opinion, dialogue from *Fight Club* to illustrate the application of the Hand formula.[32]

Justice Willett recognized that the problem of a court co-opting the jury's function is not a new one in Texas law and that the problem is not confined to negligence cases.[33] Having raised the issue, he punted, recognizing that he was simply flagging the issues, that he had "not formulated a grand unified theory of tort law or scripted the ideal way to instruct juries," and that he wrote "only to kindle further study from the bench, bar, and academy."[34]

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[29] *Id.*

[30] *Id.*

[31] *Id.* at 106.

[32] *Id.* at 106-07.

> Narrator:
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> A new car built by my company leaves somewhere traveling at 60 mph. The rear differential locks up. The car crashes and burns with everyone caught inside. Now, should we initiate a recall? Take the number of vehicles in the field, A, multiply by the probable rate of failure, B, multiply by the average out-of-court settlement, C. A times B times C equals X. If X is less than the cost of a recall, we don't do one.

*Id.* at 107 n.14 (quoting FIGHT CLUB (20th Century Fox 1999)). *Fight Club* has probably been cited in other opinions, but not for this proposition.

[33] *Id.* at 108.

[34] *Id.*

Welcome to a slice of highly studied American tort law.[35] This Article strums the divergent strings of foreseeability, to see how courts have dealt with that issue in the shadow of the Third Restatement. Part I covers rejections of the Third Restatement's position on duty. Part II covers cases where courts have crossed paths with the Third Restatement but without adopting it. Part III focuses on the issues that arise when courts continue to rely on foreseeability in duty determinations. Part IV notes cases that track the Third Restatement's position. Part V covers Minnesota's approach to the issue, primarily to illustrate the impact of a liberal stance on the issue of whether summary judgment should be adopted in cases where foreseeability in the duty determination is disputed, a position that edges closer to the Third Restatement's

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[35] Much has been written on the issue. *See generally* David G. Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1277 (2009) [hereinafter Owen, *Figuring Foreseeability*]; Rory Bahadur, *Almost a Century and Three Restatements After Green It's Time to Admit and Remedy the Nonsense of Negligence*, 38 N. KY. L. REV. 61 (2011); Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247 (2009); Victor P. Goldberg, *Protecting Reliance*, 114 COLUM. L. REV. 1033 (2014) (discussing the role of foreseeability in breach of contract reliance damages); Cara McDonald, *Torts Law: Blurred Elements: The Nebulous Nature of Foreseeability, the Confounding Quality of Misfeasance, and the Minnesota Supreme Court's Decision—*Doe 169 v. Brandon, 41 WM. MITCHELL L. REV. 365 (2015); W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf*: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873 (2011); Michael D. Green, *The Impact of the Civil Jury on American Tort Law*, 38 PEPP. L. REV. 337 (2011); Russ VerSteeg, *Perspectives on Foreseeability in the Law of Contracts and Torts: The Relationship Between "Intervening Causes" and "Impossibility*,*"* 2011 MICH. ST. L. REV. 1497; Sarah E. Smith, Comment, *Balancing the Focus on Foreseeability:* Cullum v. McCool *and Tennessee's Test for Business Liability for Third Party Acts*, 45 U. MEM. L. REV. 751 (2015); Brenna Gaytan, *The Palsgraf "Duty" Debate Resolved:* Rodriguez v. Del Sol *Moves to a Foreseeability Free Duty Analysis*, 45 N.M. L. REV. 753 (2015); Colleen Giles, Comment, *Businesses Must Pay When They Let Others Play: A Business Entity's Duty to Prevent the Foreseeable Criminal Acts of Others*, 24 ROGER WILLIAMS U. L. REV. 359 (2019); David G. Owen, *Bending Nature, Bending Law*, 62 FLA. L. REV. 569 (2010); Tory A. Weigand, *Duty, Causation and* Palsgraf*: Massachusetts and the Restatement (Third) of Torts*, 96 MASS. L. REV. 55 (2015); Vicki Lawrence MacDougall, *The Jury Verdict Favored Helen Palsgraf: A Critique of the Restatement (Third) PEH and Foreseeability—"What Does It All Mean?"*, 43 OKLA. CITY U. L. REV. 1 (2019); Louis S. Sloven, Note, *Who Could Have Seen This Coming? The Impact of Delegating Foreseeability Analysis to the Finder of Fact in Iowa Negligence Actions*, 63 DRAKE L. REV. 667 (2015); Meiring de Villiers, *Foreseeability Decoded*, 16 MINN. J.L. SCI. & TECH. 343 (2015); Brigid C. Hoffman, *Reaffirming the Role of the Jury: The Problem of Summary Judgment, Duty, and Roadkill in* Zerfas v. AMCO Insurance Company, 62 S.D. L. REV. 453 (2017); Alani Golanski, *A New Look at Duty in Tort Law: Rehabilitating Foreseeability and Related Themes*, 75 ALB. L. REV. 227 (2011).

aspiration of a more appropriate judge-jury balance in negligence cases. Part VI covers jurisdictions adopting the Third Restatement's approach to duty.

## I. REJECTIONS OF THE RESTATEMENT

Delaware, Indiana, and Kansas have explicitly rejected the Third Restatement's approach in excising foreseeability from the duty determination. Tennessee sort of did. The reasoning in the decisions is varied. Most commonly, the courts simply conclude that the Third Restatement's position on duty is inconsistent with the settled law in their jurisdictions.

### *A. Delaware*

In *Riedel v. ICI Americas Inc.*, a take-home asbestos case, the Delaware Supreme Court flirted with the Third Restatement's approach to duty before rejecting it.[36] The plaintiff, the spouse of an employee of ICI, alleged that the company was negligent in failing to prevent her husband from taking asbestos home on his clothing and failed to warn her of the dangers of exposure to asbestos.[37] Treating the case as one of nonfeasance, where there was no special relationship between the plaintiff and defendant, the supreme court held that there was no duty.[38] Before it issued its opinion, the court asked the parties for supplemental briefing on the potential application of the Third Restatement.[39] At that time, the most

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[36] 968 A.2d 17, 20-21 (Del. 2009), *overruled on other grounds by* Ramsey v. Ga. S. Univ. Advanced Dev. Ctr., 189 A.3d 1255 (Del. 2018).

[37] *Id.* at 18.

[38] *Id.* at 25, 27.

[39] The court asked the parties to answer three questions:

> (1) Should this Court adopt as the law of Delaware the provisions of the Restatement (Third) of Torts, including specifically Sections 6, 7, 37, 38, 39, 40 and 41, as the principles of law that govern the analysis of the issues presented and the disposition of this case?
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> (2) If so, what does each side contend is the appropriate analysis of the relevant Third Restatement provisions as applied to the facts of this case?
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> (3) Were this Court to conclude that it should create a duty of some scope under Section 6 of the Third Restatement, Section 7(b) authorizes the Court to determine, nonetheless, that "an articulated countervailing principle of policy warrants denying or limiting liability in a particular class of cases . . . ." Assuming that Section 7(b) is applicable, should such a "countervailing

recent version of the Third Restatement was Proposed Final Draft No. 1.[40]

The parties duly filed their briefs, providing an early window into the structure of arguments over the Third Restatement's application. Riedel's supplemental opening brief and supplemental reply brief argued that the court should adopt various provisions of the Third Restatement, including its position on duty in Section 7(a), and that its adoption would be consistent with existing Delaware law, including lower court cases involving take-home asbestos cases.[41] The briefs also focused on *Satterfield v. Breeding Insulation Co.*, a Tennessee Supreme Court take-home asbestos case holding that an employer owed a duty to the spouse of a worker who carried home clothing embedded with asbestos fibers.[42]

Notwithstanding its briefing request, the supreme court declined to adopt any of the sections of the Third Restatement, concluding that the drafters defined the duty concept in a way that was inconsistent with the supreme court's traditions and precedents and that the Third Restatement creates duties where the court had previously found no common law duties to exist because of deference to the legislature.[43] The court used its position on the liability of tavern owners as a straw man to illustrate the problems that would arise under the Third Restatement.[44]

Having set up the straw man, the court promptly burned it. An unbroken string of dram shop cases in Delaware established the court's intent to defer to the legislature's judgment on dram shop liability.[45] Given that history, the court thought that "it would be incongruous . . . to adopt the Restatement (Third) of Torts, thereby

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> principle of policy" be declared by this Court, or should the Court defer to the legislature as the appropriate branch of government to declare any such policy?

*Id.* at 20 n.8 (alterations in original).

[40] *See id.* at 19 n.1; *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 (AM. L. INST., Proposed Final Draft No. 1, 2005).

[41] Appellant Lillian Riedel's Supplemental Opening Brief at 3, 5-7, *Riedel*, 968 A.2d 17 (No. 156, 2008); Appellant Lillian Riedel's Supplemental Reply Brief at 1, *Riedel*, 968 A.2d 17 (No. 156, 2008).

[42] 266 S.W.3d 347, 369 (Tenn. 2008); *see* Appellant Lillian Riedel's Supplemental Opening Brief, *supra* note 41, at 8-11; Appellant Lillian Riedel's Supplemental Reply Brief, *supra* note 41, at 7.

[43] *Riedel*, 968 A.2d at 20.

[44] *Id.* at 20-21.

[45] *Id.* at 21.

creating a common law duty that directly contravenes the primacy of the legislative branch in resolving this question."[46] The court found "no consolation in § 7(b) . . . , which allows courts to decide that 'an articulated countervailing principle of policy warrants denying or limiting liability in a particular class of cases.'"[47] The court emphasized that in dram shop cases, the legislature decides "matters of social policy, not the courts."[48] With that example, the court thought that "[w]hether the expansive approach for creating duties found in the Restatement (Third) of Torts is viewed as a step forward or backward in assisting courts to apply the common law of negligence, it is simply too wide a leap for this Court to take."[49] The court stated its intent to continue to follow the Second Restatement's approach to duty.[50]

Of course, adopting the Third Restatement's position on foreseeability would not have mandated a change in how Delaware handles the liability of tavern keepers. Notwithstanding Section 7(a), the Third Restatement comments clearly acknowledge the latitude courts have in shaping duty.[51] It is not a greenlight for decimating duty limitations.

### *B. Indiana*

The Indiana Supreme Court rejected the Third Restatement's position on duty and foreseeability in *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*[52] The court noted that the view that "foreseeability as a component of duty is not universally embraced," and that while

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[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id. Riedel* was overruled nine years later in *Ramsey v. Georgia Southern University Advanced Development Center*, 189 A.3d 1255 (Del. 2018). The court held that a member of the household who regularly launders a spouse's asbestos-covered clothing may sue her spouse's employer for negligence in failing to provide warnings and instructions for safe laundering. *Id.* at 1262. The court hedged, however, in noting that employers who have made adequate on-site arrangements to address the harms from laundering asbestos-covered clothing or provided their employees with the information necessary to protect themselves and those laundering the employees' clothes will have a "safe harbor." *Id.*

[51] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmts. c-j (AM. L. INST. 2010).

[52] 62 N.E.3d 384 (Ind. 2016).

some critiques of the role of foreseeability as a determinant of duty have been "able and skillful,"[53] it declined to adopt the Third Restatement's position on foreseeability and duty,[54] instead adhering to the majority rule that foreseeability is an element of the duty determination.[55]

### *C. Kansas*

In Kansas, proof of duty requires a foreseeable plaintiff and foreseeable probability of harm,[56] although the supreme court may not recognize a duty that is contrary to public policy and will recognize a new duty only if it is consistent with public policy.[57] As an illustration, in *Manley v. Hallbauer*, a case involving an accident at an uncontrolled rural intersection of two gravel roads, the Supreme Court of Kansas declined to adopt the Third Restatement's approach, adhering instead to settled precedent that supported a no-duty finding under the circumstances.[58] The court left "for another day the decision whether to adopt other aspects of the Restatement (Third), in particular whether [the court] should abandon foreseeability as a consideration when analyzing a person's duty to another."[59]

## II. CROSSING PATHS – KENTUCKY, TENNESSEE, AND VIRGINIA

The Third Restatement and the Tennessee and Kentucky courts have crossed paths in a series of cases. The results make

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[53] *Id.* at 389 (quoting Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 366 (Tenn. 2008)).

[54] *Id.* at 389-90, 389 n.4. The court noted the rejection of foreseeability as a determinant of duty in Nebraska, Arizona, and Iowa. *Id.* at 389 n.4; *see* A.W. v. Lancaster Cnty. Sch. Dist. 0001, 784 N.W.2d 907, 914-17 (Neb. 2010); Gipson v. Kasey, 150 P.3d 228, 231 (Ariz. 2007); Thompson v. Kaczinski, 774 N.W.2d 829, 834-36 (Iowa 2009).

[55] *Goodwin*, 62 N.E.3d at 389-90 (quoting *Satterfield*, 266 S.W.3d at 366).

[56] Berry v. Nat'l Med. Servs., Inc., 257 P.3d 287, 290 (Kan. 2011).

[57] *Id.* at 291-92 (holding that a suit by a nurse whose license was revoked after a substance abuse company submitted erroneous testing results to the nursing board was not barred by public policy).

[58] 423 P.3d 480, 485-88 (Kan. 2018). Kansas precedent did not impose a duty on rural landowners to take action to alter natural conditions interfering with visibility, and the Supreme Court of Kansas held that rural landowners did not owe a duty to motorists to trim naturally growing trees on their property to maintain visibility at the intersection where the fatal accident occurred. *Id.* at 486-88.

[59] *Id.* at 486.

interesting reading, in part because of Justice Holder's relentless dissents urging the adoption of the Third Restatement's approach to duty and foreseeability in Tennessee and in part because of unusual opinions of intermediate court of appeals in the two states. The Kentucky Court of Appeals has issued a clarion call to the bench and bar in Kentucky, highlighting the havoc the Third Restatement would wreak on Kentucky common law, while the Tennessee Court of Appeals has urged the Tennessee Supreme Court to reconsider its position that makes foreseeability an essential determinant of duty.

In *Quisenberry v. Huntington Ingalls Inc.*, the Supreme Court of Virginia held that an employer owed a duty of care to the daughter of an employee who carried asbestos fibers home on his work clothes, exposing his daughter to the asbestos.[60] Duty turned on foreseeability, but in a twist, the Chief Justice of the court argued that foreseeability should be irrelevant in the duty determination.[61]

### *A. Tennessee*

The key Tennessee case is *Satterfield v. Breeding Insulation Co.*, a take-home asbestos case.[62] The issue was whether Alcoa, the employer of a man whose daughter died from mesothelioma, was liable to the daughter's estate because of her exposure to the asbestos-contaminated clothing her father wore from work, exposing her to asbestos fibers over a long period of time.[63]

The Tennessee Supreme Court held that it could not conclude as a matter of law that the employer did not owe a duty to the daughter.[64] The court relied in part on Section 37 of the Third Restatement in characterizing Alcoa's conduct as misfeasance

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[60] 818 S.E.2d 805, 807 (Va. 2018).

[61] *Id.* at 815 (Lemons, C.J., dissenting). While not directly citing the Third Restatement, Chief Justice Lemons relied in part on Arizona's position that foreseeability is not a factor in the duty determination. *Id.* at 816 (quoting Quiroz v. Alcoa Inc., 416 P.3d 824, 828 (Ariz. 2018)).

[62] 266 S.W.3d 347 (Tenn. 2008).

[63] *Id.* at 352. The court noted that she had been exposed to the fibers since her birth in 1979 when her father visited her in the hospital wearing clothes laden with asbestos fibers. *Id.* at 353.

[64] *Id.* at 375.

rather than nonfeasance.[65] The court's duty analysis did not touch Section 7(a) of the Third Restatement in holding that Alcoa owed a duty to the daughter. The court's discussion of the duty issue indicates why. While noting that the duty concept "is largely an expression of policy considerations,"[66] the court hastened to add 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," and, mixing metaphors, observed that "Tennessee's courts have not become so intoxicated on the liquor of public policy analysis that we have lost our appreciation for the moderating and sobering influences of the well-tested principles regarding the imposition of duty."[67]

The court then suggested that there really is not much wiggle room for duty discussions anyway because "the presence or absence of a duty is a given rather than a matter of reasoned debate, discussion, or contention," but the court also acknowledged that the common law has to "accommodate new societal realities and values—or simply better reasoning" as it moves forward, "while maintaining a sufficient stability so as to seek, and one hopes, to find, prudent reformation as opposed to anarchic revolution."[68]

Following this aspirational statement, the issue becomes how duty is to be determined in cases where duty is not settled. Tennessee considers a variety of factors in duty determinations,[69] observing that "[w]hile every balancing factor is significant, the foreseeability factor has taken on paramount importance in Tennessee."[70]

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[65] *Id.* at 356-57.

[66] *Id.* at 364.

[67] *Id.* at 365.

[68] *Id.*

[69] The court noted a nonexclusive list 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.

*Id.*

[70] *Id.* at 366 (citing Hale v. Ostrow, 166 S.W.3d 713, 716-17 (Tenn. 2005); Biscan v. Brown, 160 S.W.3d 462, 480 (Tenn. 2005)).

On the way to its full embrace of foreseeability as a key moral element in the duty determination, the court noted that there have been opposing critiques of the role of foreseeability in duty decisions, but without directly mentioning in its discussion the Third Restatement, which was in draft form at that time.[71]

Foreseeability, the court continued, has been established as a "useful hub from which central organizing principles can be maintained, while at the same time allowing for prudent modification and reformation of those principles," assisting more than it impedes the evolution of negligence law.[72]

Viewing the facts in the light most favorable to Ms. Satterfield, the court concluded that she fell within the class of persons who, with reasonable certainty, could be harmed by asbestos exposure.[73] The next step was the balancing of the policy factors, with the self-admonition that the court should not "invade the province of the jury" in doing so.[74] Then, the court proceeded to invade the province of the jury in its detailed examination of the facts.[75]

The court held that the duty it recognized in the case extends to the class of "persons who regularly and for extended periods of time came into close contact with the asbestos-contaminated work clothes of Alcoa's employees."[76]

Justice Holder's concurring and dissenting opinion is the antidote to the majority's position on foreseeability. She agreed with the court's conclusion that there is a duty but dissented from the majority's reliance on foreseeability in its duty analysis.[77] She argued that what she saw as the majority's attempted distinction between general and specific foreseeability is unworkable, and that incorporating foreseeability in the duty determination "forces trial judges to base their decision-making on a razor thin distinction and encourages judges to make factual determinations relevant to

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[71] *Id.* (citing W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739 (2005)).

[72] *Id.*

[73] *Id.* at 367.

[74] *Id.* at 367-68.

[75] *See id.* at 368-69.

[76] *Id.* at 367.

[77] *Id.* at 375 (Holder, J., concurring and dissenting).

breach of duty" and more properly resolved by a jury.[78] She would limit no-duty determination in accord with Section 7(b) of the Third Restatement where an articulated principle or policy justifies it.[79]

The supreme court has continued to apply *Satterfield* in subsequent cases, Justice Holder has continued to dissent,[80] and the court of appeals has asked the supreme court to reconsider its position in *Satterfield* and exclude foreseeability from the duty determination to spare trial courts the angst of following that opinion.

In *Stockton v. Ford Motor Co.*, the court of appeals pushed back against *Satterfield*'s approach to duty in a take-home asbestos case brought by the wife of a Ford employee after she was diagnosed with mesothelioma.[81] In his concurrence, Chief Justice Swiney questioned "how in real life" a trial judge could make the duty determination using the *Satterfield* factors without invading the province of the jury.[82] He respectfully suggested that while the majority's approach to duty in *Satterfield* may work in theory, in practice, it has made it "almost impossible" for a trial court to avoid invading the province of the jury in considering foreseeability, and urged the supreme court to reconsider its position in *Satterfield*.[83]

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[78] *Id.* at 376-77.

[79] *Id.* at 377-78.

[80] In *Cullum v. McCool*, 432 S.W.3d 829 (Tenn. 2013) (store patron sued Wal-Mart for negligence for injuries she sustained when she was hit in the parking lot by a vehicle another store patron was driving after the other patron's prescription was not filled due to her intoxication), the supreme court applied the "middle ground" rule it had previously adopted in *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891 (Tenn. 1996) for resolving issues concerning a business owner's duty to its patrons. *Cullum*, 432 S.W.3d at 834. The court's approach requires balancing "the foreseeability of harm and the gravity of harm against the burden on the business to protect against that harm." *Id.* Justice Holder, concurring and dissenting, agreed with the holding that Wal-Mart owed a duty to its patron but would have applied Section 7(a) of the Third Restatement and held that there was a duty without referring to foreseeability. *Id.* at 840 (Holder, J., concurring and dissenting). In *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 372 (Tenn. 2009) (Holder, C.J., concurring and dissenting), a case involving the shooting death of one tenant by another, Justice Holder continued to urge the adoption of the Third Restatement's position on foreseeability in duty determinations.

[81] No. W2016-01175-COA-R3-CV, 2017 WL 2021760, at *1 (Tenn. Ct. App. May 12, 2017).

[82] *Id.* at *16 (Swiney, C.J., concurring).

[83] *Id.*

### *B. Kentucky*

The Kentucky Supreme Court appeared to adopt the Third Restatement's Section 7 approach and reasoning in a landowner's duty case involving the issue of open and obvious dangers. The court adopted Section 343A of the Second Restatement, but under the influence of Section 7, made it clear that issues concerning whether a defendant should have anticipated injury to the plaintiff notwithstanding the obviousness of a danger are questions of fact for the trier of fact.

In *Shelton v. Kentucky Easter Seals Society, Inc.*,[84] the Kentucky Supreme Court intended to clarify its decision in *Kentucky River Medical Center v. McIntosh*,[85] in which it had adopted the "modern" approach to open and obvious dangers embodied in Section 343 of the *Restatement (Second) of Torts*.[86] *McIntosh* did not prevent Kentucky courts from holding as a matter of law that injuries were not foreseeable under the standard, however.[87] Flagging Section 7 of the Third Restatement, the supreme court made it clear in *Shelton* that the Section 343A issue, which involves foreseeability of the injury notwithstanding the obviousness of a hazard, is generally a question of fact for the jury, notwithstanding the obviousness of a risk of injury.[88]

In *Carney v. Galt*, a post-*Shelton* premises liability case, the court of appeals reluctantly concluded that the open and obvious danger doctrine as modified by the supreme court did not preclude the defendant's liability, depending on a resolution at trial of the plaintiff's status as a licensee or trespasser.[89] The court held that

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[84] 413 S.W.3d 901 (Ky. 2013).

[85] 319 S.W.3d 385 (Ky. 2010).

[86] *Id.* at 390.

[87] *See* Becca Reynolds, Note, *A Question of Duty or Breach?: The Ever-Changing Role of the Open and Obvious Doctrine in Kentucky and Why Kentucky Courts Should Reimplement the Doctrine as a Determination of the Landowner's Duty in Premises Liability Disputes*, 54 U. LOUISVILLE L. REV. 157, 167-71 (2016) (noting Kentucky Court of Appeals decisions barring recovery as a matter of law based on the unforeseeability of injury, even after *McIntosh*).

[88] *Shelton*, 413 S.W.3d at 911-17, 913 n.45. In *Shelton*, the court's references to *Gipson v. Kasey*, 150 P.3d 228, 230-31 (Ariz. 2007) and *A.W. v. Lancaster County School District 0001*, 784 N.W.2d 907, 914 (Neb. 2010), emphasized its intent to leave fact-specific determinations to the trier of fact. *Shelton*, 413 S.W.3d at 912 nn.39 & 41.

[89] 517 S.W.3d 507, 511 (Ky. Ct. App. 2017). The court was quite clear in expressing that reluctance:

the case would proceed as a "traditional comparative fault tort case."[90]

Judge Acree concurred and wrote separately to express his disagreement with *Shelton*'s apparent adoption of the Third Restatement's approach to duty.[91] In an unusual rebuke of a state supreme court by a lower appellate court, he suggests that *Shelton* wrested law-making and policy-making responsibilities from the trial judge and vested it in the jury disguised as fact determinations.[92] Furthermore, given:

> *McIntosh* and its progeny, the bar and bench have good reason to believe the Supreme Court has moved fully away from a relational concept of duty as Judge Cardozo expressed it in *Palsgraf*, and as it has evolved in our jurisprudence, in favor of a universal duty of care owed to society at large.[93]

He acknowledged the Kentucky Supreme Court's "prerogative . . . to steer the course of our jurisprudence, even to veer from a trajectory formed firmly over a century," and marked *Shelton* as the trigger of those changes.[94]

Notwithstanding the potential breadth of *Shelton*'s application, the Kentucky courts have not yet vocalized Judge Acree's fears. The case seems confined to cases involving the open and obvious danger doctrine.

*Grubb v. Smith* is the sequel.[95] In a case that rocked back and forth between the court of appeals and supreme court over the meaning of *McIntosh* and *Shelton*, the supreme court noted, again, that it really meant what it said in those cases.[96] Under what the

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> Based upon the Supreme Court's modification of the open and obvious doctrine to conform to comparative fault principles, we do not believe, *albeit reluctantly*, that the doctrine precludes liability against Galt under the facts of this case, and thus we must look to Carney's status upon entering Galt's property in determining whether summary judgment was properly granted for Galt.

*Id.* (emphasis added).

[90] *Id.* at 512.

[91] *Id.* at 513 (Acree, J., concurring).

[92] *Id.* at 513-14.

[93] *Id.* at 514 (footnotes omitted) (citing Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928)).

[94] *Id.* at 514-15.

[95] 523 S.W.3d 409 (Ky. 2017).

[96] *See id.* at 411.

court calls "the comparative-fault regime," the fact finder is required to apportion fault among the responsible parties.[97] The defendant's liability is proportionate to their percentage of fault.[98] The intent is to prevent the imposition of liability on defendants for the plaintiff's fault, but it also reduces, "theoretically, at least," said the court, the need for common law rules that are intended to limit the liability.[99] Prior cases made it clear that to the extent the "old rules survive," the application of those rules has to be harmonized with the comparative-fault system.[100] That includes the open and obvious danger rule.

The court referred to the academic "duty wars" in a long footnote and acknowledged that its recent premises liability cases made it "painfully aware of these 'wars' by virtue of being caught up in them."[101] Help from the scholarship? "Not really," said the court, because in contrast to "the theorists and commentators . . . who can assume the lofty perspective of generals high above the battlefield, we must chart our course into the brave new post-[comparative fault] world one case at a time."[102] The court gave a slight nod to the scholarship, labeling it as "helpful, of course," but cautioned that any use of that scholarship, including "any citations to the *Restatement (Third) of Torts*, which many see as having abandoned to a significant degree the descriptive aims of earlier editions for a role as advocate[,] should not be [interpreted], absent an express statement to the contrary, as adopting or endorsing any one or another of the contending theories."[103]

### *C. Virginia*

*Quisenberry v. Huntington Ingalls Inc.* held, in an answer to a certified question from the U.S. District Court for the Eastern District of Virginia, that an employer that "allowed asbestos fibers to be regularly transported away from the place of employment to

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[97] *Id.* at 415.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 415 n.3.
[102] *Id.* at 416 n.3.
[103] *Id.*

the employee's home" owed a duty of care to a family member who was exposed to asbestos from the employee's work clothes.[104]

The court noted that in Virginia, "a specific course of conduct gives rise to a specific duty extending to specific persons."[105] Duty in the Virginia duty configuration does not turn on foreseeability alone, but it seemed decisive in the majority's opinion, which saw that the regular accumulation of asbestos fibers on the employee's work clothes placed the employer in a position that failure to use ordinary care and skill would subject the employer's daughter to risk of injury from the asbestos fibers.[106] The court held that the duty was owed to the employer's daughter, as well as other similarly situated persons.[107]

In an interesting twist, Chief Justice Lemons dissented from the majority's use of foreseeability in the duty determination, citing the same reasons other courts have used to justify the exclusion of foreseeability, not to enhance the role of the trier of fact in resolving factual disputes over foreseeability, but rather to enhance the court's control in deciding duty issues.[108] He criticized the majority's fact-specific analysis in imposing a duty on the employer, arguing that the expansion of "civil liability in this manner will push a wave of indeterminacy into the Commonwealth's reputation for stable and predictable tort law."[109]

The Third Restatement suggests that decisions based on foreseeability are not decisions based on policy,[110] but in *Quisenberry*, the court held that there was a duty to the immediate family member affected by the asbestos fibers on her father's clothes *and* that the duty was owed to other "persons similarly situated."[111] While the dissent thought the issue was one for the legislature, in part because of its impact on the workers'

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[104] 818 S.E.2d 805, 807 (Va. 2018).

[105] *Id.* at 810 (citing Dudley v. Offender Aid & Restoration of Richmond, Inc., 401 S.E.2d 878, 883 (Va. 1991)).

[106] *Id.* at 811-12, 812 n.4.

[107] *Id.* at 812.

[108] *See id.* at 815-17 (Lemons, C.J., dissenting).

[109] *Id.* at 818.

[110] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. j (AM. L. INST. 2010).

[111] *Quisenberry*, 818 S.E.2d at 812.

compensation system in Virginia,[112] those policy factors obviously did not sway the majority. The majority's decision, seemingly quite fact-specific because of the framing of the certified question, became more categorical when it broadened the duty.

By excluding foreseeability as a factor, the dissent sought to drive the case into what it thought to be the controlling public policy, with requisite deference to the legislature.[113] The majority obviously rejected that. In effect, deciding the case based on the foreseeability of injury to an immediate family member and other "persons similarly situated" establishes a policy-based rule.[114]

## III. THE CONTINUING RELIANCE ON FORESEEABILITY IN DUTY DETERMINATIONS

While most courts continue to hold that foreseeability is part of the duty determination, there are variations on how foreseeability is calibrated.[115] One way to view the treatment of foreseeability is based on the latitude a court gives a jury in resolving the foreseeability issue.

Foreseeability may be a dominant factor in determining duty, or it may be a minimal factor. Some courts will view the issue of whether there is a foreseeable risk on a more categorical level, with the issue of specific foreseeability left to the trier of fact to resolve in considering the breach of duty or proximate cause issues,[116] while other courts focus on whether the specific harm was foreseeable.[117]

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[112] *See id.* at 814 (Lemons, C.J., dissenting).

[113] *See id.* at 817-18.

[114] *Id.* at 812.

[115] For a detailed catalogue, see generally Cardi, *supra* note 35.

[116] *See, e.g.*, Chirillo v. Granicz, 199 So. 3d 246, 249 (Fla. 2016) (stating that in a duty analysis, a court may consider "some general facts of the case," but only for the purpose of "determin[ing] whether a general, foreseeable zone of risk was created," but without engaging in a fact-specific inquiry as to whether the injury was foreseeable); Bolus v. Martin L. Adams & Son, 438 S.W.2d 79, 81 (Ky. 1969) ("It is not necessary, to impose liability for negligence, that the defendant should have been able to anticipate the precise injury sustained, or to foresee the particular consequences or injury that resulted. It is enough that injury of some kind to some person could have been foreseen.").

[117] *See* Domagala v. Rolland, 805 N.W.2d 14, 26 (Minn. 2011) ("To determine whether risk of injury from the defendant's conduct is foreseeable we 'look at whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility.'") (quoting Foss v. Kincade, 766 N.W.2d 317, 322 (Minn. 2009); Whiteford *ex rel.* Whiteford v. Yamaha Motor Corp., U.S.A., 582 N.W.2d 916, 918 (Minn. 1998)).

A court may also conclude that while foreseeability is part of the duty determination, close cases involving the foreseeability issue should be resolved by the trier of fact. Although a focus on whether specific harm is foreseeable might seem to give courts greater latitude in making no-duty determinations, a recognition that close cases on foreseeability present an issue for the jury may establish a working rule that edges closer to the Third Restatement's position on foreseeability.

Viewing foreseeability on a categorical level may lead to a clear rule, as in some of the take-home asbestos cases, but it loses value as a tool for establishing clarity if a court strays into specific facts in its analysis. The Indiana Supreme Court decisions illustrate the difficulty involved in distinguishing general from specific risks.

In *Goodwin v. Yeakle's Sports Bar & Grill, Inc.* and *Rogers v. Martin*, the Indiana Supreme Court attempted to clarify the role of foreseeability in Indiana negligence law.[118] In *Goodwin*, a bar shooting case, the court noted the lack of lucidity in its opinions on negligence because of the dual role foreseeability plays in resolving the duty and proximate cause elements of a negligence case.[119] Citing the Third Restatement in a footnote, the court noted that the view that "foreseeability as a component of duty is not universally embraced," and that some critiques of the role of foreseeability as a determinant of duty have been "able and skillful," but declined to adopt its position on foreseeability and duty,[120] adhering to the majority rule that foreseeability is an element in the duty determination.[121]

Having embraced the importance of foreseeability in the duty analysis, the court proceeded to sort out the role of foreseeability in negligence law, given its application in the breach and proximate

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[118] *See* Goodwin v. Yeakle's Sports Bar & Grill, Inc., 62 N.E.3d 384 (Ind. 2016); Rogers v. Martin, 63 N.E.3d 316 (Ind. 2016).

[119] *Goodwin*, 62 N.E.3d at 387.

[120] *Id.* at 389-90, 389 n.4. The court noted the rejection of foreseeability as a determinant of duty in Nebraska, Arizona, and Iowa, citing *A.W. v. Lancaster County School District 0001*, 784 N.W.2d 907, 914 (Neb. 2010); *Gipson v. Kasey*, 150 P.3d 228, 231 (Ariz. 2007); and *Thompson v. Kaczinski*, 774 N.W.2d 829, 835 (Iowa 2009). *Goodwin*, 62 N.E.3d at 389 n.4.

[121] *Goodwin*, 62 N.E.3d at 389-90 (quoting Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 366 (Tenn. 2008)).

cause issues as well.[122] Because duty is a question of law for the court and foreseeability relates to duty, the court held that courts must determine the foreseeability issue as a matter of law.[123] Of course, that conflicted with the role of the trier of fact in resolving the foreseeability issue as it relates to proximate cause.

The court distinguished between foreseeability of facts specific to the case, as considered when analyzing proximate cause, from what it termed a "lesser inquiry" of foreseeability when analyzing duty, which "requires a more general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence."[124] Applying that standard, the court held that there was no duty:

> The broad type of plaintiff here is a patron of a bar and the harm is the probability or likelihood of a criminal attack, namely: a shooting inside a bar. But even engaging in a "lesser inquiry" we conclude that although bars can often set the stage for rowdy behavior, we do not believe that bar owners routinely contemplate that one bar patron might suddenly shoot another. To be sure, we doubt there exists a neighborhood anywhere in this State which is entirely crime-free. Thus, in the broadest sense, all crimes anywhere are "foreseeable." But to impose a blanket duty on proprietors to afford protection to their patrons would make proprietors insurers of their patrons' safety which is contrary to the public policy of this state. Further such a blanket duty would abandon the notion of liability based on negligence and enter the realm of strict liability in tort which "assumes no negligence of the actor, but chooses to impose liability anyway." We decline to impose such liability here. In sum we hold that a shooting inside a neighborhood bar is not foreseeable as a matter of law.[125]

In *Rogers v. Martin*, a companion premises liability case, the court noted that it was charting "a definitive path" on the foreseeability issue:

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[122] *Id.*

[123] *Id.* at 390-91.

[124] *Id.* at 393 (quoting Goldsberry v. Grubbs, 672 N.E.2d 475, 479 (Ind. Ct. App. 1996)).

[125] *Id.* at 393-94 (footnote omitted) (citations omitted).

> Specifically, in the duty arena, foreseeability is a general threshold determination that involves an evaluation of (1) the broad type of plaintiff and (2) the broad type of harm. In other words, this foreseeability analysis should focus on the general class of persons of which the plaintiff was a member and whether the harm suffered was of a kind normally to be expected—without addressing the specific facts of the occurrence.[126]

As applied, the court held that a homeowner did not have a duty to take precautions to prevent a party co-host from fighting with a guest.[127] So far, so good. The court found no duty in the broader category of cases involving obligations to guard against the misconduct of a third person.

In *Cavanaugh's Sports Bar & Eatery, Ltd. v. Porterfield*, a 2020 decision, the court revisited the approach it solidified in *Goodwin* and *Rogers*.[128] The issue was whether a bar could be held liable for devastating injuries sustained by a patron in a parking lot altercation at closing time.[129] The court concluded that Cavanaugh's did not owe a duty to the plaintiff to prevent the sudden parking brawl absent evidence that the fight was imminent.[130] The court declined "to impose a comprehensive 'duty on proprietors to afford protection to their patrons' from unpredictable criminal attacks."[131] "Landowners must 'take reasonable precautions to protect invitees from foreseeable criminal attacks.'"[132] In determining whether the duty extends as a matter of law "to the criminal act at issue in a particular scenario, the critical inquiry is to determine whether the attack was foreseeable, considering the broad type of plaintiff, the broad type of harm, and whether the landowner had reason to expect any imminent

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[126] 63 N.E.3d 316, 325 (Ind. 2016).

[127] *Id.* at 326. The court did hold, however, that the homeowner "owed a duty to her social guest to protect him from the exacerbation of an injury occurring in her home." *Id.* at 327.

[128] 140 N.E.3d 837 (Ind. 2020).

[129] *Id.* at 838.

[130] *Id.*

[131] *Id.* (quoting Goodwin v. Yeakle's Sports Bar & Grill, Inc., 62 N.E.3d 384, 394 (Ind. 2016)).

[132] *Id.* at 844 (quoting *Rogers*, 63 N.E.3d at 326).

harm."[133] The court held "that the criminal attack at issue [in the case] was unforeseeable," and that Cavanaugh's duty to protect the plaintiff "did not extend to this particular scenario."[134]

In evaluating the "broad class of plaintiff and broad type of harm" in *Goodwin* and *Rogers*, the *Cavanaugh's* court noted that a key factor is whether the landowners in those cases "knew or had reason to know about any present and specific circumstances that would cause a reasonable person to recognize the probability or likelihood of imminent harm."[135]

This seems a little confusing because of the apparent crossover into a consideration of the specific facts of the case, which provoked a dissent by Justice Goff.[136] He read the court's opinion as holding that contemporaneous evidence, escalation of tensions, for example, may be relevant in making the threshold (the lesser) foreseeability determination.[137] Put another way, he thought that contemporaneous evidence that tensions might have been escalating are evidence that a criminal act was foreseeable, but that it should not be a determining factor in deciding whether there is a duty.

Justice Goff concluded that in close cases, the majority's opinion will necessarily lead to summary judgments for defendants, impeding the right to a trial.[138] He would have found that the "broad type of plaintiff" in this case is a bar patron and the "broad type of harm" is injuries from a fistfight at the early morning closing time for the bar.[139] A slight tip in how foreseeability is viewed determines the right to a jury trial.

The Florida District Court of Appeal has made passing references to Section 7 of the Third Restatement,[140] but the Florida

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[133] *Id.*

[134] *Id.*

[135] *Id.* at 840.

[136] *See id.* at 844-47 (Goff, J., dissenting).

[137] *Id.* at 845.

[138] *Id.* at 846.

[139] *Id.* at 847.

[140] *See* Sewell v. Racetrac Petroleum, Inc., 245 So. 3d 822, 825 (Fla. Dist. Ct. App. 2017) (noting Section 7's limitation of no-duty findings in exceptional cases, even if there is a foreseeable risk); Knight v. Merhige, 133 So. 3d 1140, 1150 & n.10 (Fla. Dist. Ct. App. 2014) (noting that Section 7(b) provides for duty limitations based on reasons of principle or policy and in passing that Section 7 eliminates foreseeability from the duty determination).

Supreme Court has not considered the Third Restatement. The court adheres to the view that foreseeability is relevant to the duty determination, but on a "zone of risk" level. *McCain v. Florida Power Corp.* illustrates how it works.[141]

The plaintiff, a mechanical trencher, was injured when the blade of the trencher he was operating hit an underground electrical cable.[142] Following a jury verdict in favor of the plaintiff, the district court of appeal concluded that the injury was not foreseeable and remanded to the district court with directions to enter a directed verdict in favor of the defendant.[143]

The supreme court reversed.[144] The court noted that foreseeability relates to both duty and proximate cause, and recognized the temptation to merge the elements into a "single hybrid" analysis of foreseeability, which may blur the distinctions between the elements.[145] The court pointed out that foreseeability relates to the duty and proximate cause elements in different ways and for different purposes.[146]

The focus of the duty element is on the issue of whether the defendant's conduct created a "broader 'zone of risk' that poses a general threat of harm to others."[147] Proximate cause focuses instead on "whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred."[148] The specific facts relate to the breach and

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[141] 593 So. 2d 500 (Fla. 1992).

[142] *Id.* at 501.

[143] *Id.*

[144] *Id.* at 505.

[145] *Id.* at 502.

[146] *Id.*

[147] *Id.* The court noted that duty can arise from different sources. The court recognized the sources of duty in the *Restatement (Second) of Torts*:

> (1) legislative enactments or administration regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) a duty arising from the general facts of the case. In the present case, we deal with the last category—i.e., that class of cases in which the duty arises because of a foreseeable zone of risk arising from the acts of the defendant.

*Id.* at 503 n.2 (citing RESTATEMENT (SECOND) OF TORTS § 285 (AM. L. INST. 1965)). As applied, the court held that Florida Power could foresee a zone of risk, given that power-generating equipment creates a zone of risk encompassing all who might foreseeable come into contact with the equipment. *Id.* at 504.

[148] *Id.* at 502. In analyzing duty, the court stated in *Chirillo v. Granicz*, 199 So. 3d 246, 249 (Fla. 2016), that while some general facts may be considered in the duty

proximate cause issues.[149] The court thought it clear that power-generating equipment creates a risk zone encompassing those who may come into contact with the equipment.[150]

*Dorsey v. Reider* is another illustration of the difficulty in distinguishing specific facts from the facts creating a more general zone of danger.[151] The case arose out of injuries sustained by the plaintiff who was injured by Noordhoek, a friend of Reider.[152] All three were intoxicated.[153] In a scuffle outside the bar between the plaintiff and Reider, Reider blocked the plaintiff from leaving when he was threatened by Noordhoek, who had retrieved a tomahawk from Reider's truck.[154] Following a jury verdict for the plaintiff, the district court of appeal reversed, holding that Reider owed no duty to the plaintiff.[155] The court noted that while it was probable that Reider impeded the plaintiff's ability to escape the tomahawk attack, Reider did not owe a duty to the plaintiff because there was no evidence that Reider knew that Noordhoek had a tomahawk or would attack Reider with that tomahawk.[156]

The supreme court concluded that the district court erred in finding the facts of this case did not establish a legal duty on the part of Reider.[157] The court concluded that he created a foreseeable zone of risk when he blocked the plaintiff's ability to exit in an escalating situation, creating a general threat of harm.[158] The court held that the duty extended to the injuries sustained by the plaintiff in Noordhoek's attack.[159]

It is easier to establish a more categorical rule in some cases than others. A general rule as to the use of power-generating equipment is more categorical than a rule that someone who blocks

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analysis, a court does so only for purposes of determining whether "a general, foreseeable zone of risk was created, without delving into the specific injury that occurred or whether such injury was foreseeable."

149 *See McCain*, 593 So. 2d at 503-04.

150 *Id.* at 504.

151 139 So. 3d 860 (Fla. 2014).

152 *Id.* at 862.

153 *Id.*

154 *Id.*

155 *Id.* at 863.

156 *Id.*

157 *Id.*

158 *Id.* at 864.

159 *Id.* at 866.

the exit of another person who is threatened by yet a third person owes a duty of reasonable care to those who might be blocked. The latter is necessarily fact specific.

The obvious point is that a narrowly applied categorical rule will necessarily shave the province of the trier of fact. Distinguishing categorical versus specific facts is not always easy and the analysis not always predictable.

## IV. TRACKING THE THIRD RESTATEMENT

Several jurisdictions took the universal duty approach prior to the adoption of the Third Restatement. They may or may not reinforce their views of duty and foreseeability in their duty discussions post-Third Restatement.

California's general rule is that each person has a duty to use reasonable care under the circumstances, which the California Supreme Court has noted accords with the position taken in the Third Restatement.[160] In *Kesner v. Superior Court*, a take-home asbestos case, the supreme court held that premises owners and employers have a duty to use reasonable care in their use of asbestos, including prevention of exposure to asbestos that is carried by the bodies and clothing of workers who are on-site.[161]

In California, each person in the exercise of their activities has a duty to use reasonable care for the safety of others.[162] No-duty determinations are justified by policy considerations that outweigh the broad duty principle.[163] The most relevant policy considerations are:

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[160] *See* Kesner v. Superior Ct., 384 P.3d 283, 304 (Cal. 2016); Cabral v. Ralphs Grocery Co., 248 P.3d 1170, 1172, 1174 n.2 (Cal. 2011).

[161] 384 P.3d at 288.

[162] *Id.* at 289.

[163] *Id.* at 290.

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[164]

Wisconsin follows Judge Andrews' view in *Palsgraf v. Long Island Railroad Co.* that "[e]very one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others."[165] The court's position on duty predates the Third Restatement, although in *Behrendt v. Gulf Underwriters Ins. Co.*, the court referred to comments in the Third Restatement's preliminary draft as "helpful in clarifying the role foreseeability plays in the analysis."[166] Foreseeability becomes a factor in determining breach, however, and in an appropriate case, the court may hold that a risk is unforeseeable as a matter of law.[167]

The Utah Supreme Court applies a five-factor test to determine the existence of duty:

> (1) whether the defendant's allegedly tortious conduct consists of an affirmative act or merely an omission; (2) the legal relationship of the parties; (3) the foreseeability or likelihood of injury; (4) "public policy as to which party can best bear the loss occasioned by the injury"; and (5) "other general policy considerations."[168]

In *Mower v. Baird*, in 2018, the court characterized the first two factors as "plus" factors in determining duty and the final three,

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[164] *Id.* (quoting Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968)).

[165] 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting); *see* Brenner v. Amerisure Mut. Ins. Co., 893 N.W.2d 193, 198 (Wis. 2017); Behrendt v. Gulf Underwriters Ins. Co., 768 N.W.2d 568, 574 (Wis. 2009); Alvarado v. Sersch, 662 N.W.2d 350, 353 (Wis. 2003).

[166] 768 N.W.2d at 575. The court referred to comments i and j of the RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 (AM. L. INST., Proposed Final Draft No. 1, 2005), which emphasized that foreseeability relates to the breach issue. *Behrendt*, 768 N.W.2d at 575-76.

[167] *See Behrendt*, 768 N.W.2d at 576.

[168] Mower v. Baird, 422 P.3d 837, 843 (Utah 2018) (quoting B.R. *ex rel.* Jeffs v. West, 275 P.3d 228, 230 (Utah 2012)).

which includes foreseeability, as "minus" factors that may be "used to eliminate a duty that would otherwise exist."[169] Yet, in the court's 2021 decision in *Boynton v. Kennecott Utah Copper, LLC*, the court stated that it had moved away from the plus/minus approach in its 2015 decision in *Herland v. Izatt*.[170]

That's not all. In *Ipsen v. Diamond Tree Experts, Inc.*, a case involving the issue of whether a landowner owed a duty to a professional firefighter, Justice Himonas, who also wrote for the court in *Boynton*, seemed to be edging toward Section 7 of the Third Restatement in the opening paragraph of the opinion when it stated that "[a] core principle of tort law is that we each owe 'a duty to exercise reasonable care' if our 'conduct presents a risk of harm to others.'"[171] In determining whether there should be an exception, *Ipsen* states that "factors such as the foreseeability or likelihood of injury, public policy as to which party can best bear the loss occasioned by the injury, and other general policy considerations" are relevant in determining duty.[172] Foreseeability is a potential negative factor.

If this seems confusing, it is. Although *Ipsen*'s nod to the Third Restatement might suggest a move away from foreseeability as a duty determinant, the court's five-factor duty analysis seems alive and well, but *Boynton*, a take-home asbestos case, suggests that foreseeability may be a "primary 'plus' factor" in resolving duty issues.[173]

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[169] *Id.* at 843 (quoting *West*, 275 P.3d at 230).

[170] Boynton v. Kennecott Utah Copper, LLC, 500 P.3d 847, 855 (Utah 2021) (citing Herland v. Izatt, 345 P.3d 661 (Utah 2015)). The wrongful death action in *Herland* arose out of the death of the decedent who after a night of drinking picked up a loaded handgun and shot herself in the head accidentally. *Herland*, 345 P.3d at 663. The suit was brought against Izatt, the party host and handgun owner. *Id.*

[171] 466 P.3d 190, 191 (Utah 2020) (quoting Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 993 (2019) (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 (AM. L. INST. 2010))).

[172] *Id.* at 193.

[173] *Boynton*, 500 P.3d at 855. Duty in Utah is decided on a categorical basis, in which the court looks for bright-line rules that apply to a general class of cases. *Id.* at 856. In *Boynton*, the court saw "[t]he relevant category [as] premises operators who direct, require, or otherwise cause workers to come in contact with asbestos." *Id.* at 859. The court concluded that the foreseeability factor tilted in favor of finding a duty. *Id.* at 859-60.

## V. DUTY AND SPECIFIC FORESEEABILITY – A COMPARISON

A court may take the position that duty turns on whether a specific injury is foreseeable. The impact depends on the court's position on whether the judge or jury resolves contested foreseeability issues. Minnesota is a good example of a narrow statement of duty and foreseeability, but a forgiving standard for resolving duty issues that turn on foreseeability.

In Minnesota, foreseeability is part of the duty determination.[174] Foreseeability turns on "whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility."[175]

In *Domagala v. Rolland*, the Minnesota Supreme Court noted that in *close cases*, the foreseeability issue is for the jury.[176] What a close case is cannot be defined, of course. Summary judgment may not be granted in cases where there is a "genuine issue as to any material fact,"[177] but the legal standard for duty and foreseeability seemed tilted toward judicial resolution of the foreseeability issue.[178]

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[174] The Supreme Court of Minnesota has long used foreseeability as an element of duty. *See, e.g.*, Connolly v. Nicollet Hotel, 95 N.W.2d 657, 663 (Minn. 1959) ("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 . . . ."). In *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011), the court, "echoing the principles of liability for misfeasance," noted that "general negligence law imposes a general duty of reasonable care when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff." Rather than citing Minnesota precedent, the court relied for that proposition on 1 J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY & LITIGATION § 3.48 (2d ed. 2003). That single statement of negligence law is now regularly repeated by the court in its negligence cases. *See, e.g.*, Abel v. Abbott Nw. Hosp., 947 N.W.2d 58, 77 (Minn. 2020); Warren v. Dinter, 926 N.W.2d 370, 382 (Minn. 2019); Fenrich v. The Blake Sch., 920 N.W.2d 195, 202 (Minn. 2018); Doe 169 v. Brandon, 845 N.W.2d 174, 178 (Minn. 2014).

[175] Whiteford *ex rel.* Whiteford v. Yamaha Motor Corp., U.S.A., 582 N.W.2d 916, 918 (Minn. 1998). The court has also stated that "[i]f the connection between the danger and the alleged negligent act 'is too remote to impose liability as a matter of public policy, the courts then hold there is no duty.'" *Domagala*, 805 N.W.2d at 27 (quoting Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922, 924 (Minn. 1986)).

[176] 805 N.W.2d at 27.

[177] MINN. R. CIV. P. 56.03(a).

[178] The court has gone so far as to say that it is troubled by the practice of submitting the foreseeability issue to the jury. Alholm v. Wilt, 394 N.W.2d 488, 491 n.5 (Minn. 1986). The court did not provide an explanation of why that should be the case.

The Minnesota Supreme Court gave the "close cases" standard traction in a series of cases beginning with *Montemayor v. Sebright Products, Inc.* in 2017.[179] Factually complicated, the issue turned on whether the manufacturer of an extruder, a machine used to crush discarded food to make hog food, was defective.[180] The plaintiff was inside the extruder trying to clear a jam when a co-worker started the machine, unaware the plaintiff was inside it.[181] There were numerous errors on part of the plaintiff, plaintiff's employer, and co-employees.[182] The employer incurred over $18,000 in fines for violation of Minnesota OSHA regulations.[183] The trial court granted Sebright's motion for summary judgment, holding that the injury was not foreseeable.[184] The court of appeals affirmed.[185] The supreme court reversed, holding that foreseeability was a "close case" that had to be resolved by the jury.[186]

The supreme court found foreseeability to be a close question in four subsequent cases. Those cases involved the liability of a landowner for failure to prevent the near-drowning of a child,[187] an innkeeper's failure to act to prevent a death caused by an intoxicated bar patron,[188] a school that was alleged to have improperly supervised a student driver on his way to an out-of-state cross country meet,[189] and a hospitalist who was allegedly negligent in failing to admit a prospective patient.[190] In each case, a critical issue concerning the defendant's duty was whether the injuries or deaths that occurred because of the alleged negligence were foreseeable. In each case, the supreme court held the foreseeability

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179 898 N.W.2d 623 (Minn. 2017).

180 *Id.* at 625-27.

181 *Id.* at 626-27.

182 *Id.*

183 *Id.* at 627.

184 Montemayor v. Sebright Prods., Inc., No. 20-CV-14-32, 2015 WL 5177784, at *10 (Minn. Dist. Ct. Mar. 16, 2015).

185 Montemayor v. Sebright Prods., Inc., No. A15-1188, 2016 WL 1175089, at *4 (Minn. Ct. App. Mar. 28, 2016), *rev'd*, 898 N.W.2d 623.

186 *Montemayor*, 898 N.W.2d at 625.

187 *See* Senogles v. Carlson, 902 N.W.2d 38, 40, 47-48 (Minn. 2017).

188 *See* Henson v. Uptown Drink, LLC, 922 N.W.2d 185, 192-93 (Minn. 2019).

189 *See* Fenrich v. The Blake Sch., 920 N.W.2d 195, 205-07 (Minn. 2018).

190 *See* Warren v. Dinter, 926 N.W.2d 370, 378 (Minn. 2019).

issue was for the jury, effectively raising the bar for summary judgment in cases that turn on the foreseeability of injury.[191]

A key point is that viewing cases in which the courts have granted summary judgment on the basis that a particular injury is

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[191] Minnesota's position on foreseeability might be expected to prompt a decline in the grant of defendants' summary judgment motions. There is no question that the lower courts hear the supreme court's admonition that "close cases" are for the jury. *Diehl v. 3M Co.,* No. A19-0354, 2019 WL 4412976 (Minn. Ct. App. Sept. 16, 2019), is a good example. The plaintiff in the case was walking on a public sidewalk in Duluth when she was hit by a car driven by R.B., who "was intoxicated from inhaling the contents of a can of dust remover" manufactured and sold by 3M. *Id.* at *1. She alleged that the intoxication caused R.B. to lose control of his car. *Id.* She brought suit against 3M, alleging that it negligently manufactured and sold the product while knowing that it could be "misused and abused by inhaling it to induce acute intoxication that incapacitates the abuser." *Id.* 3M moved to dismiss for failure to state a claim upon which relief could be granted, arguing that it did not owe a duty to protect the plaintiff from the criminal misconduct of a third party, both because there was no special relationship between 3M and the plaintiff, and because the "manufacture and sale of [a dust remover] did not create an objectively foreseeable risk of injury to a foreseeable plaintiff." *Id.* The plaintiff agreed that there was no special relationship but argued that the injury was foreseeable. *Id.*

The district court granted the motion without reaching the foreseeability issue, holding that no duty existed because 3M's manufacture and sale of a product that "others might misuse were not 'active misconduct' and were, instead, 'nonfeasance' or 'passive inaction, which is not enough to trigger a duty'" of care. *Id.* The court of appeals reversed and noted the general rule that duty turns on (1) whether there is a special relationship between the defendant and plaintiff and the harm to the plaintiff is foreseeable, or (2) where the defendant's own conduct creates a foreseeable risk of injury. *Id.* at *2, *4. Even assuming that 3M's role in R.B.'s conduct was not active, the court of appeals noted that there is still a duty "if 3M's own conduct of manufacturing and selling the product created a foreseeable risk of injury to Diehl," *id.* at *3, and that "[a]ccepting the facts . . . in the complaint as true, it was reasonably foreseeable that R.B. would misuse the dust remover and become acutely intoxicated." *Id.* at *4. In dissent, Judge Schellhas thought that the facts did not present a close case. *See id.* at *5 (Schellhas, J., dissenting) ("The link between the danger (being struck by a vehicle on the sidewalk) and 3M's alleged conduct (manufacturing a household dust-removal product) is simply too attenuated and remote to support the existence of a duty."). In *McDougall v. CRC Industries, Inc.*, 523 F. Supp. 3d 1061 (D. Minn. 2021), the U.S. District Court for the District of Minnesota took the same position in a wrongful death case due to a driver's alleged use of a computer duster product while he was driving. *Id.* at 1067. The court held that the plaintiff's allegations were sufficient to establish duty. *Id.* at 1073-74.

The cases are not uniform, however. The court of appeals has found no duty as a matter of law in two premises liability cases. *See* Spinler v. City of Brownsdale, No. A19-1782, 2020 WL 3172847, at *1, *5 (Minn. Ct. App. June 15, 2020) (plaintiff sustained injuries when she slipped and fell because of a hole in the sidewalk outside the post office); Frimpong v. Taylor Ridge 26 LLC, No. A19-1508, 2020 WL 1987037, at *1-3 (Minn. Ct. App. Apr. 27, 2020) (plaintiff slipped and fell on icy patches while taking out trash at his condominium).

not foreseeable as a matter of law does not generate a *principle* that appears to tie those cases together. That, of course, is one reason why the foreseeability issue should be a question of fact for the trier of fact.[192] That aside, when a state's supreme court consistently takes the position that foreseeability is a question of fact for the trier of fact, it is at least the illustration of an *attitude* toward summary judgment, if not a *principle*. The attitude tells lawyers and trial judges that the bar for summary judgment is raised when the issue is foreseeability of harm.

The Minnesota Supreme Court's approach to foreseeability edges closer to the Third Restatement's approach, which places the foreseeability issue in the jury's province when it considers breach.[193]

## VI. THE THIRD RESTATEMENT FINDS A HOME

Arizona, New Mexico, Iowa, and Nebraska have adopted the Third Restatement's position on foreseeability and duty. Iowa, an early adopter of the Third Restatement's approach to negligence cases, has the most experience with that approach. The discussion of Iowa law is somewhat more detailed because of the number of cases applying the provisions of the Third Restatement. Nebraska was also an early adopter of the Third Restatement's approach to negligence cases, but it has stopped short of Iowa's full embrace of the Third Restatement. New Mexico has stuck with its position on foreseeability. Arizona, not so much.

### *A. Arizona*

In *Gipson v. Kasey*, the Arizona Supreme Court adopted Section 7 of a preliminary draft of the Third Restatement.[194] The

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[192] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. i (AM. L. INST. 2010).

[193] The court is not clear in stating how a jury should be instructed on the issue, particularly when foreseeability is a pivotal issue. *See* Mike K. Steenson, Fenrich v. The Blake School *and Minnesota Tort Law: A Road Map Through Special Relationships, Misfeasance/Nonfeasance, and Duty*, 45 MITCHELL HAMLINE L. REV. SUA SPONTE 78, 102-06 (2019). It is possible that there could be a specific special verdict question on the issue that would be dispositive of the duty issue, but there are obvious problems with that approach. *See id.* at 104-06.

[194] 150 P.3d 228, 231 (Ariz. 2007) (adopting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 (AM. L. INST., Proposed Final Draft No. 1, 2005)).

court concluded that the Third Restatement's approach "desirably recognizes the jury's role as factfinder and requires courts to articulate clearly the reasons, other than foreseeability, that might support duty or no-duty determinations."[195] In *Quiroz v. Alcoa Inc.*, a take-home asbestos case, the court acknowledged the "sea change" that *Gipson* made in Arizona law in removing foreseeability from the duty determination,[196] but criticized the remainder of Section 7's approach to duty and rejected what it labeled the "presumed duty" rule as insufficiently constrained.[197] The court confirmed, instead, Arizona's approach to duty, which is based on recognized common law "special relationships and relationships created by public policy."[198] The court views the declaration of public policy as primarily a legislative function.[199] The intent is "to define the rights and obligations of the parties *before* a defendant, [through] his acts or omissions, places a plaintiff at risk of physical injury."[200]

*Gipson*'s position on foreseeability may be limited, however, suggesting that its "sea change" might be more of a neap tide. In *Dinsmoor v. City of Phoenix*, the Supreme Court of Arizona considered the issue of whether a school district could be held liable for the death of a student (Ana) who was killed in an off-campus shooting by another student (Matthew).[201] The court held that under the circumstances the school did not owe a duty to the student who was shot.[202] In so holding, the court distinguished *Gipson*, which it did not understand to mean that courts cannot consider facts in determining "whether a duty exists based on the presence of an unreasonable risk of harm that arose within the scope of a special relationship," because, "[l]ogically, a court cannot determine whether a duty arises from such relationships unless it

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195 *Id.*

196 416 P.3d 824, 829 (Ariz. 2018). The court noted that *Gipson* "did not . . . narrow the circumstances in which an actor may be liable for *negligent conduct*," and that it "did not completely remove foreseeability from our negligence framework" but held, rather "that foreseeability may still be used in determining breach and causation." *Id.*

197 *Id.* at 836-37.

198 *Id.* at 840.

199 *See id.* at 830.

200 *Id.* at 840.

201 492 P.3d 313, 314-15 (Ariz. 2021).

202 *Id.* at 315.

considers whether an unreasonable risk of harm arose while, for example, persons were patronizing an inn, riding a bus, or, here, attending school."[203] The court saw no conflict with *Gipson*, however, because identification of "the risk within the scope of the special relationship does not touch on concepts of breach or causation, so there is no danger of conflating duty with those elements."[204]

But it does. The court favored a somewhat limited view of a school's duty to its students, concluding the roles of the schools that form the basis for the school's duty, the school's status as a "custodian, land possessor, and quasi-parental figure," are applicable where the school is supervising and controlling students and their environment, placing the school in the position to protect students only when the school fulfills those roles.[205] That special relationship terminates, however, when students leave the control of the school.[206] At that point, the school no longer has any affirmative duty to protect its students from external risks.[207]

The court declined "to draw a bright-line rule" that bars recognition of the school's duty to its students whenever students are harmed while outside the control and supervision of the school.[208] The court did recognize that "[u]nique circumstances may exist where a school has a duty to protect students from risks that arise while under school supervision and control even though such risks result in harm when students are outside school supervision and control."[209] Duty necessarily turns on the foreseeable risk in that situation, although the court did not see it that way.

The court saw nothing in the recording suggesting that Matthew posed a risk to Ana before she left the school district's supervision and control on the day of the shooting.[210] There were

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[203] *Id.* at 319-20.

[204] *Id.* at 320 (citing Gipson v. Kasey, 150 P.3d 228, 232 (Ariz. 2007)).

[205] *Id.* at 318.

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.* As an example, the court cited *Warrington v. Tempe Elementary School District No. 3*, 928 P.2d 673, 677 (Ariz. Ct. App. 1996), an Arizona Court of Appeals decision in which the court held that a school district owed a duty of care, as to a bus stop placement, to a seven-year-old child who was hit by a car after being dropped off at a bus stop located in a high-traffic area. *Dinsmoor*, 492 P.3d at 318-19.

[210] *Dinsmoor*, 492 P.3d at 320.

text messages Matthew sent that threatened harm, but only as to another student.[211] Also, Ana did not believe that Matthew was a threat to her.[212] However, the plaintiff argued that there was a threat because of violence on Matthew's part that was directed toward another student and that Matthew and Ana had previously argued.[213]

Now comes the interesting part. The court analyzed the specific facts to determine whether Matthew posed a risk to Ana before she left the school, but refused to consider the specific facts when the plaintiff argued that there was evidence of such a threat based on Matthew's prior conduct "because it effectively injects foreseeability into the duty calculus," something the court acknowledged it has "repeatedly cautioned against," including in *Gipson*.[214] It seems to be a case not of specific versus categorical foreseeability, but selective foreseeability.

The application of this approach to any special relationship case means that Arizona courts will have to engage in a fact-specific analysis to determine whether the risks fall within the scope of the defendant's duty, and those courts will do it as a matter of law. New Mexico's approach is quite different.

### *B. New Mexico*

In *Edward C. v. City of Albuquerque*, the Supreme Court of New Mexico cited Section 7 favorably, but equivocally, in stating that foreseeability is only one factor to consider in the duty determination.[215] In *Rodriguez v. Del Sol Shopping Center Associates, L.P.*, the New Mexico Supreme Court reaffirmed its adoption of the Third Restatement's approach to duty.[216] The decision overruled *Edward C.* in holding that foreseeability is not part of the duty determination and "require[d] courts to articulate specific policy reasons" apart from foreseeability to justify no-duty

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[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] 241 P.3d 1086, 1091 (N.M. 2010), *overruled by* Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., 326 P.3d 465, 468 (N.M. 2014).

[216] *Rodriguez*, 326 P.3d 465.

findings.[217] The fact-intensive foreseeability inquiry relates to the breach and legal cause factors.[218]

The case arose out of deaths and personal injuries caused by a truck that crashed through the front glass of a Del Sol Shopping Center medical clinic.[219] Among other theories, the plaintiffs alleged that Del Sol negligently failed to post proper signage, install speed bumps, and erect barriers to prevent vehicle intrusion.[220] The trial court granted summary judgment to the defendant, concluding that there was no duty because the accident was unforeseeable as a matter of law, and the court of appeals affirmed.[221]

After holding "that an owner/occupier owes a duty of ordinary care in vehicle-building collision cases,"[222] the court provided clear directions for trial courts in resolving cases where there is an issue concerning the foreseeability of an injury:

> ["]A trial court should not grant a motion for directed verdict unless it is clear that the facts and inferences are so strongly and overwhelmingly in favor of the moving party that the judge believes that reasonable people could not arrive at a contrary result." . . . This determination requires judges to abandon their own personal thoughts regarding the merits of cases and to imagine the thoughts of twelve adult citizens from a variety of socioeconomic backgrounds—such as scientists, college faculty, laborers, uneducated, rich, poor, persons with different political persuasions—and what that diverse group might find regarding the merits of a case. The judge can enter judgment as a matter of law only if the judge concludes that no reasonable jury could decide the breach of duty or legal cause questions except one way. Because neither the Court of Appeals nor the district court judges engaged in this analysis, we reverse and remand to the district courts for proceedings consistent with this opinion.[223]

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[217] *Id.* at 467-68.
[218] *Id.* at 467.
[219] *Id.*
[220] *Id.*
[221] *Id.* at 468.
[222] *Id.* at 474.
[223] *Id.* (quoting Torres v. El Paso Elec. Co., 987 P.2d 386, 397 (N.M. 1999)).

The New Mexico Supreme Court has hewed to *Rodriguez*, as illustrated by the court's 2021 decision in *Morris v. Giant Four Corners, Inc.*[224] In that case, the Tenth Circuit certified the following question to the New Mexico Supreme Court:

> Under New Mexico law, which recognizes negligent entrustment of chattel as a viable cause of action, does a commercial gasoline vendor owe a duty of care to a third party using the roadway to refrain from selling gasoline to a driver it knows or should know to be intoxicated?[225]

The New Mexico Supreme Court answered in the affirmative, over a strong dissent by, appropriately, Justice Barbara J. Vigil.[226] Relying on a *Restatement (Second) of Torts*-based negligent entrustment theory,[227] and a public policy analysis that included an evaluation of relevant New Mexico statutes,[228] cases from other jurisdictions,[229] and "general principles of law" such as "adequate compensation for the injured party and deterrence of the tortfeasors,"[230] the court held that commercial vendors of gasoline owe a duty of care to third parties.[231]

There will be cases at the margins. The court recognized that gas stations may be unattended and that an employee may not be in a position to view the purchaser to determine whether it is the driver or passenger who is pumping the gas.[232] Those types of concerns, however, do not relate to whether a duty exists as a matter of policy.[233] Instead, they are questions involving foreseeability and breach of duty, questions appropriate for jury resolution in individual cases.[234]

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[224] 498 P.3d 238 (N.M. 2021).

[225] *Id.* at 241.

[226] *Id.* at 253. The other Justice Vigil, Chief Justice Michael E. Vigil (no apparent relation), concurred in the majority opinion. *Id.*

[227] *Id.* at 243.

[228] *Id.* at 247-49 (citing, among others, statutes prohibiting driving while intoxicated and statutes regulating the sale of alcohol).

[229] *Id.* at 249-50.

[230] *Id.* at 250.

[231] *Id.* at 253.

[232] *Id.* at 252.

[233] *Id.*

[234] *Id.*

### *C. Iowa*

In *Thompson v. Kaczinski*, the Iowa Supreme Court adopted the Third Restatement's approach to negligence law.[235] The circumstances of the case seemed tailor-made for dismissal on summary judgment based on existing Iowa law. Thompson, a minister who served three churches in his area, was on his way to a second service on a Sunday morning.[236] A thunderstorm the

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[235] 774 N.W.2d 829, 835 (Iowa 2009). The court worked from a proposed final draft of the Restatement. *See id.* at 834 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 (AM. L. INST., Proposed Final Draft No. 1, 2005)). The court also adopted the Restatement's position on scope of liability, which aided it in clarifying its approach to cause-in-fact. *See id.* at 837-39 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 (AM. L. INST., Proposed Final Draft No. 1, 2005)). The trial court in the case also held that there was no causal connection between the plaintiffs' injuries and the defendants' conduct as a matter of law because of the lack of foreseeability. *Id.* at 836. As with the duty issue, the supreme court noted the uncertainty and confusion surrounding its proximate cause formulations. *Id.* Prior to *Thompson*, Iowa separated causation into cause-in-fact and legal cause. Faber v. Herman, 731 N.W.2d 1, 7 (Iowa 2007). Cause-in-fact is determined by a "but-for" standard. Yates v. Iowa W. Racing Ass'n, 721 N.W.2d 762, 774 (Iowa 2006). The legal cause issue required consideration of whether "the harm that resulted from the defendant's negligence is so clearly outside the risks he created that it would be unjust or at least impractical to impose liability." Berte v. Bode, 692 N.W.2d 368, 372 (Iowa 2005). It is a policy issue. *Thompson*, 774 N.W.2d at 836.

The Iowa Supreme Court had also applied Section 431 of the *Restatement (Second) of Torts*, which provides that the negligent conduct of an actor is "a legal cause of harm to another if . . . his conduct is a substantial factor in bringing about the harm," assuming there is no rule of law that precludes liability. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 431 (AM. L. INST. 1965)). In determining whether a defendant's conduct is a substantial factor in causing the harm, the court "considered the 'proximity between the breach and the injury based largely on the concept of foreseeability.'" *Id.* (quoting Estate of Long *ex rel.* Smith v. Broadlawns Med. Ctr., 656 N.W.2d 71, 83 (Iowa 2002)). "'[S]ubstantial' has been used to express 'the notion that the defendant's conduct has such an effect in producing the harm as to lead reasonable minds to regard it as a cause.'" *Id.* (quoting Sumpter v. City of Moulton, 519 N.W.2d 427, 434 (Iowa Ct. App. 1994)).

The *Thompson* court noted that one of the problems with the formulation has been inconsistency in its application, and also confusion of factual determinations with policy judgments about the scope of liability. *Id.* at 836-37. The court adopted the Third Restatement's approach to scope of liability as a means of clarifying Iowa law, but in a way that satisfactorily separates cause-in-fact from scope of liability and provides a manageable and understandable means of resolving scope of liability issues. *See id.* at 839. The but-for test remains the test for factual causation in Iowa. Iowa's pattern jury instruction currently provides that "[t]he conduct of a party is a cause of damage when the damage would not have happened except for the conduct." IOWA STATE BAR ASS'N, IOWA CIVIL JURY INSTRUCTIONS § 700.3 (2017).

[236] *Thompson*, 774 N.W.2d at 831.

previous evening had blown part of a trampoline bed, which the adjacent property owners had disassembled a few weeks earlier, from their property (some thirty-eight feet away) onto the road.[237] Thompson lost control of his car when he swerved to avoid the trampoline top.[238] Thompson and his wife brought suit against the trampoline owners, alleging they breached common law and statutory duties by negligently allowing the trampoline to obstruct the road.[239]

The defendants moved for summary judgment, arguing that the risk that the trampoline top would be displaced from their yard to the road was unforeseeable.[240] The trial court granted the motion.[241] The Iowa Supreme Court transferred the case to the court of appeals, which affirmed.[242] The Iowa Supreme Court granted the petition for further review[243] and reversed, holding that the trial court erred in holding that the defendants did not owe a common law duty to the plaintiffs.[244]

Foreseeability figured prominently in the arguments over scope of liability.[245] A key issue was whether it was foreseeable that the wind would have caused the trampoline bed to be blown off the defendants' property and onto the roadway.[246]

The appellate briefs sparred with Iowa precedent. None of the briefs cited the Third Restatement. The Thompsons argued that the defendants owed a common law duty to keep the roadways safe, including duties not to obstruct and a duty to remove the obstruction once it existed.[247] The defendant-appellees argued that Iowa has "uniformly recognized the rule that *reasonable foreseeability* of harm is the fundamental basis of the law of negligence,"[248] and that it was not foreseeable that the trampoline

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[237] *Id.* at 831-32.
[238] *Id.*
[239] *Id.* at 832.
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.* at 840.
[245] *Id.* at 832.
[246] *Id.*
[247] Appellants' Brief at 13-15, *Thompson*, 774 N.W.2d 829 (No. 08-0647).
[248] Appellees' Brief at 11, *Thompson*, 774 N.W.2d 829 (No. 08-0647) (quoting Davis v. Coats Co., 119 N.W.2d 198, 202 (Iowa 1963)).

would be blown onto the roadway and that the appellees' conduct could therefore not be the legal or proximate cause of the appellant's injuries.[249] The appellants argued to the contrary.[250]

The Iowa Supreme Court bypassed precedent and launched a new version of Iowa negligence law, one based on the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*.[251]

In deciding duty issues, the court noted that previous Iowa cases 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."[252] The court has viewed those factors as considerations in "a balancing process" rather than distinct and essential elements in establishing duty.[253]

The Iowa Supreme Court accepted the Third Restatement's view of duty and eliminated foreseeability from the duty determination, leaving the foreseeability issue to the trier of fact, except in cases where the breach issue can be decided as a matter of law.[254] 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."[255] The court concluded that there was no such principle that would justify refusing to impose a duty.[256] To the contrary, the court said there is a public interest in keeping roadways clear of dangerous obstructions.[257]

*Thompson*'s excision of foreseeability from the duty determination by no means creates a plaintiffs' superhighway. Section 7(b), coupled with other Third Restatement sections, mutes the broad principle in Section 7(a). The court has considered the

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[249] *Id.* at 14-15.

[250] Appellants' Brief, *supra* note 247, at 13-15.

[251] *See Thompson*, 774 N.W.2d at 835. The American Law Institute adopted the Third Restatement in 2010. *See generally* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (AM. L. INST. 2010).

[252] *Thompson*, 774 N.W.2d at 834 (quoting Stotts v. Eveleth, 688 N.W.2d 803, 810 (Iowa 2004)).

[253] *Id.*

[254] *Id.* at 834-35.

[255] *Id.* at 835.

[256] *Id.*

[257] *Id.*

duty issue in several contexts,[258] but two bookend Iowa cases, *Hoyt v. Gutterz Bowl & Lounge L.L.C.*[259] and *Morris v. Legends Fieldhouse Bar & Grill, LLC*,[260] involving the duty of bars to their patrons, illustrate the court's post-*Thompson* approach to duty issues.

Hoyt and a co-worker were asked by bar staff to leave a bar for taunting Knapp inside the bar.[261] Knapp came out and hit Hoyt in the parking lot.[262] Hoyt sued Knapp and Gutterz, alleging that Gutterz was negligent in failing to prevent his injuries.[263] Gutterz moved for summary judgment.[264] The district court granted the

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[258] The Iowa Supreme Court has considered the public duty doctrine in several cases, both before and after the court's adoption of the Third Restatement's approach to negligence cases. For earlier applications of the public duty doctrine, see Raas v. State, 729 N.W.2d 444, 448-49 (Iowa 2007); Kolbe v. State, 625 N.W.2d 721, 729-30 (Iowa 2001). In two post-*Thompson* decisions split 4-3, *Estate of McFarlin v. State*, 881 N.W.2d 51, 60 (Iowa 2016) and *Johnson v. Humboldt Cnty.*, 913 N.W.2d 256, 259 (Iowa 2018), the supreme court adhered to the public duty doctrine and made it clear that the doctrine survives the Third Restatement. While the public duty doctrine is subject to criticism because of its retention in the face of the legislative limitations on sovereign immunity, *see id.* at 270 (Wiggins, J., dissenting), its application is by no means automatic and is inapplicable in cases where there is misfeasance. *See* Fulps v. City of Urbandale, 956 N.W.2d 469, 475 (Iowa 2021) ("The term 'nonfeasance' does not encompass ordinary neglect of the same sort of responsibilities a private party might have."); Breese v. City of Burlington, 945 N.W.2d 12, 21 (Iowa 2020) (finding the public duty doctrine potentially inapplicable where the defendant engages in an affirmative act).

In *Gries v. Ames Ecumenical Housing, Inc.*, the Iowa Supreme Court retained the "continuing storm" doctrine and applied it in a suit by the tenant against the landlord for injuries sustained when the tenant fell on an icy sidewalk. 944 N.W.2d 626, 627, 631-32 (Iowa 2020). The application of the doctrine was criticized by Justice Appel, concurring in part and dissenting in part, where the dissent was prompted by the court's retention of an "archaic, unworkable, and outmoded" doctrine. *Id.* at 635 (Appel, J., concurring in part and dissenting in part).

In *McCormick v. Nikkel & Associates, Inc.*, the court held that a subcontractor was not liable to a property owner's employee for an electrocution occurring after the subcontractor's work was finished and where the employer contravened warnings and regulations requiring deenergizing of the work site. 819 N.W.2d 368, 376-77 (Iowa 2012). The court cited the Third Restatement's acknowledgment that the principle or policy justifying a finding of no duty may be based on "longstanding precedent." *Id.* at 374 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. a (AM. L. INST. 2010)).

[259] 829 N.W.2d 772 (Iowa 2013).

[260] 958 N.W.2d 817 (Iowa 2021).

[261] *Hoyt*, 829 N.W.2d at 773.

[262] *Id.*

[263] *Id.*

[264] *Id.* at 773-74.

motion, holding that the parking lot assault and Hoyt's injuries were not foreseeable to Gutterz, and that the evidence was insufficient to create a genuine issue of material fact on the question of whether the employees used reasonable care in discovering the potential for harm or failed to provide a warning to Hoyt after discovering the potential danger.[265] The Iowa Court of Appeals reversed, and the Iowa Supreme Court affirmed.[266]

The Iowa Supreme Court applied Section 40 of the Third Restatement in holding that Gutterz owed a duty to Hoyt, noting that the special relationships include "an innkeeper with its guests" and "a business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises."[267] Section 40 imposes a duty to act even where they do not affirmatively create a risk of injury.[268] The court found the Third Restatement position with respect to tavern owner-patron cases compelling for the same reasons as in *Thompson*:

> Recognizing that a duty exists whenever an actor has created a risk of harm and that risks arise out of the special relationships contemplated by section 40 encourages simplicity and predictability. Limiting no-duty rulings to exceptional problems of policy or principle promotes judicial transparency, encouraging judges to justify in explicit terms any reasons for declining to impose a duty in a given scenario. Further, foreseeability is central to the fact finder's inquiries regarding breach and the range of harms for which an actor may be liable. Any overlap in the duty inquiry is likely to be redundant and confusing, and may well frustrate longstanding rationales for specific allocations of decision-making power between the judge and jury. The redundancy also gives rise to the possibility that judge and jury may reach inconsistent results regarding foreseeability, at odds with goals of procedural fairness, predictability, and treating like cases alike. For these reasons,

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[265] *Id.* at 774.

[266] *Id.* at 774, 782.

[267] *Id.* at 776 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 (AM. L. INST. 2010)).

[268] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 cmt. g (AM. L. INST. 2010).

> we emphasize again our adoption of the duty analysis of the Restatement (Third).[269]

After holding that foreseeability is irrelevant in the duty determination, the court considered whether there were reasons of principle or policy that would justify a finding of no duty.[270] Rather than holding that there is a special relationship between tavern owners and patrons, the court concluded that tavern owners fit comfortably in the class of business owners who owe a duty to their patrons under Section 40(b)(3).[271]

After examining the facts, the Iowa Supreme Court concluded that the issue of whether Gutterz exercised reasonable care was a question for the fact finder.[272] That left the scope of liability issue, which was not decided by the district court but was raised by Gutterz on appeal.[273] Gutterz argued that the risk that Knapp would assault Hoyt fell outside the scope of Gutterz's liability because it was unforeseeable as a matter of law.[274] The court concluded that the issue of whether Hoyt's injury was within the scope of Gutterz's liability was also a question of fact.[275]

The court reiterated its explanation of the issue in *Thompson* that in considering the scope of liability issue on a motion for summary judgment, courts must consider, at the outset, the range of harms that a "jury *could* find as the basis" for finding a defendant's conduct tortious.[276] A court can then determine whether a reasonable jury could find that the harm that occurred falls within that range of harms.[277]

The court acknowledged that "[n]o straightforward rule can be provided to determine the appropriate level of generality or specificity to employ in characterizing the harms," but stated that if "there are contending plausible characterizations of the range of reasonably foreseeable harms arising from the defendant's conduct

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[269] *Hoyt*, 829 N.W.2d at 776-77 (citations omitted).

[270] *Id.* at 777.

[271] *Id.* (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 cmt. h (AM. L. INST. 2010)).

[272] *Id.* at 780.

[273] *Id.*

[274] *Id.*

[275] *Id.* at 781.

[276] *Id.* (quoting Thompson v. Kaczinski, 774 N.W.2d 829, 838 (Iowa 2009)).

[277] *Id.* (citing *Thompson*, 774 N.W.2d at 838).

leading to different outcomes and requiring the drawing of an arbitrary line, the case should be left to the judgment and common sense of the fact finder."[278]

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[278] *Id.* The Iowa pattern jury instruction on scope of liability reads as follows:

> You must decide whether the claimed harm to plaintiff is within the scope of defendant's liability. The plaintiffs [sic] 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.

IOWA STATE BAR ASS'N, *supra* note 235, §700.3A.

Jury instructions on scope of liability and proximate cause may vary significantly. There is a detailed collection of the conflicting authorities in RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 reporters' note, cmt. b (AM. L. INST. 2010). The reporters' note offers four suggestions for scope of liability jury instructions:

> (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 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.
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> (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.
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> (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.
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> (4) 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.

Gutterz argued that the relevant range of risks did not include the possibility that a patron who was verbally aggressive would be the victim of retaliatory harm by another patron who did not exhibit any indication of physical aggression, but Hoyt argued that the risk of physical confrontation between bar patrons engaged in verbal conflict was readily within that range.[279] The court concluded that it could not say, as a matter of law, that Hoyt's harm fell outside the scope of Gutterz's liability.[280]

As a final matter, the court thought it prudent to note that the scope of liability standard it adopted "is flexible enough to accommodate fairness concerns raised by the specific facts of a case."[281] Questions of fairness are involved in determining whether a bar owner should be held liable for injuries occurring in a bar fight, but the court thought that those fairness issues were better resolved by fact finders applying the breach of duty, scope of liability, and comparative fault rules.[282]

Justice Waterman, joined by Chief Justice Cady and Justice Mansfield, dissented.[283] Justice Waterman made it clear that, in his opinion, the "court's recent adoption of sections of the Restatement (Third) of Torts is not the death knell for summary judgments in negligence cases."[284] He would have held that the motion for summary judgment in Gutterz's favor should have been granted because the injury sustained by Hoyt was not reasonably foreseeable.[285]

Eight years later, Justice Waterman got a chance to reinforce that dissent and trim *Hoyt*'s edges in his majority opinion in *Morris v. Legends Fieldhouse Bar & Grill, LLC*.[286] The case arose out of the death of the decedent, Holly, who was asked by a security guard to leave the defendant-operator's strip club because of his

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*Id.*

[279] *Hoyt*, 829 N.W.2d at 781-82.

[280] *Id.* at 782.

[281] *Id.* (citing *Thompson*, 774 N.W.2d at 838).

[282] *Id.*

[283] *Id.*

[284] *Id.* at 783 (Waterman, J., dissenting) (citing McCormick v. Nikkel & Assocs., Inc., 819 N.W.2d 368, 371-75 (Iowa 2012) (holding an electrical subcontractor not liable for injuries to owner's employee six days after project completion)).

[285] *Id.* at 784-85 (explaining he would also have held that Hoyt's injuries were outside the scope of Gutterz's liability).

[286] 958 N.W.2d 817 (Iowa 2021).

intoxication.[287] He was offered a cab but refused.[288] He was run over and killed by a car over thirty minutes later and half a mile away.[289]

The district court granted the defendant's motion for summary judgment, holding that the duty the defendant owed to the decedent ended when he left the club.[290] The court of appeals reversed, holding that the district court erred in including foreseeability in its analysis of the duty issue.[291] The Iowa Supreme Court reversed, holding that the duty of the strip club ended when Holly left the club.[292] Justice Appel, siding with the majority in *Hoyt*, dissented.[293]

Justice Waterman's majority opinion launched with a nod to *Thompson*, but with an emphasis on *Thompson*'s conclusion that "a lack of duty may be found if either the relationship between the parties or public considerations warrants such a conclusion."[294] While recognizing that its decision in *Hoyt* imposed a duty on a bar for a parking lot altercation, the court shelved *Hoyt* because Hoyt's injury occurred on, rather than off the premises, unlike Holly's injury.[295] The court concluded that the imposition of liability in *Morris* "would impose potentially limitless liability on Iowa businesses, putting them in the untenable position to choose whether to forcibly detain intoxicated patrons and risk liability for false arrest or allowing intoxicated patrons to remain on site and risk liability for their on-site harm to themselves or others," particularly "at closing time when patrons depart en masse."[296]

Justice Appel's lengthy dissent wound through his perception of the purpose of tort law,[297] the incoherence of negligence law and

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[287] *Id.* at 819.

[288] *Id.*

[289] *Id.*

[290] *Id.* at 821.

[291] *Id.*

[292] *Id.* at 828.

[293] *Id.* (Appel, J., dissenting).

[294] *Id.* at 821-22 (quoting McCormick v. Nikkel & Assocs., Inc., 819 N.W.2d 368, 371 (Iowa 2012)).

[295] *Id.* at 822.

[296] *Id.* at 827.

[297] *Id.* at 829 (Appel, J., dissenting) ("As every law student learns in their first year torts class, the common law of torts occupies a very important field in American law. In particular, negligence law has proven to be a mainstay in advancing the very important social goals of tort law: deterrence, compensation, and spreading of risk. A person harmed by the negligence or other types of risk producing conduct should not face a

the Third Restatement's solution to that incoherence,[298] and the impact of the adoption of the Third Restatement's position on negligence law as well as Iowa's embrace of the Third Restatement's principles in cases ranging from *Thompson* to *Hoyt*.[299] He concluded that the defendants owed a duty to Holly when they affirmatively created a risk of injury to him in asking him to leave the premises and that the duty could not be limited by the use of Section 40.[300]

The conflict between the opinions of Justices Waterman and Appel is a short story of negligence law. The working title might be "Who Gets to Decide What?" The conclusion turns on the author.

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'tough luck' response from the courts. Instead, injured parties generally should have the opportunity to show that because of the risk-producing conduct of others, the injured party is entitled to compensation. The law recognizes that people who are likely to be exposed to potential cost-shifting claims have the opportunity, and in some cases a legal mandate, to purchase insurance, thereby spreading the risk of loss. No one suggests that this system is perfect, but it is far preferable to a Wild West system of 'leave 'em where they are flung' that does not advance the goals of compensation, deterrence, and spreading of the risk of loss. In an era of skyrocketing medical costs that can bankrupt families, the ability to shift the costs and spread the risk can have dramatic impact on injured parties and their families. At the other end of the spectrum, it generally remains true that, subject to certain exceptions such as strict liability, defendants are not insurers. Care must be taken, however, to ensure that undue emphasis on the 'defendants are not insurers concept' does not invade the province of a jury and defeat the general application of tort law.").

[298] *Id.* at 829-32.

[299] *Id.* at 832-35 ("First, foreseeability is not part of the duty analysis and, as a result, is generally for the jury to consider under breach of duty. Second, exceptions to the duty analysis based on public policy are reserved to exceptional cases where the public policy is clearly articulated by the court. Third, in the case of a tavern serving intoxicating beverages, public policy considerations did not categorically bar liability for injuries to a bar patron inflicted by a third party who had left the bar. Fourth, on the issue of breach, the question is for the jury except where no reasonable jury could come to another conclusion. Fifth, on the issue of scope of liability, whether the injury arose from the risks that made the conduct tortious is ordinarily a matter for the jury. Sixth, we found that the fact that an injury occurred off-premises did not prevent liability under a scope of liability theory and noted that while the duty question was not preserved, the cases finding no liability for off premises injuries were based upon foreseeability, a concept inapplicable to no-duty determinations under the Restatement (Third).").

[300] *Id.* at 837-40. He recognized the majority's concerns over Holly's conduct, but concluded that comparative fault provided a basis for the resolution of that issue. *Id.* at 842.

### *D. Nebraska*

In *A.W. v. Lancaster County School District 0001*, the Nebraska Supreme Court followed the Third Restatement in excising foreseeability from the duty determination in negligence law.[301] The case arose out the sexual assault of a kindergarten student by an intruder that occurred at an elementary school during school hours.[302] The child's mother sued the school on the child's behalf, alleging negligence.[303] The district court dismissed the case on the basis that the assault was not foreseeable.[304] The key issue on appeal was whether the school owed a duty to the child.[305]

On appeal, A.W. argued that Lancaster owed the child a duty because the assault was foreseeable, a position consistent with Nebraska precedent.[306] In prior cases, the Nebraska Supreme Court applied a risk-utility analysis in deciding duty issues,[307] and recognized that foreseeability is a factor in the duty determination,[308] although it was a late addition,[309] which it also has ignored in some cases.[310] After establishing its wrong turn in using foreseeability in its duty cases, the court embraced the Third Restatement's rationale for removing foreseeability from the duty formulation and placing it squarely as a factor in the breach issue.[311] The court emphasized that questions concerning foreseeability are fact-specific and better suited for resolution by the trier of fact, that those issues "are not particularly 'legal,' in the sense that they do not require" legal expertise to resolve, and that

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[301] 784 N.W.2d 907 (Neb. 2010).

[302] *Id.* at 911.

[303] *Id.* at 912.

[304] *Id.* at 912-13.

[305] *Id.* at 913.

[306] *Id.*

[307] *See, e.g.*, Hughes v. Omaha Pub. Power Dist., 735 N.W.2d 793, 805 (Neb. 2007); Fuhrman v. State, 655 N.W.2d 866, 873 (Neb. 2003). The court's risk-utility analysis focused on the degree of risk, the relationship between the parties, the nature of the risk created by the defendant, the opportunity to use reasonable care, the foreseeability of the harm, and the policy interest in the proposed solution. *Id.*

[308] Schmidt v. Omaha Pub. Power Dist., 515 N.W.2d 756, 763 (Neb. 1994); Holden v. Urban, 398 N.W.2d 699, 701 (Neb. 1987).

[309] *A.W.*, 784 N.W.2d at 915-16 (citing *Schmidt*, 515 N.W.2d 756).

[310] *See* Parrish v. Omaha Pub. Power Dist., 496 N.W.2d 902, 908-09 (Neb. 1993).

[311] *A.W.*, 784 N.W.2d at 917.

the use of foreseeability in the duty analysis can obscure the real reasons for a court's decision on a duty issue.[312]

The court's decision in *A.W.* represents a clarification in Nebraska law. Foreseeability is an issue better associated with the breach issue, subject to resolution by the trier of fact.

The court considered the reach of Section 7 in *Bell v. Grow With Me Childcare & Preschool LLC*.[313] The case arose out of the death of a child who died from injuries inflicted by his nanny.[314] His parents carefully screened potential nannies before hiring the nanny, but saw no red flags.[315] The nanny had previously worked for two childcare centers.[316] There were reports of her abuse of children at those centers, but the abuse was not reported by the centers.[317] In a wrongful death and survival action against the childcare centers, the plaintiffs alleged that the centers were negligent because they knew or should have known that the nanny had abused other children while working at the centers and that the centers were negligent in failing to report that abuse to the authorities.[318] Had they done so, they alleged, the authorities would have investigated the reports and the investigation would have either prompted the nanny to stop working in childcare or her name would have been placed on the central registry Nebraska maintains for all reports of child abuse because the abuse would have been substantiated by the Health and Human Services agency or the nanny would have been convicted of child abuse.[319] Either way, the Bells alleged, they would not have hired the nanny and she would not have been in a position to harm Cash Bell.[320]

The childcare centers moved to dismiss on the basis that they did not owe a duty to protect the child from the nanny's criminal actions.[321] The district court denied the motion concluding that the alleged conduct of the childcare centers in failing to report the

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312 *Id.* at 914-17.
313 907 N.W.2d 705 (Neb. 2018).
314 *Id.* at 709.
315 *Id.*
316 *Id.*
317 *Id.*
318 *Id.*
319 *Id.* at 712.
320 *Id.*
321 *Id.*

abuse created a risk of physical harm to the child.[322] The court apparently relied on *A.W.* and Section 7 of the Third Restatement in doing so.[323]

At the close of the plaintiffs' case, the centers moved for a directed verdict.[324] The district court granted the motion.[325] That court thought the duty evidence was thin, but the court granted the motion on the basis of no proximate cause because the causal chain in the case was "too tenuous."[326]

The Nebraska Supreme Court affirmed, but on the basis that the centers did not owe a duty to the child.[327] On appeal, the plaintiffs argued that Section 7 "effectively recognized a general duty of reasonable care to all others at all times."[328] The Nebraska Supreme Court quickly rejected that argument, noting that Section 7 of the Third Restatement "does not recognize a universal duty to exercise reasonable care to all others in all circumstances," but rather "imposes a general duty of reasonable care only on an actor whose conduct has created a risk of physical harm to another."[329]

That has by no means ended the controversy over the role of foreseeability in Nebraska law. Instead, the focus shifted to the proximate cause or scope of liability issue. The Nebraska Supreme Court has rejected the approach of the Third Restatement in favor of its own proximate cause formulation, as *Latzel v. Bartek* illustrates.[330] The case arose out of a two-vehicle collision at an unmarked intersection on a Nebraska country road in which visibility was partially obscured by an abutting field with corn that had grown to a height of seven feet up to the adjoining ditch.[331] Thomas Latzel, a passenger in one of the vehicles, died from the catastrophic injuries he sustained in the collision.[332]

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[322] *Id.*
[323] *Id.*
[324] *Id.*
[325] *Id.*
[326] *Id.*
[327] *Id.* at 721.
[328] *Id.* at 717-18.
[329] *Id.* at 718.
[330] 846 N.W.2d 153 (Neb. 2014).
[331] *Id.* at 156-57.
[332] *Id.* at 156.

While Mr. Latzel was still alive, his wife brought suit on her behalf and on his behalf against the drivers of the two vehicles and the landowners.[333] The district court granted the landowners' motion for summary judgment, concluding that the drivers' negligence was an intervening cause as a matter of law and that the landowners were not liable.[334] On appeal, the Nebraska Supreme Court affirmed.[335] The court assumed for purposes of the decision that the district court found that the drivers of the two cars breached the applicable standard of care,[336] and held that the actions of the drivers constituted an efficient intervening cause as a matter of law because the landowners could not have anticipated the negligent actions of the drivers in proceeding through the intersection without taking proper precautions.[337]

Under Nebraska law, an "efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury."[338] It breaks the causal connection between the original conduct and injury.[339] There are four elements: (1) the negligent action of a third party has to intervene; (2) the third party must have had full control over the situation; (3) the defendant could not have anticipated the third party's negligence; and (4) the negligence of the third party must have been a direct cause of the plaintiff's injuries.[340] A third party's negligence cannot be an efficient intervening cause if it is foreseeable.[341]

The Nebraska Supreme Court noted that there was some discussion at the trial court level of the wisdom of adopting the Third Restatement's position on intervening cause and related principles, but the court thought it unnecessary to settle the issue in the case before it.[342] First, the court considered the Third Restatement's position on scope of liability to be unclear, or

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[333] *Id.* at 157.
[334] *Id.*
[335] *Id.*
[336] *Id.* at 163.
[337] *Id.* at 167.
[338] *Id.* at 164.
[339] *Id.*
[340] *Id.*
[341] *Id.*
[342] *Id.* at 166-67.

according to one of the cases cited by the court, "as clear as mud."[343] Second, the court saw the negligence (breach) and scope of liability issues as frequently converging,[344] a point noted in the Restatement comments.[345] The court saw the concurring opinion's importation of foreseeability jurisprudence from the causation cases into its breach analysis as an illustration of that point.[346] Third, the court decided that even if it were inclined to adopt the Third Restatement's position on scope of liability, it could not do so because of the procedural posture of the case, given that it was unable to assess the risks in the case because the trial court did not do so.[347]

The shifting of the battleground over foreseeability is illustrated by *Baumann v. Zhukov*, an Eighth Circuit case applying Nebraska law.[348] The case arose out of a two-truck crash on a Nebraska freeway that stopped traffic for a mile.[349] Approximately forty minutes later, the Schmidt family was stopped in their car at an almost mile-long backup of traffic when they were hit by a truck driven by Slezak.[350] The Schmidts—a mother, father, two children, and the mother's unborn child—were killed.[351] The Schmidts' estate administrators sued the two truck drivers who caused the initial crash, their employers, and the equipment provider of one of the drivers.[352] The plaintiffs alleged that the negligence of the drivers in causing the initial crash was the proximate cause of the deaths

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[343] *Id.* at 166 (quoting Hill v. Damm, 804 N.W.2d 95, 103 (Iowa Ct. App. 2011)). The court also cited *United States v. Monzel*, a case involving a restitution claim under the Violence Against Women Act, in which the court questioned whether the Third Restatement's approach to the scope of liability issue will "be any easier or clearer for judges, who must write appropriate instructions on causation, or for jurors, who must apply them." 746 F. Supp. 2d 76, 86 n.16 (D.D.C. 2010). Of course, proximate cause jury instructions can also be unclear. For a detailed collection of the conflicting authorities, see RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 reporters' note, cmt. b (AM. L. INST. 2010).

[344] *Latzel*, 846 N.W.2d at 166.

[345] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 19 cmt. c (AM. L. INST. 2010).

[346] *Latzel*, 846 N.W.2d at 166.

[347] *Id.* at 166-67.

[348] 802 F.3d 950 (8th Cir. 2015).

[349] *Id.* at 952.

[350] *Id.*

[351] *Id.*

[352] *Id.*

of the Schmidts.[353] The district court granted summary judgment for those defendants, holding that the Schmidts' injuries were not proximately caused by the drivers because Slezak's unanticipated negligence was an "efficient intervening cause."[354] The Eighth Circuit affirmed.[355]

Slezak had been driving for at least fourteen hours at the time, three hours more than allowed by federal regulation.[356] He was going seventy-five miles-per-hour when he hit the car driven by Christopher Schmidt, propelling it into the car driven by Christopher's wife, Diane.[357]

Under Nebraska law, a cause is an "efficient intervening cause" if "(1) the negligent actions of a third party intervene, (2) the third party had full control of the situation, (3) the third party's negligence could not have been anticipated by the defendant, and (4) the third party's negligence directly resulted in injury to the plaintiff."[358]

The court concluded that the case turned on the third factor:

> As in *Latzel*, Defendants may have generally anticipated that traffic would become impeded or stopped due to a traffic accident occurring on the roadway. However, Defendants were not bound to anticipate that a fatigued trucker, driving well-over the hours of service limit, would fail to stop behind a line of traffic at a point nearly a mile away from the initial collision and at least thirty-six minutes after the initial accident, and slam into the back of the Schmidts' vehicle at seventy-five miles-per-hour without even attempting to apply the brakes.[359]

The Eighth Circuit agreed.[360] Many of the vehicles in front of Slezak, including the Schmidts, had their lights on.[361] Emergency vehicles were at the scene and on their way to the accident scene.[362] The court concluded that the hazard was patently obvious, and it

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353 *Id.*
354 *Id.*
355 *Id.*
356 *Id.* at 953.
357 *Id.*
358 *Id.* at 954 (quoting Latzel v. Bartek, 846 N.W.2d 153, 164 (Neb. 2014)).
359 *Id.* at 956.
360 *Id.*
361 *Id.*
362 *Id.*

would have been readily visible to approaching traffic.[363] Consistent with Nebraska law, the court concluded that Slezak's negligence was an efficient intervening cause as a matter of law.[364] Judge Bye, in dissent, would have held that the proximate cause issue presented a question for the trier of fact.[365]

The Nebraska Supreme Court seems to be locked into its proximate cause/efficient intervening cause analysis. The key issue in determining whether a third party's conduct is an efficient intervening cause is whether the conduct was foreseeable by the defendant. The court correctly noted the overlap between the negligence and scope of liability issues in the Third Restatement. The efficient intervening cause analysis is quite fact-specific, however, as the post-*A.W.* cases indicate. If the fact-specific nature of the negligence inquiry justifies excising the foreseeability issue from the duty formulation and leaving it to the trier of fact to resolve, the issue is why the result should be different when the issue is scope of liability, as Judge Bye indicated.

Of course, sometimes it may be that the issue is so clear that there is no issue for the trier of fact. Nothing prevents a court from taking the position that a defendant is not negligent as a matter of law. Justice Stephan would have done that in *Latzel*.[366] But, in the ordinary cases, there is nothing about the efficient intervening cause issue that is so special (consider the "legal" factors that have to be considered in the duty determination by way of comparison) that the trier of fact should not be able to resolve the issue.

## CONCLUSION

Strumming the foreseeability strings makes for a discordant composition. There are significant variations on how the issue is handled by the courts. The Third Restatement of Torts expunged foreseeability from the duty determination. Some courts did that before and some after, some citing the Third Restatement in support and some specifically adopting the Third Restatement's approach to foreseeability. Other courts have stayed the course,

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[363] *Id.*

[364] *Id.*

[365] *Id.* at 958 (Bye, J., dissenting).

[366] *See* Latzel v. Bartek, 846 N.W.2d 153, 168 (Neb. 2014) (Stephan, J., concurring).

either rejecting the Third Restatement's position on foreseeability, or not even considering it. Precedent, inertia, and caution account for the holding pattern on the issue.

Courts continue to struggle with a central issue in all of these cases, which is how to divide the duties of the court versus the jury. Justice Willett's candid flagging of the issue in *UDT Texas Properties, L.P. v. Petrie* is indicative of the problem,[367] as are the conflicting decisions on the issue in Tennessee and Kentucky.[368] Courts are concerned that any seismic shift in duty analysis will either expand liability in an unprincipled way, or in the alternative, that a failure to adopt the Third Restatement position will lead to unprincipled decision-making on the duty issue.

Taking foreseeability out of the duty determination may solve part of the problem, but foreseeability is protean. It may surface elsewhere, particularly in scope of liability or proximate cause determinations. Even if not, courts may simply rely on other factors, unfairness, for example,[369] in deciding cases. Or they may simply conclude that there is no breach as a matter of law, although if they do so, it is at least with a greater awareness that the foreseeability issue is usually a jury issue.

Courts may differentiate between foreseeability on a more categorical or zone basis or as a greater or lesser factor, leaving the issue of whether the specific injury in question was foreseeable to the jury. In making that determination, however, courts have to make judgments about how to view the facts in determining whether an injury is foreseeable. The dividing line may be clearer in some cases than others.

Even if a court requires specific foreseeability, the application of the rule may tilt towards jury resolution of foreseeability in "close cases." The Minnesota cases demonstrate that a liberal view of what a "close case" is can have an impact on judge-jury balance.[370] Even if a jurisdiction requires specific foreseeability, the impact of a tilt toward jury resolution may bring the rule closer to the result

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[367] 517 S.W.3d 98, 105 (Tex. 2017) (Willett, J., concurring).

[368] *Compare* Stockton v. Ford Motor Co., No. W2016-01175-COA-R3-CV, 2017 WL 2021760, at *15 (Tenn. Ct. App. May 12, 2017), *with* Carney v. Galt, 517 S.W.3d 507, 512 (Ky. Ct. App. 2017).

[369] *See* Owen, *Figuring Foreseeability*, *supra* note 35, at 1306.

[370] *See supra* Part V.

the Third Restatement is intended to achieve through Section 7(a). On the other hand, with a view that general foreseeability is a question for the court via categorical determinations, it is often difficult to see a clear separation of what facts are specific and what facts are general. The more the line blurs, the more difficult it is to apply the division in a principled way.

If a court does take the Third Restatement's approach, there will be consequences. Summary judgments based on lack of foreseeability will not be granted with the frequency that they were. But there is no indication that the sky has fallen in Iowa negligence cases. As Justice Waterman noted in his dissent in *Hoyt*, *Thompson* did not sound "the death knell" of summary judgment in negligence cases,[371] and as subsequent Iowa duty cases note, *Thompson* did not by any means signal the demise of limitations on duty.[372] That may be the most important takeaway for jurisdictions considering whether to adopt the Third Restatement's position on duty and foreseeability.

[371] Hoyt v. Gutterz Bowl & Lounge L.L.C., 829 N.W.2d 772, 783 (Iowa 2013) (Waterman, J., dissenting).

[372] *See* Morris v. Legends Fieldhouse Bar & Grill, LLC, 958 N.W.2d 817, 828 (Iowa 2021).