FILED
SUPREME COURT
STATE OF WASHINGTON
3/27/2020 11:44 AM
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SUPREME COURT
STATE OF WASHINGTON
4/6/2020
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No. 97583-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KATHLEEN MANCINI,

Petitioner,

vs.

CITY OF TACOMA,

Respondent.

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in whether targets of negligent police investigations may assert claims under Washington common law.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case presents the Court with the opportunity to examine whether persons injured by negligent police investigations should be barred from bringing a claim for damages under Washington common law. The facts are drawn from the Court of Appeals opinions and the parties' briefs. *See Mancini v. City of Tacoma,* No. 71044-6-I, 2015 WL 3562229, 188 Wn. App. 1006 (2015) (*Mancini I*); *Mancini v. City of Tacoma*, No. 77531-6-I, 2019 WL 2092698, 8 Wn. App. 2d 1066, *review granted,* 194 Wn.2d 1009 (2019) (*Mancini II)*; Mancini Pet. for Rev. at 2-5; City Ans. to Pet. for Rev. at 1-4; Mancini Supp. Br. at 1-5; City Supp. Br. at 1-6.

Tacoma Police Officer Kenneth Smith received a tip from a confidential informant (CI) identifying a King County apartment as the residence of an individual selling illegal drugs. Smith neither conducted surveillance nor performed a controlled drug buy to verify the location, explaining that while he would ordinarily employ these safeguards, he

dispensed with them here to avoid administrative obligations required by King County. Instead, relying on the unsubstantiated tip, Smith sought and obtained a search warrant from Pierce County Superior Court. He then led a team of police officers into Mancini's apartment while she slept. Dressed in swat gear and carrying guns, the officers shouted "get down" and pushed her to the floor. Despite "immediately" knowing they had the wrong location, they made her wait outside in her nightgown for over 30 minutes.

Mancini sued the City of Tacoma, the Tacoma Police Department and the police chief (the City), alleging several theories, including negligence. The City moved for summary judgment. As to negligence, it asserted the claim was barred by the public duty doctrine, and that it was not cognizable because it amounted to a negligent investigation claim. The trial court granted the motion. Mancini appealed and the Court of Appeals reversed. It held that the public duty doctrine is inapplicable to common law claims. The court also rejected the City's assertion that Mancini's negligence claim should be "reformulated" as one of negligent investigation.

At trial, Mancini presented expert testimony that Smith should have conducted surveillance and a controlled buy before seeking a warrant, and the failure to do so fell below the standard of care. The City moved for judgment notwithstanding the verdict at the close of Mancini's case and at the close of evidence. The court denied the motions. The jury returned a verdict for Mancini in the amount of $250,000 on her negligence claim.[1]

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[1] The City's liability was based on a vicarious liability theory. Mancini had previously asserted negligent training and supervision directly against the City. The City moved for

The City appealed, arguing once again the claim was barred because it constituted a negligent investigation claim. This time, the court agreed. While unable to define this "forbidden tort," the court surmised that it "must encompass, at minimum, assertions of negligence occurring during the authorized evidence gathering aspects of police work." *Mancini II,* 2019 WL 2092698, at *5. Mancini sought review, which this Court granted.

III. ISSUE PRESENTED

Whether The Court Should Reject The "No Duty" Rule And Hold That Under Washington Common Law, Law Enforcement Owes A Duty Of Reasonable Care With Respect To The Targets Of Its Investigations.

IV. SUMMARY OF ARGUMENT

Since 1991, Washington courts of appeals have barred common law negligent investigation claims, stating this "no duty" rule is necessary to avoid the chilling effect that tort liability may have on law enforcement officers. While this Court has restated the no duty rule, its statements have appeared in cases addressing the viability of a statutory claim for negligent child abuse investigation. It has never squarely examined the issue.

Legal duty is a question of law and rests on considerations of precedent, public policy, justice, logic and common sense. The no duty rule is irreconcilable with this Court's precedent holding that an actor whose affirmative act creates a risk of foreseeable harm to another has a duty to take reasonable precautions to prevent that harm. The rule is also

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judgment on the pleadings, arguing that when a plaintiff asserts vicarious liability against an employer for an employee's acts within the scope of employment, direct negligence claims are "redundant and futile." CP 28 (Defendants' Motion for Partial Judgment on the Pleadings). The court granted the motion. *See* CP 49 (Order Granting Defendants' Motion).

inconsistent with public policy: as compared to a liability scheme that recognizes a duty and extends qualified immunity to officers without immunizing their employers, it deprives individuals and society the benefits of tort liability without affording appreciable benefit. It undermines justice because it fails to place responsibility in the hands of the entity best situated to prevent harm. Finally, it defies logic and common sense, as it eliminates claims based on negligent investigative acts, despite the fact that such acts routinely form the basis of claims where recognized duties are present.

The duty considerations here should not be altered by case law governing probable cause or constitutional requisites for obtaining search warrants. The Court of Appeals dismissed Mancini's negligence claim based *solely* on its conclusion that negligent investigation claims are not cognizable. Moreover, tort law and constitutional law governing searches operate as independent bodies of law, and where a tort duty of reasonable care is present, this Court has resisted the notion that probable cause or a warrant necessarily relieves an officer of liability. The analysis of the duty issues raised here should recognize these conceptual distinctions and resist conflating the separate principles applicable in these distinct bodies of law.

V. ARGUMENT

A. Brief Overview Of Negligent Investigation Claims Under Washington Common Law.

Washington courts of appeals have struggled with whether and under what circumstances they should permit claims against law enforcement arising out of misconduct in the course of criminal

investigations. Early opinions barred such claims, doing so on the basis of immunity. *See, e.g., Clipse v. Gillis*, 20 Wn. App. 691, 696, 582 P.2d 555 (1978); *see also Moloney v. Tribune Pub. Co.*, 26 Wn. App. 357, 360, 613 P.2d 1179, *review denied*, 94 Wn.2d 1014 (1980). These decisions arose out of concern that liability may impair vigorous investigations. *See Clipse*, 20 Wn. App. at 694 (immunity necessary to ensure officers are not "unduly hampered and intimidated in the discharge of their duties"). In *Bender v. City of Seattle,* 99 Wn.2d 582, 664 P.2d 492 (1983), this Court disapproved *Clipse* and *Moloney*, noting the better public policy is "[a]ccountability through tort liability." *Bender*, 99 Wn.2d at 589-90 (brackets added).

Despite this Court's rejection of the public policy reason to extend immunity for investigative acts, this same public policy was soon cited as a basis to bar claims for what was termed "negligent investigation." *See Dever v. Fowler*, 63 Wn. App. 35, 816 P.2d 1237, *as amended*, 824 P.2d 1237 (1991), *review denied,* 118 Wn.2d 1028 (1992). The court in *Dever* relied for its holding on the public policy cited in *Clipse* and *Moloney* and rejected by this Court in *Bender*: "The reason courts have refused to create a cause of action for negligent investigation is that holding investigators liable for their negligent acts would impair vigorous prosecution and have a chilling effect upon law enforcement." *Id.*, 824 P.2d at 1238.[2]

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[2] Without separately examining the distinct public policies implicated in different factual contexts, courts of appeals have relied on *Dever* and the public policy it cited to bar claims in a wide range of other contexts, including employment investigations, *see Corbally v. Kennewick Sch. Dist.*, 94 Wn. App. 736, 740, 973 P.2d 1074 (1999), child abuse, *see Pettis v. State*, 98 Wn. App. 553, 558-59, 990 P.2d 453 (1999) and professional misconduct, *see Janaszak v. State*, 173 Wn. App. 703, 725, 297 P.3d 723 (2013).

This Court has referenced the "no duty" rule developed in the courts of appeals. *See Wrigley v. State*, __ Wn.2d __, 455 P.3d 1138, 1144 (2020) (stating "we have not recognized a general tort claim of negligent investigation"); *Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 702, 222 P.3d 785 (2009) (citing court of appeals cases holding negligent investigation claims "do not exist under common law in Washington"); *M.W. v. Dep't of Soc. & Health Svcs.*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003) (observing Washington courts "have not recognized a general tort claim for negligent investigation"). In each of these cases, the issue before the Court involved the proper interpretation of a statutory cause of action for negligent child abuse investigation under Ch. 26.44 RCW. *See Wrigley,* 455 P.3d at 1140; *Ducote*, 167 Wn.2d at 700; *M.W.*, 149 Wn.2d at 591.

B. This Court Should Reject The "No Duty" Rule And Hold That Consistent With Washington Common Law, Law Enforcement Investigators Owe A Duty Of Reasonable Care To The Targets Of Their Investigations When Their Affirmative Acts Create A Risk Of Foreseeable Harm.

Under the doctrine of stare decisis, a binding decision of this Court may be overruled only if it finds the decision is "incorrect and harmful." *State v. Pierce,* __ Wn.2d __, 455 P.3d 647, 652 (2020).[3] In this case, there is no binding decision from this Court triggering the incorrect and harmful analysis. While the Court has referenced the no duty rule adopted in the courts of appeals, in those cases the issues presented related to the interpretation of a statutory cause of action for child abuse investigations

[3] This Court is not bound by courts of appeals decisions. *See Fast v. Kennewick Public Hosp. Dist.*, 187 Wn.2d 27, 40, 384 P.3d 232 (2016).

under RCW 26.44.050. To the extent the Court's statements suggest support for a broad no duty rule in the context of negligent criminal investigations under the common law, its statements appear to be dicta and do not require application of the "incorrect and harmful" test for overruling precedent.[4] *See State ex rel. Todd v. Yelle*, 7 Wn.2d 443, 450-51, 110 P.2d 162 (1941) (stare decisis does not apply to language unnecessary to court's holding).

Even if the Court feels constrained by its prior statements, the no duty rule should be abandoned because it is incorrect and harmful. In Washington, legal duty is a question of law for the Court, and rests on considerations of precedent, public policy, justice, logic and common sense. *See Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 389, 241 P.3d 1256 (2010). Applying these principles, the no duty rule is incorrect because it cannot be reconciled with Washington precedent recognizing tort duties in related settings; it is harmful because it subverts public policy, justice, logic and common sense. The Court should reject the no duty rule and hold that investigators who affirmatively target individuals for investigation have a duty under Washington common law to use reasonable care to prevent foreseeable harm to the targets of their investigations.

1. **The no duty rule is inconsistent with common law precedent recognizing that all persons, including law enforcement, have a duty of reasonable care with respect to their affirmative acts creating a risk of foreseeable harm.**

[4] Dicta is "an observation or remark made by a judge in pronouncing an opinion upon a cause. . . not necessarily involved in the case or essential to its determination." *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954) (citation omitted).

The City contends that it should be relieved from liability for negligent investigation and that tort duties recognized under Washington law are consistent with this rule. To the extent it argues that investigators do not have an affirmative duty to investigate, the failure of which may give rise to a private right of action, the City may be correct. However, Washington law makes clear that where an actor *chooses* to act, and in so doing he or she creates a risk of foreseeable harm to others, the actor has a duty to take reasonable precautions to prevent harm to the other. Thus, where an investigator targets an individual for an investigation, and that targeting creates a risk of foreseeable harm, the investigator should have the same duty owed by all other actors in Washington -- to take reasonable precautions to prevent foreseeable harm to the target of the investigation.

Washington courts recognize the "general principle that '[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.'" *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 608, 257 P.3d 532 (2011) (quoting *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 7(a) (2010)); *see also Robb v. City of Seattle,* 176 Wn.2d 427, 437, 295 P.3d 212 (2013); *Washburn v. City of Federal Way,* 178 Wn.2d 732, 757, 310 P.3d 1275 (2013). In *Robb,* the estate of a shooting victim sued the City of Seattle, after its police officers failed to remove shotgun shells during a traffic stop, and the driver later retrieved the shells and used them to shoot the victim. Citing *Restatement (Second) of Torts* § 302B (1965), the plaintiff argued that an affirmative act

may create a tort duty to protect against a risk of foreseeable harm perpetrated by a dangerous third party. *See Robb*, 176 Wn.2d at 433. The City responded that § 302B permits such conduct to constitute evidence of breach, but that the source of the duty would have to arise independently of the affirmative act creating the risk, such as a special relationship. *See id*.

The Court held an affirmative act creating a foreseeable risk of harm may be an independent source of a duty: "The actor's prior conduct, whether tortious or innocent, may have created a situation of peril to the other, as a result of which the actor is under a duty to act to prevent harm." *Id.* at 434 (citing *Restatement (Second) of Torts* § 314 cmt. a (1965)). It noted "anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act." *Id*. at 436 (citing *Restatement (Second) of Torts* § 302 cmt. a (1965)). Triggering a duty under this analysis "requires an affirmative act that creates or exposes another to a situation of peril." *Id*. at 435 (citing *Restatement* § 302B cmt. e). The distinction turns on whether one creates the risk or merely neglects to mitigate it: "Misfeasance necessarily entails the creation of a new risk of harm to the plaintiff," while "through nonfeasance, the risk is merely made no worse." *Id.* at 437.

This Court subsequently applied this duty analysis in *Washburn v. City of Federal Way, supra*. There, a woman filed a petition for an antiharassment order to seek protection from her live-in boyfriend. She stated in her petition that her boyfriend did not speak English and that he

had a history of violence. The officer who served the order neglected to read it. He handed the order to the boyfriend in the woman's presence and left the residence. The boyfriend later killed her. In holding that the officer's employer, the City of Federal Way, owed the woman a duty, the Court recognized that actors "have a duty of reasonable care to avoid the foreseeable consequences of their acts." *Washburn,* 178 Wn.2d at 757 (citing *Restatement (Second) of Torts* § 281 cmts. c, d (1965)). The officer's service of the order constituted a duty-triggering event because it was an affirmative act creating a risk of foreseeable harm.[5]

This Court recently applied these principles to hold that a law enforcement officer has a common law duty to the target of her interrogation, clarifying this duty analysis is not limited to factual contexts where the source of the harm is a third party. *See Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550, 442 P.3d 608 (2019). In *Beltran-Serrano,* a Tacoma police officer stopped to question a homeless man. Despite his apparent mental illness and inability to understand English, Officer Volk declined to wait for a Spanish-speaking officer and instead initiated an aggressive interrogation in English. The man became distressed and the situation escalated. Volk tased him and shot him four times. Beltran-Serrano sued the City, alleging several causes of action, including negligence.

[5] The Court acknowledged the officer's acts, such as the failure to read the order or the failure to bring an interpreter, could be characterized as failures to act, but that understood in context, they were affirmative acts because they described ways the officer "served the antiharassment order improperly." *Washburn*, 178 Wn.2d at 760-61.

Holding the City owed Beltran-Serrano a duty of reasonable care with respect to acts preceding the use of deadly force, this Court relied upon the larger body of common law recognizing that when an actor interacts with another, he or she has a duty to avoid causing foreseeable harm. As in *Washburn*, the Court in *Beltran-Serrano* relied on *Restatement* § 281 for the principle that "[a]t common law, every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others." 193 Wn.2d at 550 (citing *Restatement* § 281 cmt e).

The City asserts two arguments in an effort to distinguish *Beltran-Serrano* and the duty principles on which it is based. First, it insists a "critical component" of the reasoning in *Beltran-Serrano* was that the officer's interaction was a "consensual contact," and was therefore distinct from her "statutorily imposed duty to 'provide police services, enforce the law, and keep the peace." Ans. to Pet. for Rev. at 5-6 (quoting *Beltran-Serrano*, 193 Wn.2d at 551-52). Second, it contends *Beltran-Serrano* arose "because of the direct interaction between the officer and the plaintiff," an element it claims is "wholly absent in the instant case." City Supp. Br. at 8.

The City's argument misapprehends the duty analysis underlying *Beltran-Serrano*. In both *Beltran-Serrano* and *Mancini*, the officers had a statutorily-imposed duty "to provide police services, enforce the law, and keep the peace." *Beltran-Serrano*, 193 Wn.2d at 552. In neither case did this statutory duty create a right of action to enforce the duty. However, when the officers engaged in an affirmative act creating a situation of peril

(in *Beltran-Serrano* initiating the interrogation and in this case targeting Mancini's residence for an armed raid), the officers assumed a *common law* duty to prevent foreseeable harm to those individuals arising out of their affirmative acts. For purposes of tort liability, there is no principled way to distinguish acts leading to the unreasonable use of force, which under *Beltran-Serrano* are reachable in tort, from acts leading to the unwarranted entry of Mancini's home, which under the "no duty" rule are not.

In sum, Washington law establishes a duty to prevent foreseeable harm to others arising out of one's affirmative acts, and an officer who targets an individual for investigation has a duty to use reasonable care to prevent foreseeable harm arising from that affirmative act.

2. The no duty rule for negligent investigation cannot be justified as a matter of public policy.

Duty "is a reflection of all those considerations of public policy which lead the law to conclude that a plaintiff's interests are entitled to legal protection against the defendant's conduct." *Taylor v. Stevens County*, 111 Wn.2d 159, 168, 759 P.2d 447 (1988) (citation omitted). To undertake this analysis, the Court must "balance the interests at stake." *Affil. FM Ins. Co. v. LTK Consulting Svcs., Inc.*, 170 Wn.2d 442, 450, 243 P.3d 521 (2010).

The duty of reasonable care and the tort liability that arises from its breach serve important public policies. These public policies include compensation for injured victims, punishing wrongdoers, deterring wrongful conduct and encouraging public safety. *See Beltran-Serrano,* 193 Wn.2d at 550; *Eastwood,* 170 Wn.2d at 407 (Chambers, J., concurring);

Davis v. Baugh Indus. Contractors, Inc., 159 Wn.2d 413, 419-20, 150 P.3d 545 (2007); *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 154, 43 P.3d 1223 (2002). Concurring in *Eastwood*, Justice Chambers recognized:

> Tort duties are important to our society and are imposed for a variety of reasons. We impose these duties to protect innocent parties; to deter hazardous, reckless, and negligent conduct; to compensate for injuries; and to provide a fair distribution of risk.

Eastwood, 170 Wn.2d at 407 (Chambers, J., concurring).

No Washington court to date has balanced the public policies implicated by the no duty rule. The first case to preclude such claims, *Dever v. Fowler*, *supra,* barred these claims on the strength of a single public policy: that liability "would impair vigorous prosecution and have a chilling effect on law enforcement." 63 Wn. App. at 45.[6] *Dever* neither balanced this interest against competing public policies nor considered whether an alternative approach would better serve this stated public policy without denying society and injured persons the benefits of a tort remedy.

Scholars have recognized that a liability scheme that extends qualified immunity to officers while retaining liability of their employers optimizes public policy, because it mitigates the chilling effect liability may have on officers without sacrificing the benefits to individuals and society that are achieved through tort liability. *See, e.g.,* Richard A. Posner,

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[6] It is questionable whether the no duty rule will generally serve the goal of encouraging vigorous investigations. In this case, for instance, Officer Smith accepted largely at face value the statements of the CI. In part to avoid additional paperwork, Smith dispensed with both a controlled drug buy and any surveillance of the residence that may have revealed the error in the CI's information, despite his acknowledgment that he employs these safeguards in 95% of cases. Under these facts, a tort duty requiring the investigator to use ordinary care would likely have *encouraged* -- rather than *chilled* – vigorous investigation.

Excessive Sanctions for Governmental Misconduct in Criminal Cases, 57 Wash. L. Rev. 635, 641 (1982) (arguing a tort remedy for police misconduct that extends qualified immunity to the officer, while "ensuring that an officer's immunity for misconduct (committed in good faith) is not extended to the agency employing him" optimizes deterrence and economic benefits); Note, *Government Tort Liability*, 111 Harv. L. Rev. 2009, 2014 (1998) (arguing for immunity of officers and liability of employers as this framework will "promote and balance the goals of tort law: compensation, risk-spreading, deterrence, the rule of law [and] vigorous decisionmaking" (brackets added)); Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts,* 107 Calif. L. Rev. 933, 978 (2019) (similar).

The public policy benefits of this liability scheme have also been recognized by this Court. In *Bender*, the Court considered the liability of the City of Seattle for its officer's misconduct in the course of a criminal investigation. Rejecting the City's immunity argument, the Court emphasized the public policy that "[a]ccountability through tort liability in areas outside the narrow exception [of discretionary immunity for high level, policy-making decisions] may be the only way of assuring a certain standard of performance from governmental entities." *Bender*, 99 Wn.2d at 590 (brackets added). It acknowledged concern that liability of individual officers may impair officers' decision making, but concluded this concern is not implicated when the defendant is the government employer:

> These fears [upon a rationale for personal liability of government officials for discretionary acts] are not founded upon fact, however,

> if it is the municipality and not the employee who faces liability. The most promising way to correct the abuses, if a community has the political will to correct them, is to provide incentives to the highest officials by imposing liability on the governmental unit.

Id. (quoting *King v. Seattle*, 84 Wn.2d 239, 244, 525 P.2d 228 (1974)). In *Savage v. State*, 127 Wn.2d 434, 441-42, 466, 899 P.2d 1270 (1995), the Court reached a similar conclusion, holding that the law should grant qualified immunity to a parole officer from a negligent supervision claim in order "to protect the individual from the unduly inhibiting effect the fear of personal liability would have on performance of his or her professional obligations." 127 Wn.2d at 441-442. It held that immunity should not extend to the officer's employer, however, explaining because state liability "can be expected to have the salutary effect of providing the State an incentive to ensure that reasonable care is used in fashioning guidelines and procedures for the supervision of parolees." *Id.* at 446. *See also Babcock v. State,* 116 Wn.2d 596, 617-22, 809 P.2d 143 (1991) (qualified immunity from negligent investigation claims for DSHS caseworkers but not DSHS).

In sum, public policy as a whole is better served by a framework that extends qualified immunity to officers but holds accountable their employers, as it can mitigate the chilling effect of liability on individual officers while still serving the benefits of compensation, deterrence, risk spreading and public safety that are accomplished through tort liability.

3. The no duty rule undermines considerations of justice.

Under the justice prong, the Court may consider whether recognizing a duty will place liability on the party that is best able to prevent

the potential harm. *See Centurion Props. III, LLC v. Chi. Title Ins. Co.*, 186 Wn.2d 58, 83, 375 P.3d 651 (2016). Entities employing law enforcement are best situated to establish and enforce policies requiring reasonable conduct. Innocent targets, like Mancini, are utterly powerless against government entities, which are entrusted with the unparalleled authority to execute an armed and potentially violent raid of a private residence without permission or warning.[7] Such entities are clearly best situated to encourage ordinary care in what are truly extraordinary circumstances.

4. The no duty rule cannot be justified by considerations of logic and common sense.

Logic and common sense also support the recognition of a duty in this context. Negligence claims asserted under Washington common law have routinely been based on investigative acts. *See, e.g., H.B.H. v. State,* 192 Wn.2d 154, 181, 429 P.3d 484 (2018) (permitting a claim based on breach of the duty to protect where plaintiffs alleged "DSHS breached its duty by failing to conduct required health and safety checks"); *Wrigley,* 455 P.3d at 1145 n.7 (holding no statutory duty to investigate was triggered, but that the failure by DSHS to investigate "may be appropriately addressed in a general negligence claim on remand"); *Taggart v. State*, 118 Wn.2d 195, 213-14, 822 P.2d 243 (1992) (recognizing a "take charge" duty owed by a parole officer based on the officer's failure to investigate reports of parole

[7] Tort remedies for police misconduct have been "especially important where the exclusion remedy was irrelevant because the plaintiff was not charged with a crime." Marc L. Miller, Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims,* 52 Buff. L. Rev. 757, 761 (2004).

violations).[8] In such cases, the negligent acts forming the basis of the claims have not defined the duty. Rather, the facts asserted have been examined to determine whether they fit within a tort duty recognized under Washington common law. It does not serve considerations of logic and common sense to deny recovery for the forbidden "negligent investigation" tort, while permitting claims in a variety of contexts to be based on negligent investigative acts.[9] A more logical and commonsense approach would be to employ the same inquiry here that is generally used in other contexts: to ascertain whether there is a theory of recovery that is cognizable under Washington common law within which the asserted facts may be located.

C. *State v. Chenoweth* Is Inapposite And Should Not Alter The Duty Analysis Here.

Citing *State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007), the City contends a negligent investigation claim is "unworkable in this context," because the warrant process rests on probable cause and probable cause is irreconcilable with a negligence standard in tort. Resp. Supp. Br. at 12. This argument should be rejected because it overlooks the core issue on review, misreads *Chenoweth,* and disregards the differences between tort remedies and safeguards governing rights of criminal defendants.

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[8] After this Court issued its decision in *Taggart*, Division I questioned whether its refusal in *Dever* to recognize a common law claim of negligent investigation was consistent with this Court's decision. *See Hanson v. City of Snohomish*, 65 Wn. App. 441, 444 n.1, 828 P.2d 1133 (1992), *rev'd on other grounds*, 121 Wn.2d 552, 852 P.2d 295 (1993).

[9] "No duty" rules are appropriate "only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases." *Restatement (Third) of Torts* § 7 cmt. a. Significant confusion persists regarding the nature and scope of the "forbidden tort" of negligent investigation. *See Mancini II*, 2019 WL 2092698 at *5.

First, the key issue on review is whether a negligent investigation claim is cognizable under Washington common law. In *Mancini II*, the Court of Appeals held that the negligence claim should have been dismissed because it constituted a claim for negligent investigation. It neither examined nor relied upon the warrant in its decision to bar Mancini's claim.

Second, the City reads too much into *Chenoweth*, which did not address whether the probable cause standard is incompatible with a negligence claim in *tort.* There, defendants in a criminal prosecution argued the search warrant was invalid under Wash. Const. art. I, § 7 because the affiant negligently failed to disclose material facts to the court. *See Chenoweth*, 160 Wn.2d at 458. The issue was whether a warrant lacks authority of law under art. I, § 7 when a subsequent investigation reveals the supporting affidavit contained errors made negligently. *See id*. at 473. Grounding its decision in the language of art. I, § 7, as well as Washington rules and statutes regarding search warrants, the Court held that "under article I, section 7, only material falsehoods or omissions made recklessly or intentionally will invalidate a search warrant." *Id*. at 479. It noted that state criminal procedure jurisprudence provides that a warrant is entitled to a presumption of validity, the decision to issue a search warrant is highly discretionary, and courts resolve doubts concerning the existence of probable cause in favor of the warrant's validity. *See id*. at 477. The issue in *Mancini* is not whether a warrant should be invalidated, but instead whether a tort claim exists for a negligent police investigation that led to the

wrongful issuance of a warrant, forced intrusion into Mancini's residence, and restraint by police.[10]

Where a negligence claim is otherwise cognizable, courts have rejected the view that investigators automatically avoid liability by obtaining a warrant. *See Babcock,* 116 Wn.2d at 607-08 (recognizing a "magistrate's warrant does not absolve the officer" when he "controls the flow of information to the court"); *see also Rodriguez v. Perez*, 99 Wn. App. 439, 449, 994 P.2d 874, *review denied*, 141 Wn.2d 1020 (2000) (investigations "can be conducted negligently and yield false information which may then be used to support a finding of probable cause"). *In Tyner v. Dep't of Soc. & Health Servs*., 141 Wn.2d 68, 1 P.3d 1148 (2000), this Court held that "the duty of the CPS workers to investigate exists apart from any action which might be taken by a court." 141 Wn.2d at 83. The Court agreed with the court of appeals reasoning that "[t]he pivotal consideration is not the involvement of the court per se but whether the State has placed before the court all the information material to the decision the court must make. Concealment of information or negligent failure to discover material information may subject the State to liability." *Tyner*, 141 Wn.2d at 83-84.

Maintaining distinct standards applicable to tort law on the one hand and constitutional rules governing searches and seizures on the other

[10] This Court has permitted a target of a police raid to assert a negligence-based claim, where officers executing the raid exceeded the scope of authority granted by a warrant. *See Brutsche v. City of Kent*, 164 Wn.2d 664, 674, 193 P.3d 110 (2008). While the Court grounded its opinion in a negligent trespass theory and did not reach the issue of whether a negligence claim could lie, the duty recognized required the officers to use reasonable care in the manner in which they executed the raid. *See Brutsche*, 164 Wn.2d at 674, 679.

reflects the important differences in their purposes. While constitutional protections establish a floor below which law enforcement conduct may not fall, the remedy of tort is aimed at establishing a standard of reasonable care with which all persons generally should comply:

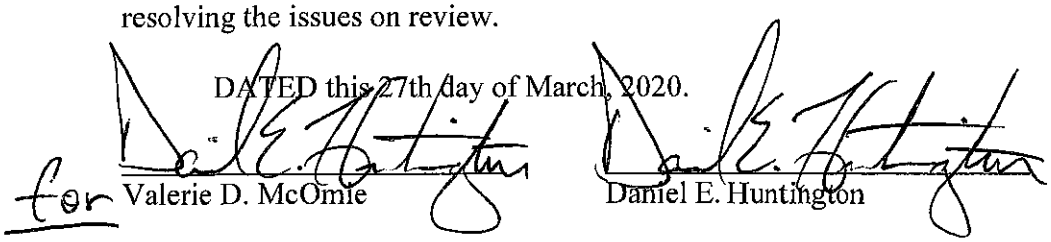
> [T]he constitutionality inquiry is limited to what the Constitution *permits* an officer to do, rather than what an officer *should* do. In that sense, the difference between constitutional and common law tort analysis cannot be overstated. The former assesses the police conduct by establishing a floor for constitutional behavior; the latter examines the conduct by comparing it to standard police procedures.

Paul David Stern, *Tort Justice Reform*, 52 U. Mich. J.L. Reform 649, 653-54 (2019) (brackets added); *see also* Posner, *supra* page 13-14, at 640-41 (arguing tort liability provides a more effective and economically efficient disincentive for police misconduct than the exclusionary rule). Tort remedies can and should operate alongside criminal procedure protections. Whatever potential that constitutional safeguards may have to deter rights abuses, they should neither replace nor dilute the social and economic benefits that may be achieved through a robust scheme of tort liability.

VI. CONCLUSION

The Court should adopt the analysis in this brief in the course of resolving the issues on review.

DATED this 27th day of March, 2020.



for Valerie D. McOmie Daniel E. Huntington

On behalf of WSAJ Foundation

Appendix

Restatement (Second) of Torts § 281 (1965)

Restatement (Second) of Torts § 302 (1965)

Restatement (Second) of Torts § 302B (1965)

Restatement (Second) of Torts § 314 (1965)

Restatement (Third) of Torts:
Liability for Physical and Emotional Harm § 7 (2010)

Restatement (Second) of Torts § 281 (1965)

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Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 1. The Elements of a Cause of Action for Negligence

§ 281 Statement of the Elements of a Cause of Action for Negligence

Comment:
Reporter's Notes
Case Citations - by Jurisdiction

The actor is liable for an invasion of an interest of another, if:

(a) the interest invaded is protected against unintentional invasion, and

(b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and

(c) the actor's conduct is a legal cause of the invasion, and

(d) the other has not so conducted himself as to disable himself from bringing an action for such invasion.

See Reporter's Notes.

Comment:

a. Clauses (a) and (b) state the conditions necessary to make the actor's conduct negligent. Clauses (c) and (d) state the conditions which are necessary to make negligent conduct actionable.

Comment on Clause (a):

b. This Clause states the requirement that the interest which is invaded must be one which is protected, not only against acts intended to invade it, but also against unintentional invasions. The extent to which particular interests are protected is considered in those Chapters which deal with the various interests, and no catalogue is here given of the interests which are protected against unintentional invasions and those which are not so protected.

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Comment on Clause (b):

c. Risk to class of which plaintiff is member. In order for the actor to be negligent with respect to the other, his conduct must create a recognizable risk of harm to the other individually, or to a class of persons—as, for example, all persons within a given area of danger—of which the other is a member. If the actor's conduct creates such a recognizable risk of harm only to a particular class of persons, the fact that it in fact causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not make the actor liable to the persons so injured.

Illustrations:

1. A, a passenger of the X Railway Company, is attempting to board a train while encumbered with a bulky and apparently fragile package. B, a trainman of the Company, in assisting A, does so in such a manner as to make it probable that A will drop the package. A drops the package, which contains fireworks, although there is nothing in its appearance to indicate it. The fireworks explode. The force of the explosion knocks over a platform scale thirty feet away, which falls upon C, another passenger waiting for a train, and injures her. X Railway Company is not liable to C.

2. A is driving a car down the street. He drives so carelessly that he collides with another car. The second car contains dynamite. A is ignorant of this and there is nothing in its appearance or in the circumstances to give him reason to suspect it. The collision causes an explosion which shatters a window of a building on an intersecting street, half a block away, inflicting serious cuts upon B, who is working at a nearby desk. The explosion also harms C, who is walking on the sidewalk near the point where the collision occurs. It also shatters the windows in the building opposite, injuring D at work therein. A is not negligent toward B, since he had no reason to believe that his conduct involved any risk of harming anyone at the point where B is injured. A is negligent toward C since he should have realized that careless driving might result in an accident which would affect the safety of those traveling upon the sidewalk, and the fact that the harm occurred in a different manner from that which might have been expected does not prevent his negligence from being in law the cause of the injury. Whether or not A is negligent toward D depends upon whether A as a reasonable man should have expected that the manner in which he drove the car might cause harm to persons in D's situation.

Comment:

d. There are situations in which the obvious probability of harm to one class of persons may be considered in determining whether an act is negligent to a person of a different class, although the risk of harm to persons of the latter class is so slight that the actor's conduct might otherwise not be negligent as to them. (See § 294.)

e. The hazard problem. Conduct is negligent because it tends to subject the interests of another to an unreasonable risk of harm. Such a risk may be made up of a number of different hazards, which frequently are of a more or less definite character. The actor's negligence lies in subjecting the other to the aggregate of such hazards. In other words, the duty established by law to

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refrain from the negligent conduct is established in order to protect the other from the risk of having his interest invaded by harm resulting from one or more of this limited number of hazards.

In some cases the duty to refrain from certain conduct may be established solely to protect the other from the risk of harm arising from one particular hazard. As to harm resulting from that hazard, the conduct is negligent. Thus in some situations the locking of a securely closed door may be required only for the purpose of protecting goods within the room or building from the risk of theft. When the thief appears on the scene, opens the unlocked door, and steals the goods within, the harm which results is the precise harm which the duty to lock the door was designed to prevent. (See § 449.)

In other cases the number of hazards, although limited, may be large. Thus the duty to exercise reasonable care in driving an automobile down the highway is established for the protection of the persons or property of others against all of the unreasonable possibilities of harm which may be expected to result from collisions with other vehicles, or with pedestrians, or from the driver's own automobile leaving the highway, or from narrowly averted collisions or other accidents. When harm of a kind normally to be expected as a consequence of the negligent driving results from the realization of any one of these hazards, it is within the scope of the defendant's duty of protection.

f. Harm beyond the risk. Where the harm which in fact results is caused by the intervention of factors or forces which form no part of the recognizable risk involved in the actor's conduct, the actor is ordinarily not liable. This is subject, however, to the qualification that where the harm which has resulted was itself within the risk created, the fact that it has been brought about in a manner which was not to be expected, or by the intervention of forces which were not within the risk, does not necessarily prevent the actor's liability. (See § 442B.)

Illustration:

3. A gives a loaded pistol to B, a boy of eight, to carry to C. In handing the pistol to C the boy drops it, injuring the bare foot of D, his comrade. The fall discharges the pistol, wounding C. A is subject to liability to C, but not to D.

g. Flexibility of risk. In determining whether a particular harm or hazard is within the scope of the risk created by the actor's conduct, "risk" must be understood in the broader sense of including all of those hazards and consequences which are to be regarded as normal and ordinary. "Risk" is not limited to those hazards which a reasonable man would have in contemplation and take into account in planning his conduct. Thus one who drives an automobile through city streets at excessive speed may not, as a reasonable man, have in mind the possibility that he may endanger a child in the street and that one who attempts to rescue the child may suffer harm; that he may injure some one who will suffer further injury from negligent medical treatment, or from a fall while attempting to walk on crutches; or that the injured man may be left lying in the highway, where a second car will run over him. None of these possibilities is in itself sufficient to make the driver negligent, and none of them is sufficiently probable to influence the conduct of a reasonable man in his position, which will be determined without regard to them. Nevertheless, each of them is a normal, not unusual consequence of the hazardous situation risked by the driver's conduct, and each is justly attachable to the risk created, and so within its scope.

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In determining whether such events are within the risk, the courts have been compelled of necessity to resort to hindsight rather than foresight. If an event appears to have been normal, not unusual, and closely related to the danger created by the actor's original conduct, it is regarded as within the scope of the risk even though, strictly speaking, it would not have been expected by a reasonable man in the actor's place.

h. Relation to legal cause. The problem which is involved in determining whether a particular intervening force is or is not a superseding cause of the harm is in reality a problem of determining whether the intervention of the force was within the scope of the reasons imposing the duty upon the actor to refrain from negligent conduct. If the duty is designed, in part at least, to protect the other from the hazard of being harmed by the intervening force, or by the effect of the intervening force operating on the condition created by the negligent conduct, then that hazard is within the duty, and the intervening force is not a superseding cause. (See §§ 443- 452.) A completely accurate analysis of the hazard element in negligence would require the material on superseding cause in Chapter 16 to be placed in this chapter. However, in the past the courts generally have discussed the effect of intervening forces in terms of causation. The solution of the problem of determining whether the presence of an intervening force should relieve the actor from liability for harm which his conduct was a substantial factor in bringing about (see § 440) is facilitated by an appreciation of the fact that the problem is a "hazard problem" rather than a problem of causation.

i. Application to violation of statutes. The statement in Comment *e* is most easily recognized in cases of violation of legislative enactments. The language of many statutes makes it clear that they are intended to prevent a very definite type of accident or class of accidents, the prevalence of which has led to the enactment of the statute. (See § 286, Clause (c), and Illustrations.) Many acts are prohibited or required by the common law for substantially the same reason, although the fact that this is so is less easy to recognize.

j. Risk to particular interest. Conduct may be negligent because it involves an unreasonable risk of invading only a particular interest of the plaintiff, or one of a particular species of interests, such as an interest of personality, but may involve no recognizable risk of invading another interest of the same species, or an interest of another species, such as an interest in land or chattels. If so, the fact that the interest to which harm results is a different interest, or a different kind of interest, from that which was threatened with harm, will not prevent the actor from being liable, so long as the interest in fact harmed is one entitled to legal protection against negligence. Thus where harm is threatened only to the plaintiff's land, and harm results instead to his person, or vice versa, the defendant is not relieved from liability by the unexpected nature of the result, or by the fact that an interest of a different kind has been invaded. The plaintiff is not subjected to fragmentation in terms of risk or harm to his foot, his hand, his eye, his chattels, or his land.

Illustration:

4. A, negligently shooting in the street, wounds B's dog. The dog, yelping with pain, runs into B's house and collides with B in the hallway, knocking B down and injuring him. A is subject to liability to B, not only for the harm to his dog but also for the harm to his person.

Comment on Clause (c):

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Restatement (Second) of Torts § 302 (1965)

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Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 4. Types of Negligent Acts

§ 302 Risk of Direct or Indirect Harm

Comment:
Reporter's Notes
Case Citations - by Jurisdiction

A negligent act or omission may be one which involves an unreasonable risk of harm to another through either
(a) the continuous operation of a force started or continued by the act or omission, or
(b) the foreseeable action of the other, a third person, an animal, or a force of nature.

See Reporter's Notes.

Comment:

a. This Section is concerned only with the negligent character of the actor's conduct, and not with his duty to avoid the unreasonable risk. In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty. As to the distinction between act and omission, or "misfeasance" and "non-feasance," see § 314 and Comments. If the actor is under no duty to the other to act, his failure to do so may be negligent conduct within the rule stated in this Section, but it does not subject him to liability, because of the absence of duty.

b. A special application of Clause (b) of this Section, involving the risk of harm through the negligent or reckless conduct of others, is stated in § 302A. A second special application of Clause (b), involving the risk of the intentional or criminal conduct of others, is stated in § 302B.

c. The actor may be negligent in setting in motion a force the continuous operation of which, without the intervention of other forces or causes, results in harm to the other. He may likewise be negligent in failing to control a force already in operation from other causes, or to prevent harm to another resulting from it. Such continuous operation of a force set in motion by the

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actor, or of a force which he fails to control, is commonly called "direct causation" by the courts, and very often the question is considered as if it were one of the mechanism of the causal sequence. In many instances, at least, the same problem may be more effectively dealt with as a matter of the negligence of the actor in the light of the risk created.

Illustrations:

1. A sets a fire on his own land, with a strong wind blowing toward B's house. Without any other negligence on the part of A, the fire escapes from A's land and burns down B's house. A may be found to be negligent toward B in setting the fire.

2. A discovers on his land a fire originating from some unknown source. Although there is a strong wind blowing toward B's house, A makes no effort to control the fire. It spreads to B's land and destroys B's house. A may be found to be negligent toward B in failing to control the fire.

d. Probability of intervening action. If the actor's conduct has created or continued a situation which is harmless if left to itself but is capable of being made dangerous to others by some subsequent action of a human being or animal or the subsequent operation of a natural force, the actor's negligence depends upon whether he as a reasonable man should recognize such action or operation as probable. The actor as a reasonable man is required to know the habits and propensities of human beings and animals and the normal operation of natural forces in the locality in which he has intentionally created such a situation or in which he knows or should realize that his conduct is likely to create such a situation. (See § 290.) In so far as such knowledge would lead the actor as a reasonable man to recognize a particular action of a human being or animal or a particular operation of a natural force as customary or normal, the actor is required to anticipate and provide against it. The actor is negligent if he intentionally creates a situation, or if his conduct involves a risk of creating a situation, which he should realize as likely to be dangerous to others in the event of such customary or normal act or operation. (See § 303.)

e. Meaning of "normal." The actor as a reasonable man is required to anticipate and provide against the normal operation of natural forces. And here the word "normal" is used to describe not only those forces which are constantly and habitually operating but also those forces which operate periodically or with a certain degree of frequency.

Illustration:

3. A erects a swinging sign over the highway. He is required to keep it in such condition that it will not be blown down, not only by the ordinary breezes which are of everyday occurrence, but also by the gales which experience shows are likely to occur from time to time.

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f. Normal conditions of nature. As stated in § 290, Comments *g* and *h*, the actor is required to recognize the fact that a certain number of animals and human beings may act in a way which is not customary for ordinary individuals, and that there are occasional operations of natural forces which are radically different from the normal. It would, however, be impracticable to set a standard of behavior so high as to require every man under all circumstances to take into account the chance of these exceptional actions and operations. Therefore, except where the actor has reason to expect the contrary, he is entitled to assume that human beings and animals will act and the natural forces will operate in their usual manner, unless their exceptional action or operation would create a serious chance of grave harm to some valuable interest and there is little utility in the actor's conduct. Thus a motorist driving along a highway is entitled to assume, unless he has special reason to expect the contrary, that other motorists will keep to the right side of the road, since motor traffic would be unduly hindered unless motorists were free to act on that assumption. On the other hand, a motorist approaching a railroad crossing is not entitled to assume that the railway company will comply with its duty to blow the whistle and ring the bell, but is required to take very great precautions to look out for trains which have not given such notice of their approach.

g. Abnormal conditions of nature. The actor is not required to anticipate or provide against conditions of nature or the operation of natural forces which are of so unusual a character that the burden of providing for them would be out of all proportion to the chance of their existence or operation and the risk of harm to others involved in their possible existence or operation. It is therefore not necessary that a particular operation of the natural force be unprecedented. The likelihood of its recurrence may be so slight that in the aggregate the burden of constantly providing against it would be out of all proportion great as compared with the magnitude of the risk involved in the possibility of its recurrence.

Illustration:

4. In 1938 a hurricane caused serious damage in a city in New England. There is no record of any hurricane of similar force within the preceding 130 years. A, thereafter constructing a building in the city in question, is not negligent in failing to adopt an expensive method of construction which would make it safe against damage from a similar hurricane.

5. The same facts as in Illustration 4, with the additional fact that by 1957 hurricanes of similar violence have recurred four times in New England. A, constructing a building in 1957, may be found to be negligent in failing to adopt a method of construction which would make it safe against such hurricanes.

h. If the actor knows or should perceive circumstances which would lead a reasonable man to expect a particular operation of a natural force, he is required to provide against it, although, but for such circumstances, it would be so extraordinary that he would be entitled to ignore the possibility of its occurrence.

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Illustration:

6. A moors his boat in a river fed by mountain streams. The moorings are sufficient to prevent the boat from being cast adrift by any stage of water likely to occur at that season of the year. A sudden cloudburst in the mountain causes an extraordinary flood which sweeps his boat away, causing it to collide with the boat of B. A may be found to be negligent if he has or should have such knowledge of the occurrence of the cloudburst as to give him reason to expect the unusual and otherwise unforeseeable flood.

i. Action of domestic animals. The actor as a reasonable man is both entitled to assume and required to expect that domestic animals will act in accordance with the nature of such animals as a class, unless he knows or should know of some circumstances which should warn him that the particular animal is likely to act in a different manner.

j. Action of human beings. As stated in § 290, the actor is required to know the common qualities and habits of other human beings, in so far as they are a matter of common knowledge in the community. The actor may have special knowledge of the qualities or habits of a particular individual, over and above the minimum which he is required to know. His act or omission may be negligent because it involves an unreasonable risk of harm to another through the intervention of conduct on the part of the other, or of third persons, which a reasonable man in the actor's position would anticipate and guard against. As to the actor's negligence where such foreseeable conduct is itself negligent, see § 302A. As to his negligence where the foreseeable conduct is intentional or criminal, see § 302B.

Reporter's Notes

This Section has been changed from the first Restatement by rewording it to include negligent omissions as well as acts. The original Comments *j* to *n* inclusive, with the accompanying Illustrations, have been shifted to Sections 302A and 302B, which involve special applications of the rule stated in this Section.

Case Citations - by Jurisdiction

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C.A.2
C.A.3
C.A.4
C.A.5
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C.A.8
C.A.9
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Restatement (Second) of Torts § 302B (1965)

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Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 4. Types of Negligent Acts

§ 302B Risk of Intentional or Criminal Conduct

Comment:
Reporter's Notes
Case Citations - by Jurisdiction

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

See Reporter's Notes.

Comment:

a. This Section is a special application of the rule stated in Clause (b) of § 302. Comment *a* to that Section is equally applicable here.

b. As to the meaning of "intended," see § 8A. The intentional conduct with which this Section is concerned may be intended to cause harm to the person or property of the actor himself, the other, or even a third person.

c. Where the intentional misconduct is that of the person who suffers the harm, his recovery ordinarily is barred by his own assumption of the risk (see Chapter 17A) or his contributory negligence (see Chapter 17). This does not mean, however, that the original actor is not negligent, but merely that the injured plaintiff is precluded from recovery by his own misconduct. There may still be situations in which, because of his immaturity or ignorance, the plaintiff is not subject to either defense; and in such cases the actor's negligence may subject him to liability.

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Illustration:

1. A leaves dynamite caps in an open box next to a playground in which small children are playing. B, a child too young to understand the risk involved, finds the caps, hammers one of them with a rock, and is injured by the explosion. A may be found to be negligent toward B.

d. Normally the actor has much less reason to anticipate intentional misconduct than he has to anticipate negligence. In the ordinary case he may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law. Even where there is a recognizable possibility of the intentional interference, the possibility may be so slight, or there may be so slight a risk of foreseeable harm to another as a result of the interference, that a reasonable man in the position of the actor would disregard it.

Illustration:

2. A leaves his automobile unlocked, with the key in the ignition switch, while he steps into a drugstore to buy a pack of cigarettes. The time is noon, the neighborhood peaceable and respectable, and no suspicious persons are about. B, a thief, steals the car while A is in the drugstore, and in his haste to get away drives it in a negligent manner and injures C. A is not negligent toward C.

With this illustration, compare Illustration 14 below.

e. There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account. The following are examples of such situations. The list is not an exclusive one, and there may be other situations in which the actor is required to take precautions.

A. Where, by contract or otherwise, the actor has undertaken a duty to protect the other against such misconduct. Normally such a duty arises out of a contract between the parties, in which such protection is an express or an implied term of the agreement.

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Illustration:

3. The A Company makes a business of conducting tourists through the slums of the city. It employs guards to accompany all parties to protect them during such tours. B goes upon such a tour. While in a particularly dangerous part of the slums the guards abandon the party. B is attacked and robbed. The A Company may be found to be negligent toward B.

B. Where the actor stands in such a relation to the other that he is under a duty to protect him against such misconduct. Among such relations are those of carrier and passenger, innkeeper and guest, employer and employee, possessor of land and invitee, and bailee and bailor.

Illustrations:

4. The A company operates a hotel, in which B is a guest. C, another guest, approaches B in the hotel lobby, threatening to knock him down. There are a number of hotel employees on the spot, but, although B appeals to them for protection, they do nothing, and C knocks B down. The A Company may be found to be negligent toward B.

5. A rents an automobile from B. A keeps the automobile in his garage, but fails to lock either the car or the garage. The car is stolen. A may be found to be negligent toward B.

C. Where the actor's affirmative act is intended or likely to defeat a protection which the other has placed around his person or property for the purpose of guarding them from intentional interference. This includes situation where the actor is privileged to remove such a protection, but fails to take reasonable steps to replace it or to provide a substitute.

Illustrations:

6. A leases floor space in B's shop. On a holiday, A goes to the shop, and on leaving it forgets to take the key from the door. A thief enters the shop through the door and steals B's goods. A may be found to be negligent toward B.

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7. A negligently operated train of the A Railroad runs down the carefully driven truck of B at a crossing, and so injures the driver as to leave him unconscious. While he is unconscious the contents of the truck are stolen by bystanders. The A Company may be found to be negligent toward B with respect to the loss of the stolen goods.

8. The A Company has a legislative authority to excavate a subway, and in so doing to remove a part of the wall of the basement of B's store. The workmen employed by the company remove a part of the wall, leaving an opening sufficient to admit a man. They leave the opening unguarded. During the night a thief enters the store through the opening, and steals B's goods. The A Company may be found to be negligent toward B.

D. Where the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct.

Illustrations:

9. A is the landlord of an apartment house. He employs B as a janitor, knowing that B is a man of violent and uncontrollable temper, and on past occasions has attacked those who argue with him. C, a tenant of one of the apartments, complains to B of inadequate heat. B becomes furiously angry and attacks C, seriously injuring him. A may be found to be negligent toward C.

10. A, a young girl, is a passenger on B Railroad. She falls asleep and is carried beyond her station. The conductor puts her off of the train in an unprotected spot, immediately adjacent to a “jungle” in which hoboes are camped. It is notorious that many of these hoboes are criminals, or men of rough and violent character. A is raped by one of the hoboes. B Railroad may be found to be negligent toward A.

E. Where the actor entrusts an instrumentality capable of doing serious harm if misused, to one whom he knows, or has strong reason to believe, to intend or to be likely to misuse it to inflict intentional harm.

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11. A gives an air rifle to B, a boy six years old. B intentionally shoots C, putting out C's eye. A may be found to be negligent toward C.

F. Where the actor has taken charge or assumed control of a person whom he knows to be peculiarly likely to inflict intentional harm upon others.

Illustration:

12. A, who operates a private sanitarium for the insane, receives for treatment and custody B, a homicidal maniac. Through the carelessness of one of the guards employed by A, B escapes, and attacks and seriously injures C. A may be found to be negligent toward C.

G. Where property of which the actor has possession or control affords a peculiar temptation or opportunity for intentional interference likely to cause harm.

Illustrations:

13. The same facts as in Illustration 1, except that the explosion injures C, a companion of B. A may be found to be negligent toward C.

14. In a neighborhood where young people habitually commit depredations on the night of Halloween, A leaves at the top of a hill a large reel of wire cable which requires a considerable effort to set it in motion. A group of boys, on that night, succeed in moving it, and in rolling it down the hill, where it injures B. A may be found to be negligent toward B, although A might not have been negligent if the reel had been left on any other night.

H. Where the actor acts with knowledge of peculiar conditions which create a high degree of risk of intentional misconduct.

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Illustration:

15. The employees of the A Railroad are on strike. They or their sympathizers have torn up tracks, misplaced switches, and otherwise attempted to wreck trains. A fails to guard its switches, and runs a train, which is derailed by an unguarded switch intentionally thrown by strikers for the purpose of wrecking the train. B, a passenger on the train, and C, a traveler upon an adjacent highway, are injured by the wreck. A Company may be found to be negligent toward B and C.

f. It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases of negligence (see §§ 291- 293), it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct. Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the risk is relatively slight in comparison with the utility of the actor's conduct, he may be under no obligation to protect the other against it.

Illustration:

16. A, a convict, is confined in a state prison for forging a check. His conduct while in prison exhibits no tendency toward violence, and prison tests show that he is mentally normal. In company with other prisoners, A is permitted to do outside work on the prison farm, in accordance with the prison system. While at work he is not properly guarded, and escapes. In endeavoring to get away, A stops B, an automobile driver, threatens him with a knife, and takes B's car. B suffers severe emotional distress, and an apoplectic stroke from the excitement. The State is not negligent toward B.

Reporter's Notes

This Section has been added to the first Restatement. The Comments and Illustrations are in large part transferred from the original § 302.

Illustration 1 is based on Vills v. City of Cloquet, 119 Minn. 277, 138 N.W. 33 (1912); Fehrs v. McKeesport, 318 Pa. 279, 178 A. 380 (1935); City of Tulsa v. McIntosh, 90 Okla. 50, 215 P. 624 (1923); Luhman v. Hoover, 100 F.2d 127, 4 N.C.C.A.N.S. 615 (6 Cir.1938). Otherwise where the caps are left where it is not reasonably to be expected that children will interfere with

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Restatement (Second) of Torts § 314 (1965)

Restatement of the Law - Torts | October 2019 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

§ 314 Duty to Act for Protection of Others

Comment:
Reporter's Notes
Case Citations - by Jurisdiction

The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

See Reporter's Notes.

Comment:

a. The general rule stated in this Section should be read together with other sections which follow. Special relations may exist between the actor and the other, as stated in § 314A, which impose upon the actor the duty to take affirmative precautions for the aid or protection of the other. The actor may have control of a third person, or of land or chattels, and be under a duty to exercise such control, as stated in §§ 316- 320. The actor's prior conduct, whether tortious or innocent, may have created a situation of peril to the other, as a result of which the actor is under a duty to act to prevent harm, as stated in §§ 321 and 322. The actor may have committed himself to the performance of an undertaking, gratuitously or under contract, and so may have assumed a duty of reasonable care for the protection of the other, or even of a third person, as stated in §§ 323, 324, and 324A.

b. The word "actor" is used in the Restatement of this Subject to describe the person whose conduct is in question as a basis for liability. (See § 3.) It includes, therefore, one whose conduct consists of failure to act as well as one who does act.

c. The rule stated in this Section is applicable irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection.

The origin of the rule lay in the early common law distinction between action and inaction, or "misfeasance" and "non-feasance." In the early law one who injured another by a positive affirmative act was held liable without any great regard even for his

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fault. But the courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his omission to act. Hence liability for non-feasance was slow to receive any recognition in the law. It appeared first in, and is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff.

The result of the rule has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown. Such decisions have been condemned by legal writers as revolting to any moral sense, but thus far they remain the law. It appears inevitable that, sooner or later such extreme cases of morally outrageous and indefensible conduct will arise that there will be further inroads upon the older rule.

Illustration:

1. A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B.

d. The rule stated in this Section applies only where the peril in which the actor knows that the other is placed is not due to any active force which is under the actor's control. If a force is within the actor's control, his failure to control it is treated as though he were actively directing it and not as a breach of duty to take affirmative steps to prevent its continuance (see § 302, Comments *a* and *c*).

Illustrations:

2. A, a factory owner, sees B, a young child or a blind man who has wandered into his factory, about to approach a piece of moving machinery. A is negligent if he permits the machinery to continue in motion when by the exercise of reasonable care he could stop it before B comes in contact with it.

3. A, a trespasser in the freight yard of the B Railroad Company, falls in the path of a slowly moving train. The conductor of the train sees A, and by signalling the engineer could readily stop the train in time to prevent its running over A, but does not do so. While a bystander would not be liable to A for refusing to give such a signal, the B Railroad is subject to liability for permitting the train to continue in motion with knowledge of A's peril.

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e. Since the actor is under no duty to aid or protect another who has fallen into peril through no conduct of the actor, it is immaterial that his failure to do so is due to a desire that the other shall be harmed.

Illustration:

4. A, a strong swimmer, sees B, against whom he entertains an unreasonable hatred, floundering in deep water and obviously unable to swim. Knowing B's identity, he turns away. A is not liable to B.

f. Except as stated in §§ 335, 337, and 339, it is immaterial that the other's peril and need of aid or protection is due to the condition of land or chattels owned or in the possession or custody of the actor, unless he stands in some relation to the other which carries with it the duty of preparing a safe place or thing for the other's reception or use, or of warning him of its dangerous condition. (See §§ 342- 350.)

Reporter's Notes

The general rule stated in this Section is supported by the following: Gautret v. Egerton, L.R. 2 C.P. 371 (1867); Toadvine v. Cincinnati, N.O. & T.P.R. Co., 20 F.Supp. 226 (E.D.Ky.1937); Gilbert v. Gwin-McCollum Funeral Home, Inc., 268 Ala. 372, 106 So.2d 646 (1958); Louisville & N.R. Co. v. Scruggs & Echols, 161 Ala. 97, 49 So. 399, 23 L.R.A. N.S. 184, 135 Am.St.Rep. 114 (1909); Allen v. Hixon, 111 Ga. 460, 36 S.E. 810 (1900); Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058, 53 L.R.A. 135, 83 Am.St.Rep. 198 (1901); Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301, 56 A.L.R. 1123 (1928); O'Keefe v. W.J. Barry Co., 311 Mass. 517, 42 N.E.2d 267 (1942); Matthews v. Carolina & N.W.R. Co., 175 N.C. 35, 94 S.E. 714, L.R.A. 1918C, 899 (1917); Schichowski v. Hoffmann, 261 N.Y. 389, 185 N.E. 676 (1933); Stager v. Troy Laundry Co., 38 Or. 480, 63 P. 645, 53 L.R.A. 459 (1901); Prospert v. Rhode Island Suburban R. Co., 28 R.I. 367, 67 A. 522, 11 L.R.A. N.S. 1142 (1907); King v. Interstate Consolidated R. Co., 23 R.I. 583, 51 A. 301, 70 L.R.A. 924 (1902); Riley v. Gulf, C. & S.F.R. Co., 160 S.W. 595 (Tex.Civ.App.1913); Sidwell v. McVay, 282 P.2d 759 (Okla.1955); Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959).

Case Citations - by Jurisdiction

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C.A.1
C.A.3
C.A.4
C.A.5
C.A.6

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Restatement (Third) of Torts: Phys. & Emot. Harm § 7 (2010)

Restatement of the Law - Torts | October 2019 Update

Restatement (Third) of Torts: Liability for Physical and Emotional Harm

Chapter 3. The Negligence Doctrine and Negligence Liability

§ 7 Duty

Comment:
Reporters' Note
Case Citations - by Jurisdiction

(a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.
(b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

Comment:

a. The proper role for duty. As explained in § 6, Comment *f*, actors engaging in conduct that creates risks to others have a duty to exercise reasonable care to avoid causing physical harm. In most cases, courts can rely directly on § 6 and need not refer to duty on a case-by-case basis. Nevertheless, in some categories of cases, reasons of principle or policy dictate that liability should not be imposed. In these cases, courts use the rubric of duty to apply general categorical rules withholding liability. For example, a number of modern cases involve efforts to impose liability on social hosts for serving alcohol to their guests. A jury might plausibly find the social host negligent in providing alcohol to a guest who will depart in an automobile. Nevertheless, imposing liability is potentially problematic because of its impact on a substantial slice of social relations. Courts appropriately address whether such liability should be permitted as a matter of duty. Courts may also, for the same reasons, determine that modification of the ordinary duty of reasonable care is required. Thus, courts generally impose on sellers of products that are not defective at the time of sale the limited duty to warn of newly discovered risks, rather than the more general duty of reasonable care, which a jury might find includes a duty to recall and retrofit the product so as to eliminate the risk. Similarly, some courts have modified the general duty of reasonable care for those engaging in competitive sports to a more limited duty to refrain from recklessly dangerous conduct.

There are two different legal doctrines for withholding liability: no-duty rules and scope-of-liability doctrines (often called "proximate cause"). An important difference between them is that no-duty rules are matters of law decided by the courts, while the defendant's scope of liability is a question of fact for the factfinder. When liability depends on factors specific to an individual

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case, the appropriate rubric is scope of liability. On the other hand, when liability depends on factors applicable to categories of actors or patterns of conduct, the appropriate rubric is duty. No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases.

When addressing duty, courts sometimes are influenced by the relationship between the actor and the person harmed. Thus, courts hold that landowners are free of negligence liability to some trespassers. See Chapter 9. In a different vein, courts have been cautious about imposing liability on physicians when their care for patients causes harm to third parties. At other times, courts focus on particular claims of negligence, forbidding some but preserving others. Thus, a court might hold that a landlord has no duty to provide security for rented space in a building, but has a duty of reasonable care in providing security for common areas in the building. See Chapter 9. Courts also sometimes hold that an actor has a more limited duty than reasonable care, such as an obligation to avoid engaging in reckless conduct that causes physical harm. A number of the factors relevant to these no-duty and modified-duty determinations are explained in Comments *c*-*g*.

The principle or policy that is the basis for modifying or eliminating the ordinary duty of care contained in § 7(a) may be reflected in longstanding precedent and need not be restated each time it is invoked. Thus, the modified duty applicable to medical professionals, which employs customary rather than reasonable care, reflects concerns that a lay jury will not understand what constitutes reasonable care in the complex setting of providing medical care and the special expertise possessed by professionals. At the same time, new concerns may arise that have not previously been the basis for modification of the duty of reasonable care and, when those are invoked, they should be identified and explained.

b. *Procedural aspects of duty determination.* A defendant has the procedural obligation to raise the issue of whether a no-duty rule or some other modification of the ordinary duty of reasonable care applies in a particular case. The appropriate method for a defendant to raise this issue is a matter for the procedural rules of the jurisdiction. The jurisdiction's rules should provide adequate notice to the plaintiff that the defendant claims he or she did not owe the plaintiff a duty of reasonable care.

Courts determine legislative facts necessary to decide whether a no-duty rule is appropriate in a particular category of cases. In most cases, the adjudicative facts that bear on whether a duty exists are not in dispute. When resolution of disputed adjudicative facts bears on the existence or scope of a duty, the case should be submitted to the jury with alternative instructions. In such a case, the plaintiff bears the burden of proof on facts necessary to establish a duty.

Illustration:

1. Sadie owns land adjacent to Sam's. She sues Sam, alleging that he failed to exercise reasonable care to prevent a large tree branch on his land from falling on her land and hitting her. Sam claims that Sadie was trespassing on his land when the branch hit her. The law in the applicable jurisdiction imposes a duty on landowners only to avoid wanton or willful injury to trespassers, while also imposing a general duty of reasonable care to avoid causing harm to persons off the land. Sam has the procedural obligation to notify Sadie that he will invoke the limited-duty rule applicable to trespassers. Then, Sadie has the burden to prove that she was injured on her land if she wants to benefit from the more favorable duty rule. If the evidence permits a finding that Sam was wanton or willful, the court should submit the case to the jury with alternative instructions on his duty. If the evidence would not support such a finding, the court should instruct the jury that, if it finds Sam was negligent and Sadie was injured on her land, it should return a verdict for Sadie, but if it finds Sadie was a trespasser, it should return a verdict for Sam.

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c. Conflicts with social norms about responsibility. In deciding whether to adopt a no-duty rule, courts often rely on general social norms of responsibility. For example, many courts have held that commercial establishments that serve alcoholic beverages have a duty to use reasonable care to avoid injury to others who might be injured by an intoxicated customer, but that social hosts do not have a similar duty to those who might be injured by their guests. Courts often justify this distinction by referring to commonly held social norms about responsibility. The rule stated in this Section does not endorse or reject this particular set of rules. It does support a court's deciding this issue as a categorical matter under the rubric of duty, and a court's articulating general social norms of responsibility as the basis for this determination.

d. Conflicts with another domain of law. In some cases, negligence-based liability might interfere with important principles reflected in another area of law. For example, one reason the general duty of reasonable care stated in § 6 is limited to physical harm is that liability for purely economic harm in commercial cases often raises issues better addressed by contract law or by the tort of misrepresentation. Similarly, no-duty and limited-duty rules in cases involving owners and occupiers of land are influenced by issues that are important in property law. See Chapter 9. In cases alleging physical harm caused by the content of a publication by a media defendant, some courts have relied on First Amendment concerns in finding that media publishers have no duty or a limited duty. See also § 46, Comment *e*; § 47, Comment *l*. No-duty and limited-duty rules in tort help police the boundaries between these various areas of law.

e. Relational limitations. Courts sometimes use the rubric of duty to decide whether an otherwise negligent actor should be liable to a class of persons in a certain relationship. For example, a property owner who creates a hazard might be liable to persons lawfully on the property, but not to a trespasser. Similarly, a home owner who negligently starts a fire might be liable to an adjacent landowner but not to a firefighter. Thus, an actor may have a duty of reasonable care to some persons but not to others. See also § 48.

f. Institutional competence and administrative difficulties. Sometimes a particular category of negligence claims would be difficult for courts to adjudicate. Courts may have difficulty gathering evidence or drawing doctrinal lines necessary to adjudicate certain categories of cases. These administrative concerns may support adopting a no-duty rule. For example, when a plaintiff claims that it is negligent merely to engage in the activity of manufacturing a product, the competing social concerns and affected groups would be appropriate considerations for a court in deciding to adopt a no-duty rule.

g. Deference to discretionary decisions of another branch of government. Courts employ no-duty rules to defer to discretionary decisions made by officials from other branches of government, especially decisions that allocate resources or make other policy judgments. Courts often use the rubric of duty to hold that it is inappropriate to review these decisions in lawsuits. For example, courts often hold that police have no duty of reasonable care in deciding how to allocate police protection throughout a city. This no-duty limitation requires analysis of whether the challenged action involves a discretionary determination of the sort insulated from review or instead is a ministerial action that does not require deference. This analysis is similar to that under the "discretionary function" exception to the Federal Tort Claims Act. See 28 U.S.C. § 2680(a).

h. Plaintiff negligence and no-duty determinations. Ordinary language makes it awkward to speak of a person having a duty of care to himself or herself. Nevertheless, the rules of comparative responsibility ordinarily diminish the recovery of a plaintiff who has failed to exercise reasonable care to avoid harm to himself or herself. However, cases arise in which courts hold that a plaintiff's recovery should not be affected by the plaintiff's own negligent conduct. Just as special problems of policy may support a no-duty determination for a defendant, similar concerns may support a no-duty determination for plaintiff negligence. By relieving the plaintiff of an obligation to act reasonably for self-protection, these rules eliminate the defense of comparative

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responsibility that otherwise would diminish the plaintiff's recovery. For example, when a facility undertakes to care for a person who is mentally ill, and when the person then suffers injury because of his or her own negligence and the facility's negligence, a court might hold that the facility's undertaking relieves the patient's own obligation of self-protection. Thus, the person can recover fully, unaffected by comparative responsibility. See Restatement Third, Torts: Apportionment of Liability § 3 and Comment *d*.

i. No duty and no negligence as a matter of law. Sometimes reasonable minds cannot differ about whether an actor exercised reasonable care under § 8(b). In such cases, courts take the question of negligence away from the jury and determine that the party was or was not negligent as a matter of law. Courts sometimes inaptly express this result in terms of duty. Here, the rubric of duty inaccurately conveys the impression that the court's decision is separate from and antecedent to the issue of negligence. In fact, these cases merely reflect the one-sidedness of the facts bearing on negligence, and they should not be misunderstood as cases involving exemption from or modification of the ordinary duty of reasonable care.

In other situations, reasonable minds could differ about the application of the negligence standard to a particular category of recurring facts, but under the rubric of duty courts render a judgment about that category of cases. See § 8(b), Comment *c*. In conducting its analysis, the court may take into account factors that might escape the jury's attention in a particular case, such as the overall social impact of imposing a significant precautionary obligation on a class of actors. These cases are properly decided as duty or no-duty cases. When no such categorical considerations apply and reasonable minds could differ about the competing risks and burdens or the foreseeability of the risks in a specific case, however, courts should not use duty and no-duty determinations to substitute their evaluation for that of the factfinder.

Thus, in the field of products liability, courts have declared that the warning obligation of prescription-drug manufacturers ordinarily is limited to the prescribing physician and does not extend to warning the patient directly. They reason that the physician can best assess the relevant risk information and determine the appropriate course of treatment. When appropriate, the physician can inform the patient of means by which the patient may minimize the risk of adverse side effects. The physician may also, in appropriate situations, consult with the patient as required by the informed-consent doctrine. Courts have, through this duty limitation, made a categorical determination that having manufacturers provide safety information to physicians, rather than to patients, is the appropriate manner for minimizing the costs of adverse side effects. Such a categorical determination also has the benefit of providing clearer rules of behavior for actors who may be subject to tort liability and who structure their behavior in response to that potential liability. Even when such categorical determinations are adopted, exceptions or limitations may also be appropriate. For example, Restatement Third, Torts: Products Liability § 6(d)(2) contains exceptions to the duty of a drug manufacturer to warn only physicians.

j. The proper role for foreseeability. Foreseeable risk is an element in the determination of negligence. In order to determine whether appropriate care was exercised, the factfinder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. Thus, for reasons explained in Comment *i*, courts should leave such determinations to juries unless no reasonable person could differ on the matter.

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

Courts do appropriately rule that the defendant has not breached a duty of reasonable care when reasonable minds cannot differ on that question. See Comment *i*. These determinations are based on the specific facts of the case, are applicable only to that case, and are appropriately cognizant of the role of the jury in factual determinations. A lack of foreseeable risk in a specific

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case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination. Rather, it is a determination that no reasonable person could find that the defendant has breached the duty of reasonable care.

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

k. Continuing risks of harm. When an actor's conduct creates a risk of harm, this Section requires that the actor exercise reasonable care in connection with that conduct. However, in some cases an actor's conduct may create a continuing risk of harm and the question arises whether the actor has a duty later with regard to that continuing risk. Thus, a person may be exposed to imminent harm by the conduct of an actor many years before in disposing of a live land mine. The duty imposed by this Section requires reasonable care in the initial disposal, and failure to exercise reasonable care in the disposition of the land mine would subject the actor to liability for harms that occur later. However, the actor may exercise reasonable care at the time by disposing of the mine in a location where there is no reasonable prospect that others would be subjected to danger. Subsequent events may, however, result in risks to others. Whether the actor has a duty at that subsequent time when others are at risk is governed by § 39 (Duty Based on Prior Conduct Creating a Risk of Physical Harm), not by this Section.

l. Relationship with affirmative duties to act. The general duty rule contained in this Section is conditioned on the actor's having engaged in conduct that creates a risk of physical harm. Section 37 states the obverse of this rule: In the absence of conduct creating a risk of harm to others, an actor ordinarily has no duty of care to another. Section 37 is contained in Chapter 7, which addresses the no-duty-to-rescue rule, along with its exceptions.

m. Relationship with intentionally and negligently inflicted emotional harm. Recovery for stand-alone emotional harm is more circumscribed than when physical harm occurs. These limitations are often reflected in no- (or limited-) duty rules that limit liability. Chapter 8 of this Restatement addresses the special rules for recovery of emotional harm and provides for more limited duties (and liability) when the only harm suffered by the plaintiff is emotional harm than those duties that exist for physical harm. Thus Chapter 8, rather than this Section, addresses whether a duty exists and its scope when a plaintiff seeks recovery for pure emotional harm. If, however, a duty exists under Chapter 8, the remainder of this Restatement is applicable to such claims.

n. Relationship with duties of landowners and possessors. As with stand-alone emotional harm, courts have employed different duty rules for land possessors for harm caused to those on the land. Chapter 9 of this Restatement contains the duties owed by land possessors in such circumstances. Once a duty pursuant to Chapter 9 exists, the remainder of this Restatement is applicable to such claims.

o. Conduct creating risk. An actor's conduct creates a risk when the actor's conduct or course of conduct results in greater risk to another than the other would have faced absent the conduct. Conduct may create risk by exposing another to natural hazards, as, for example, when a pilot of an airplane flies the plane into an area of thunderstorms. Conduct may also create risk by exposing another to the improper conduct of third parties. See § 19; see also § 37, Comment *c*.

Reporters' Note

*Comment a. The proper role for duty.*Dean Prosser reports that the concept of duty did not develop until negligence emerged as a separate theory of liability in the 19th century and then was employed in order to confine the scope of liability. William Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1, 12-13 (1953). The concept of duty remains confined to claims based on negligence. An early acknowledgment of the ordinary duty to exercise reasonable care was provided in Heaven v. Pender, (1883) 11 Q.B.D. 503, 509:

> The proposition which these recognized cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March, 2020, I electronically filed with the Clerk of the Court using the Washington State Appellate Courts Portal and also served via email the foregoing document to the following:

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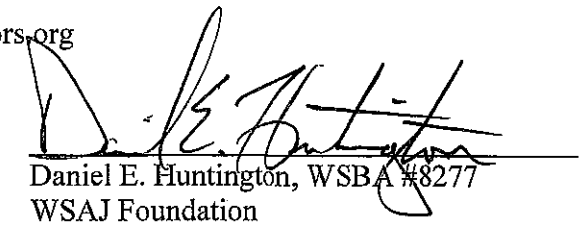

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