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No. 98280-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BONNIE I. MEYERS, as personal representative of the estate of GABRIEL LEWIS ANDERSON, a deceased minor, and on behalf of the beneficiaries of the estate; BRANDI K. SESTROM and JOSHUA ANDERSON, individually,

Plaintiffs/Respondents,

vs.

FERNDALE SCHOOL DISTRICT,
a public school district of the State of Washington,

Defendant/Petitioner.

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 Foundation operates an amicus curiae program and has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the relationship between the elements of duty and legal cause in a negligence claim.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case presents the Court with the opportunity to address whether the doctrine of legal cause should operate to limit liability in cases in which a defendant has a duty to protect or control arising out of a special relationship. The facts are drawn from the Court of Appeals opinion and the briefing of the parties. *See Meyers v. Ferndale Sch. Dist.,* 12 Wn. App. 2d 254, 457 P.3d 483, *review granted,* 466 P.3d 769 (2020) (Table); Meyers Op. Br. at 2-8; Ferndale Resp. Br. at 8-16; Meyers Reply Br. at 1-4; Ferndale Pet. for Rev. at 3-5; Meyers Ans. to Pet. for Rev. at 2-6.

For purposes of this amicus brief, the following facts are relevant. Gabriel Anderson (Gabriel) attended Windward High School, located in Defendant Ferndale School District (Ferndale), and was a student in a physical education class taught by Evan Ritchie. Windward has a modified closed campus that requires teachers to obtain parent permission to take students off campus for certain school-related activities. The high school is

located in what was previously an elementary school building, and outside has only a rudimentary playground and a small area for outdoor activities.

On June 10, 2015, Ritchie informed the school principal, Tim Keigley, that he was taking the class for a walk. He did not seek parent permission. Ritchie then led his class on a route outside the school zone to an area where the speed limit was 40 miles per hour. Students were spread out as far as 200 meters apart. They were told that they could cross the street without using designated crosswalks, which they did. As they returned, Gabriel was walking alongside Ritchie on the sidewalk, with their backs to oncoming traffic. Still outside the school safety zone, Gabriel and several other students were struck from behind when Defendant William Klein drove his vehicle onto the sidewalk after he fell asleep at the wheel. Gabriel and one other student were killed, and two other students seriously injured.

Meyers brought an action against Ferndale on behalf of Gabriel's estate. She contended the District had a duty to protect Gabriel based on the special relationship between a school and its students, and its negligence caused Gabriel's death. Ferndale moved for summary judgment, arguing 1) Ferndale had no legal duty because the accident was not foreseeable as a matter of law, and 2) any alleged breach was not the proximate cause of Gabriel's death. The trial court granted Ferndale's motion on the issue of foreseeability. It did not reach the issue of proximate cause.

The Court of Appeals reversed. Regarding duty and foreseeability, the court held that the trial court misconstrued the relevant foreseeability

inquiry. It clarified that the foreseeability issue is not whether the particular mechanism of injury was foreseeable, but whether the harm fell within the general field of danger that should have been anticipated. Regarding that issue, the court held there was a question of fact.

Proceeding to examine proximate cause, the Court of Appeals first concluded that there was sufficient evidence to permit the trier of fact to decide factual cause. Second, with respect to legal cause, it held that duty and legal causation should not be "uncoupled" and that the presence of duty was dispositive of legal cause. Ferndale petitioned for review, arguing: 1) cause in fact is lacking; and 2) legal cause is absent here because the injury was too remote from Ferndale's alleged negligence to warrant the imposition of liability.[1] This Court granted review.

III. ISSUE PRESENTED

Whether a negligence claim may be dismissed for lack of legal causation where the defendant has a duty arising out of a special relationship with another to protect the plaintiff from the risk of foreseeable harm.

IV. SUMMARY OF ARGUMENT

To state a claim for negligence, a plaintiff must prove duty, breach, proximate cause and injury. Proximate cause generally requires proof of both factual and legal cause. However, the policy-based inquiries undertaken in both duty and legal cause are intertwined, and in certain

[1] Before this Court, Ferndale concedes duty and foreseeability and focuses solely on whether proximate cause is present in this case. *See* Pet. at 9.

categories of cases, assuming the other predicates of negligence are present, duty may be dispositive of legal cause.

In Washington, the presence of a special relationship should be dispositive of legal cause. In the context of affirmative duties based on a special relationship, the Court employs a detailed policy analysis at the duty stage. The resulting duty is circumscribed based on the scope of the relationship at issue, and within its scope, gives rise to a duty to protect against all foreseeable harms. It is limited only by the concept of foreseeability. In keeping with this Court's precedent, duty combined with a genuine issue of fact as to factual cause should be dispositive of legal cause in this context. Such a rule would not lead to unlimited liability, as it requires only that the defendant exercise reasonable care. Additionally, the plaintiff must still prove breach, cause in fact and foreseeability, all of which may be decided by the court if reasonable minds cannot differ.

Finally, the Court should reject Ferndale's proposed "increased risk" limitation. The cases on which it relies are inapposite. Moreover, there is already a duty in Washington arising from the creation of a risk of harm to another. To conflate this duty with special relationship duties would ignore that these are distinct duties giving rise to distinct legal obligations.

V. ARGUMENT

While duty and legal cause are separate elements of negligence, there are situations in which the policy considerations determining whether a duty should lie will resolve any issues related to legal cause. One such

example is the circumstance in which a defendant has a duty based on a special relationship to protect or control another. This brief focuses on the intertwining of duty and legal cause in this context, arguing that where a defendant is in a special relationship giving rise to a duty to protect or a duty to control, and there are issues of fact as to foreseeability, breach and factual cause, legal cause should not operate as a limitation on liability.

A. Overview Of The Elements Of A Negligence Cause Of Action, Including The Relationship Between Duty And Legal Cause.

A plaintiff asserting a negligence claim must show (1) duty, (2) breach, (3) injury and (4) proximate cause. *See N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 429, 378 P.3d 162 (2016). The existence and scope of the duty are questions of law. *See Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 395, 241 P.3d 1256 (2010). Duty turns on "considerations of logic, common sense, justice, policy and precedent." *Snyder v. Med. Serv. Corp. of E. Washington*, 145 Wn.2d 233, 243, 35 P.3d 1158, 1164 (2001).

Once a duty is found to exist, foreseeability serves to limit its scope. *See Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989). Whether the particular facts fall within the scope of the duty is to be decided by the trier of fact, unless reasonable minds could not differ. *See Taggart v. State,* 118 Wn.2d 195, 224, 822 P.2d 243 (1992). Harm is foreseeable and within the scope of the duty if it is "reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant."

Christen, 113 Wn.2d at 492 (citation omitted).[2] Scope of duty includes consideration of whether the harm was "too remote" to warrant liability. *See Lowman v. Wilbur,* 178 Wn.2d 165, 172, 309 P.3d 387 (2013) (recognizing foreseeability questions encompass remoteness of harm). Intervening acts may be foreseeable as long as they are not "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *McLeod v. Grant County Sch. Dist.*, 42 Wn.2d 316, 323, 255 P.2d 360 (1953).

Proximate cause consists of factual cause and legal cause. *See N.L.*, 186 Wn.2d at 436-37. Cause in fact is generally a question for the jury, and involves the "'but for' consequences of an act.'" *N.L.* 186 Wn.2d at 437 (quoting *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985)). Legal cause is a question of law, and rests on considerations as to "how far the consequences of defendant's acts should extend." *Hartley,* 103 Wn.2d at 779; *see also Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). Like duty, legal cause turns on "considerations of logic, common sense, justice, policy, and precedent." *Schooley*, 134 Wn.2d at 479 (citation omitted). Where the defendant's negligence is "too remote and insubstantial" to impose liability, the doctrine of legal cause may operate to limit liability. *See id.,* 134 Wn.2d at 478-79.

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[2] Ferndale contends that the general field of danger test is unique to schools, and that "Washington courts have made almost every conceivable risk 'foreseeable' by adoption of the "general field of danger test.'" Ferndale Supp. Br. at 9. In fact, this test simply focuses the trier of fact's foreseeability analysis to determine whether the harm falls within the scope of the duty, and is applied broadly under Washington tort law. *See, e.g., Christen,* 113 Wn.2d at 492 (liability of one furnishing intoxicants); *McKown v. Simon Property Grp, Inc.*, 182 Wn.2d 752, 764, 344 P.3d 661 (2015) (landowner liability); *Maltman v. Sauer*, 84 Wn.2d 975, 981, 530 P.2d 254 (1975) (liability for injuries suffered by a rescuer).

Given their overlapping inquiries, duty and legal cause are "intertwined." *See Hartley,* 103 Wn.2d at 779-80; *Taggart,* 118 Wn.2d at 226. *Lowman v. Wilbur, supra,* is instructive regarding the relationship between duty and legal cause. There, the plaintiff was a passenger in a car operated by an intoxicated driver, and was injured when the car swerved off the road and struck a utility pole. The plaintiff sued the county for negligent roadway design. The county admitted it had a duty, but argued liability should be barred for lack of legal cause because the car left the roadway due to the driver's intoxication and any negligence by the county was too remote to warrant liability. This Court revisited its decision in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), in which it held that the duty to maintain the roadway extends to "all persons, whether negligent or fault-free." 146 Wn.2d at 249. It noted that *Keller* had examined the relevant policies underlying the recognition of the duty to maintain safe roadways, and any policy-based challenge to liability, whether asserted under duty or legal cause, was foreclosed by the reasoning in *Keller.* It concluded that "the policy considerations that support imposition of a duty will often compel the recognition of legal causation, so long as cause-in-fact is established . . . [and s]uch is the case here." *Lowman*, 178 Wn.2d at 171 (brackets added).

Lowman is one of many circumstances in which duty has been deemed dispositive of legal cause. *See, e.g., Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 476, 656 P.2d 483 (1983) (wrongful birth); *Beal v. City of Seattle*, 134 Wn.2d 769, 787-88, 954 P.2d 237 (1998) (911 operator

providing express assurances, creating a special relationship); *Hertog*, 138 Wn.2d at 283-84 ("take charge" duty based on a special relationship); *Joyce v. State*, 155 Wn.2d 306, 317, 119 P.3d 825 (2005) (similar). Where the policies informing the recognition of the duty have been examined, thereby resolving any purported policy reasons to limit liability, this Court has not hesitated to hold that duty and factual cause are dispositive of legal cause.[3]

B. The Special Relationship Between A School And Its Students Creates A Duty To Protect Students From All Foreseeable Harm, And A School's Breach Of This Duty, Assuming The Other Predicates Of Negligence Are Present, Should Not Be Excused Under The Doctrine Of Legal Cause.

1. Special relationship duties are carefully circumscribed based on the unique features of the relationship at issue.

The general rule of tort liability for the acts of third parties was established in *Petersen v. State,* 100 Wn.2d 421, 671 P.2d 230 (1983). Adopting *Restatement (Second) of Torts* § 315 (1965), *Petersen* held that while there is generally no duty to prevent a person from harming another, an exception exists where there is a special relationship between the defendant and either a victim or perpetrator of harm. *See* 100 Wn.2d at 426.

[3] Ferndale misreads *Schooley* when it claims that it made proof of legal cause "mandatory" in all cases. *See* Ferndale Supp. Br. at 3. In fact, *Schooley* simply said it should not automatically be assumed that duty and factual cause satisfy legal cause; it did not deny that in certain categories of cases, duty and factual cause may be dispositive of legal cause. *See Schooley*, 134 Wn.2d at 479-80. Notably, the *Restatement (Third)* has moved away from traditional legal cause analysis altogether, addressing legal limits to liability under the duty analysis and incorporating remoteness into the scope of liability question to be decided by the trier of fact. *Compare Restatement (Second) of Torts* §§ 281, 430, 431 & 435 (1965) (recognizing the doctrine of legal cause), *with Restatement (Third) of Torts* § 29 & cmt. f (2010) (addressing legal limits to liability as a question of duty, and treating remoteness as a scope of liability issue to be resolved by the factfinder). This Court has cited *Restatement (Third)* § 29 with approval. *See Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 608, 257 P.3d 532 (2011).

There is substantial conceptual overlap between the two duties described in *Restatement* § 315. Both are based on a special relationship that gives the defendant the authority and ability to control another. *See Restatement* § 315; *see also H.B.H. v. State,* 192 Wn.2d 154, 173, 429 P.3d 484 (2018) (recognizing the common underpinnings of the duties to protect and control). The imposition of a duty in either circumstance reflects a policy determination, recognizing there is "some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act." *See* W. Page Keeton et al., Prosser and Keeton on Torts § 56, at 374 (5th ed. 1984). Since *Petersen*, the Court has recognized a variety of special relationships giving rise to both a duty to control, *see, e.g., Volk v. DeMeerleer*, 187 Wn.2d 241, 386 P.3d 254 (2016) (mental health professional & outpatient), *Taggart v. State*, *supra* (parole officer & parolee), *Hertog v. State, supra* (probation officers & probationers), and a duty to protect, *see, e.g., Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997) (nursing home & resident), *H.B.H. v. State*, *supra* (DSHS & foster child), *N.L. v. Bethel Sch. Dist., supra* (school & students).

To frame the duty, the Court engages in a detailed policy analysis, identifying the relevant aspects of the relationship between the parties and the purposes for which the relationship exists. The relationship defines the scope of the duty and the class of persons to whom the duty is owed. This policy analysis creates a carefully circumscribed duty. *See Volk*, 187 Wn.2d at 265 (recognizing "diverse levels of control" lead to "corresponding

degrees of responsibility"); *see also Restatement (Second) of Torts* § 314A cmt. c (1965) (clarifying the duty to protect applies "only where the relation exists between the parties, and the risk of harm, or of further harm, arises in the course of that relation"); *Restatement (Third) of Torts* § 40 cmt. h (2010) (noting the "relationship identifies a specific person to be protected and thus provides a more limited and justified incursion on autonomy").

Based on these principles, the legal duty is circumscribed based on the particular relationship. The duty is limited by the purpose of the relationship. *See Sheikh v. Choe*, 156 Wn.2d 441, 451-52, 128 P.3d 574 (2006) (no duty owed by DSHS to a victim injured by foster children in its charge, because the purpose of the relationship is to protect foster children and not to protect the public from crime). The duty is also limited by the scope of the defendant's control. *See, e.g., Binschus v. Dep't of Corrections*, 186 Wn.2d 573, 581, 380 P.3d 468 (2016) (no duty owed by the Department of Corrections to the victims of crimes perpetrated by an offender after release from incarceration); *Hungerford v. State Dep't of Corrections*, 135 Wn. App. 240, 258, 139 P.3d 1131 (2006), *review denied,* 160 Wn.2d 1013 (2007) (duty ended upon termination of the period of supervision).

The duty analysis is focused on statutes and other relevant public policies that create the relationship. For instance, in *Taggart*, a parole officer owed a take charge duty under *Restatement (Second) of* Torts §§ 315(a) & 319 (1965) to a victim injured by a parolee in his charge, where applicable statutes afforded the officer authority to regulate the parolee's

movements, require ongoing check-ins and impose release conditions, and this authority was established for the benefit of third parties. *See Taggart,* 118 Wn.2d at 219-20. Similar analysis has been used to adopt and define take charge duties owed by probation officers. *See Hertog,* 138 Wn.2d at 276-81; *Bishop v. Miche,* 137 Wn.2d 518, 524-31, 973 P.2d 465 (1999).

Similar scrutiny is employed in defining the scope of the duty to protect, including the duty owed by a school to its students. "Washington courts have long recognized that school districts 'have an enhanced and solemn duty' of reasonable care to protect their students." *N.L.,* 186 Wn.2d at 430 (citation omitted). The "essential rationale" for imposing upon schools the duty to protect its students is that the student is placed in the custody of the school, "with resulting loss of control to protect himself or herself." *Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343, 368, 423 P.3d 197 (2018) (citations omitted); *see also N.L.*, 186 Wn.2d at 436 (noting the duty to protect has "special application in cases... where the defendant has custody of the plaintiff" (quoting *McLeod,* 42 Wn.2d at 320)).

A school's protective duty has long been circumscribed to only encompass harm falling within its scope of authority. *See Juntila v. Everett Sch. Dist. No. 24*, 178 Wash. 637, 639, 35 P.2d 78 (1934) (holding student's injury occurred within the scope of the school's control, but recognizing that had the incident occurred "beyond the power of the district, either express or implied, it would not be liable"); *Coates v. Tacoma Sch. Dist. No. 10*, 55 Wn.2d 392, 396, 347 P.2d 1093 (1960) (acknowledging that "a

school district . . . [is] not responsible for torts arising from *ultra vires* activities" (brackets added));[4] *Sherwood v. Moxee Sch. Dist. No. 90*, 58 Wn.2d 351, 360, 363 P.2d 138 (1961) (Hill, J., concurring) (similar).

Applying duty analysis, Washington law continues to limit liability to the scope of a school's custody and control. For instance, in *Anderson*, the Court recently recognized that a school's duty is grounded in the custodial nature of the relationship. It emphasized that the negligence must occur during the custodial period, but identified two narrow circumstances in which a duty may be found where the injury occurs off campus. *See Anderson*, 191 Wn.2d at 368-69. Significantly, the limitation on liability recognized in *Anderson* took place at the *duty* stage of the analysis. *See id.*, 191 Wn.2d at 367-73 (describing the standards of conduct encompassed by the duty and holding that the school's alleged misconduct did not fall within its scope); *see also id.* at 386 n.29 (Gordon McCloud, J., dissenting in part) (noting the school district asserted only absence of duty and did not raise the issue of proximate cause). The conclusion that the school owed no duty was based on a number of considerations, including the remoteness of the harm:

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[4] There is language in *Coates* suggesting the plaintiff's case was faulty for lack of legal cause. *See Coates,* 55 Wn.2d at 397 (discussing proximate cause principles). However, absence of duty appears to be the basis for the Court's actual holding. *See id.*, 55 Wn.2d at 395-97 (noting the non-custodial nature of the incident precluded the recognition of a duty). Moreover, the Court's reference to proximate cause cites authorities that equate legal cause with foreseeability. *See id.* at 398 (citing *Eckerson v. Ford's Prairie Sch. Dist. 11*, 3 Wn.2d 475, 101 P.2d 345 (1940) (stating that "[i]f the particular injury was reasonably expectable at the time of the misconduct, then the act of negligence will be regarded as the legal, or proximate, cause of the injury sustained" (*Eckerson*, 3 Wn.2d at 484) (brackets added)). It has since been recognized in Washington that foreseeability is a component of duty, not proximate cause. *See Rikstad v. Holmberg,* 76 Wn.2d 265, 269, 456 P.2d 355 (1969).

> Anderson did not present a genuine issue of material fact that the event was a school activity such that Soap Lake exercised custody over [the plaintiff]. No other member of the high school girls' basketball team was present at [the coach's] house with [the plaintiff]. Neither was there any evidence that [the plaintiff's] presence at the home was somehow related to [her] role on the team. Anderson presented no evidence that the district knew of the activity or that [the coach] held the activity as part of his duties as basketball coach. Thus, we conclude that the gathering at [the coach's] home was [too] distant in time and place from any normal school activity to impose liability on Soap Lake.

Id., 191 Wn.2d at 370 (brackets added; citations omitted). The duty in *Anderson* was limited by the scope of control, and policy concerns related to remoteness of harm were easily incorporated into the duty analysis.

2. The Court should clarify and reaffirm that where a duty based on a special relationship is present, and there are genuine issues of material fact as to foreseeability, negligence and factual cause, the doctrine of legal cause should not operate to limit liability.

This Court has long recognized that the presence of a special relationship has particular significance for the applicability of the doctrine of legal cause. In *Hartley*, the Court examined the doctrine of legal cause and noted its relationship to duty, recognizing that "the question of 'whether liability should attach is essentially another aspect of the policy decision which we confronted in deciding whether duty exists.'" *Hartley,* 103 Wn.2d at 780 (citing *Harbeson*, 98 Wn.2d at 476). Analyzing the doctrine of legal cause, the Court noted that central to the examination of any potential limits on liability is whether the defendant stands "'in any such relation to the plaintiff as to create any legally recognized obligation of conduct for his benefit.'" *Hartley*, 103 Wn.2d at 780 (quoting W. Prosser, *Torts* § 42, 245 (4th ed. 1971). Surveying case law, the Court concluded:

> [W]e have premised legal causation (liability) on the existence of some direct contact or special relationship between the defendant and the injured party. . . . In the case of an injury caused directly by a third party, we have attributed legal causation on the basis of the relationship between the defendant and the third party. *Petersen v. State, supra*[.]

Hartley, 103 Wn.2d at 784 (brackets added).[5] Subsequently, in *Beal v. City of Seattle, supra*, a wrongful death action was brought against the City of Seattle, claiming its delayed response to a 911 call caused the caller's death. Rejecting the City's legal cause challenge, the Court reasoned it had already rejected the same policy considerations for limiting liability in this context when it examined the issue of duty in *Chambers-Castanes v. King County*, 100 Wn.2d 275, 669 P.2d 451 (1983). *See Beal,* 134 Wn.2d at 788.[6]

In take charge cases under *Restatement (Second) of Torts* § 319 (1965), Washington courts have expressly held that duty and factual cause are dispositive of legal cause. *See Joyce*, 155 Wn.2d at 318; *Hertog*, 138 Wn.2d at 284; *Taggart,* 118 Wn.2d at 226. In *Hertog,* the court considered whether a city probation counselor and a county pretrial release counselor owed a duty to a victim injured by an offender under their supervision. Upon finding a duty, the court of appeals concluded legal cause could not operate to limit liability. *See Hertog v. City of Seattle*, 88 Wn. App. 41, 57-59, 943 P.2d 1153 (1997), *affirmed*, 138 Wn.2d 265, 979 P.2d 400 (1999). It

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[5] *Hartley* examined cases applying both the special relationship exception to the public duty doctrine as well as the special relationship duties embodied in *Restatement (Second) of Torts* § 315 (1965) and *Petersen*, 100 Wn.2d at 426. *See Hartley,* 103 Wn.2d at 783-84. *Hartley's* conclusions regarding the relevance of a special relationship in the legal cause analysis should thus apply to either formulation of special relationship duties.

[6] While *Beal* involves the special relationship exception to the public duty doctrine and is not a special relationship case arising under *Restatement* § 315, it is nonetheless instructive as to how the presence of a special relationship duty may satisfy legal cause.

distinguished cases not involving a special relationship, and concluded that the defendants "had a special relationship to [the dangerous third party] for the purposes of preventing him from committing reasonably foreseeable sex-related crimes. We cannot conclude as a matter of law on this record that there was no proximate cause." *Id.*, 88 Wn. App. at 59 (brackets added).

On review, this Court agreed, recognizing the significance of a special relationship in resolving a legal cause challenge:

> Keeping in mind that establishment of a duty does not resolve the proximate cause issue, there is nevertheless a distinction between circumstances where a special relationship is found and where none is found. Policy considerations involved in imposing the duty, such as the parole officer's taking charge of the parolee with the ability and responsibility to supervise the parolee, and the knowledge of the one taking charge of dangerous propensities posing a harm to others, also suggest that where such a relationship is not found, proximate causation may not be so readily found either. Where a special relation exists based upon taking charge of the third party, the ability and duty to control the third party indicate that defendant's actions in failing to meet that duty are not too remote to impose liability.

Hertog, 138 Wn.2d at 284; *see also Joyce*, 155 Wn.2d at 318 (citing *Hertog* as controlling as to legal cause for claims under § 319).

The Court reached a similar conclusion in its analysis of a school's duty to protect a student in *McLeod.* Finding a duty and a fact question as to foreseeability, it rejected a proximate cause challenge:

> Having given full consideration to the factor of foreseeability in discussing the allegations as to negligence, it is not necessary to cover the same ground in dealing with proximate cause. We have held that it is for the jury to decide whether the general field of danger should have been anticipated by the school district. If the jury finds respondent negligent in not having anticipated and guarded against this danger, then it is not for the court to say that such negligence could not be a proximate cause of a harm falling within that very field of danger.

McLeod, 42 Wn.2d at 324.

A defendant in a special protective relationship has a duty to protect against "all foreseeable harms." *See Niece,* 131 Wn.2d at 50. This affirmative duty to protect encompasses a broad range of risks:

> The duty to protect the other against unreasonable risk of harm extends to risks arising out of the actor's own conduct, or the condition of his land or chattels. It extends also to risks arising from forces of nature or animals, or from the acts of third persons, whether they be innocent, negligent, intentional, or even criminal. . . . It extends also to risks arising from pure accident, or from the negligence of the plaintiff himself...

Restatement (Second) of Torts § 314A cmt. d; *see also Anderson*, 191 Wn.2d at 367 n.18 (recognizing the duty to protect is "much broader" than the duty to supervise an employee (citing *Niece*, 131 Wn.2d at 52)).

The nature of the duty based on a special protective relationship was examined in *Niece*. There, the resident of a group home who was sexually assaulted by an employee brought suit against the group home on a number of theories, including negligent supervision of the employee, vicarious liability and breach of the duty to protect. Rejecting the first two bases of liability but recognizing a duty to protect claim, the Court explained the duty to protect was "much broader," in that it required protection against "all foreseeable harms." 131 Wn.2d at 52. This expansive duty "is limited only by the concept of foreseeability." *Id.*

This Court has recognized the relevance of the duty announced in *Niece* in the school/student context, agreeing that where the protective duty is present, it imposes a broad duty to protect the plaintiff from all harm "within the general field of danger which should have been anticipated."

Anderson, 191 Wn.2d at 368. A student is vulnerable in the school setting, as he is required to attend school and must comply with staff directions. Students may not decline to participate in mandated activities, even when unreasonable or unsafe, and are deprived of ordinary means of protection. As recognized in *Briscoe v. Sch. Dist. No. 123, Grays Harbor Cty.*, 32 Wn.2d 353, 201 P.2d 697 (1949):

> [W]hen a pupil attends a public school, he or she is subject to the rules and discipline of the school, and the protective custody of the teachers is substituted for that of the parent. As a correlative of this right on the part of the school district to enforce, as against the pupils, rules and regulations...a duty is imposed by law on the school district to take certain precautions to protect the pupils in its custody from dangers reasonably to be anticipated....

32 Wn.2d at 362 (brackets added).

A school's duty to protect, like other special relationship duties, is unique in its breadth. *See Hendrickson v. Moses Lake Sch. Dist.*, 192 Wn.2d 269, 277, 428 P.3d 1197 (2018). In *Hendrickson*, a student sued her school after she injured her hand during shop class. At trial, the plaintiff requested an instruction stating that the special relationship between a school and its students gives rise to a "heightened" duty. This Court held the trial court correctly refused the instruction, because the duty to protect requires only ordinary care. What sets apart special relationship duties, like that of a school to its students, is not the standard of care, but the "larger pool of risk" that is encompassed by this affirmative duty:

> [I]t is helpful to think of a school district's duty of care as existing within a pool of risk. Ordinarily, parties operate within a limited pool of risk—they are not required to take affirmative action to protect

> others from harm unless the object causing harm is within the party's direct control. However, when parties have a special custodial relationship, like the relationship between a school district and its students, they enter a larger pool of risk and are required to "take affirmative precautions for the aid or protection of the other."

Hendrickson, 192 Wn.2d at 277 (brackets added).

The policy analysis undertaken at the duty stage to examine special relationships creates carefully circumscribed duties. Within the scope of the relationship, the resulting duty is broad, and is limited only by the concept of foreseeability. In keeping with this Court's precedent, where a special relationship duty is present and there are issues of fact as to the other elements of negligence, legal cause should not operate to limit liability.

Ferndale protests that if a legal cause defense is not recognized here "there would be *no risk* that a school could take... without facing almost-automatic liability." Ferndale Supp. Br. at 10. This Court has generally found such pleas unpersuasive, noting concepts like foreseeability, superseding cause and contributory negligence operate to prevent excessive liability. *See Crowe v. Gaston,* 134 Wn.2d 509, 518-20, 951 P.2d 1118 (1998); *Schooley*, 134 Wn.2d at 481-83. And, rather than "almost-automatic liability," schools are only required to act reasonably. *See Hendrickson*, 192 Wn.2d at 277 (noting the duty "is only one to exercise reasonable care under the circumstances"); *see also Volk*, 187 Wn.2d at 273-74 (stating the reasonable care standard "fairly balances the needs of protecting the public... and providing the necessary protection for [defendants] to perform their jobs" (brackets added)).

3. The Court should reject Ferndale's "increased risk" limitation on schools' liability.

Ferndale urges the Court to limit school liability to conduct that increases the risk of harm. *See* Ferndale Supp. Br. at 12-16. The cases it cites, however, concern the policy implications related to school liability for student injuries suffered in car accidents occurring outside school custody after students voluntarily drive off campus. Here, no such policy issue is presented because Gabriel was clearly in Ferndale's custody when he died.

In Washington, a school's protective duty is circumscribed by its scope of control, and creates an *affirmative* duty to protect within the scope of the relationship. Ferndale's argument appears to misapprehend the distinction between affirmative duties and duties to refrain from affirmative acts of misfeasance. It conflates affirmative duties to control or protect with the separate duty arising from the creation of an unreasonable risk of harm. Both are categories of duty-triggering events in Washington and the analytical distinction between them should be preserved.

Washington law looks to the *Restatements of Torts* in defining tort duties in this context. *See Robb v. City of Seattle,* 176 Wn.2d 427, 433-39, 295 P.3d 212 (2013) (examining *Restatement (Second) of Torts* §§ 302, 302B, 314, 316-324 (1965)); *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 608, 257 P.3d 532 (2011) (analyzing scope of duty under *Restatement (Third) of Torts* §§ 7(a) & 29 (2010)). *Robb* applied *Restatement (Second)* § 314, which observes separate duties are triggered by special relationships on the one hand and the creation of an increased risk on the other:

> 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.

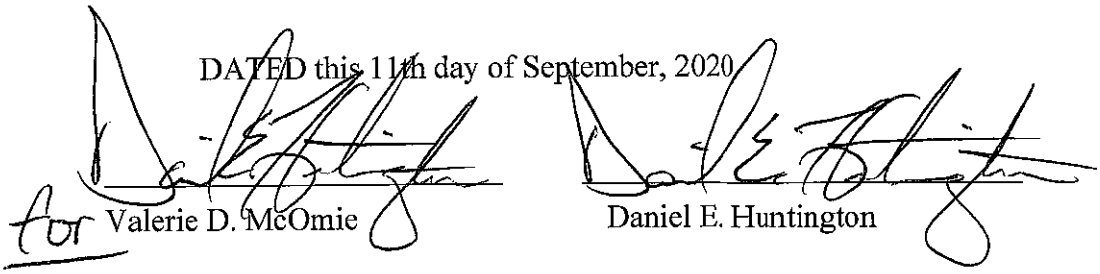
Robb, 176 Wn.2d at 434-35 (quoting *Restatement (Second)* § 314 cmt. a).

Restatement (Third) § 40 expressly identifies the protective duty a school owes to its students, and clarifies this duty "is in addition to" other duties owed by a school, including the duty to "use reasonable care in its operations for the safety of its students," and the duty owed by a possessor of land. *Restatement (Third)* § 40 cmt. l; *see also Restatement (Third)* § 29 cmt. r (recognizing affirmative duties "do not arise because of the actor's conduct creating risk . . . [but instead] arise out of relationships or undertakings that require an actor to exercise reasonable care to avoid or ameliorate risks posed to another by natural forces or others" (brackets added)). The Court should preserve the integrity of these independent tort duties and reject Ferndale's increased risk limitation here.

VI. CONCLUSION

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

DATED this 11th day of September, 2020



for Valerie D. McOmie

Daniel E. Huntington

On behalf of WSAJ Foundation

Appendix

Restatement (Second) of Torts § 314 (1965)

Restatement (Second) of Torts § 314A (1965)

Restatement (Second) of Torts § 315 (1965)

Restatement (Second) of Torts § 319 (1965)

Restatement (Third) of Torts: § 29 (2010)

Restatement (Third) of Torts § 40 (2010)

Restatement (Second) of Torts § 314 (1965)

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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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Restatement (Second) of Torts § 314A (1965)

§ 314A Special Relations Giving Rise to Duty to Aid or Protect

Comment:
Reporter's Notes
Case Citations - by Jurisdiction

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against unreasonable risk of physical harm, and

(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

(2) An innkeeper is under a similar duty to his guests.

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

See Reporter's Notes.

Caveat:

The Institute expresses no opinion as to whether there may not be other relations which impose a similar duty.

Comment:

a. An additional relation giving rise to a similar duty is that of an employer to his employee. (See § 314B.) As to the duty to protect the employee against the conduct of third persons, see Restatement of Agency, Second, Chapter 14.

b. This Section states exceptions to the general rule, stated in § 314, that the fact that the actor realizes or should realize that his action is necessary for the aid or protection of another does not in itself impose upon him any duty to act. The duties stated

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in this Section arise out of special relations between the parties, which create a special responsibility, and take the case out of the general rule. The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found. There may be other such relations, as for example that of husband and wife, where the duty is recognized by the criminal law, but there have as yet been no decisions allowing recovery in tort in jurisdictions where negligence actions between husband and wife for personal injuries are permitted. The question is therefore left open by the Caveat, preceding Comment *a* above. The law appears, however, to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.

c. The rules stated in this Section apply only where the relation exists between the parties, and the risk of harm, or of further harm, arises in the course of that relation. A carrier is under no duty to one who has left the vehicle and ceased to be a passenger, nor is an innkeeper under a duty to a guest who is injured or endangered while he is away from the premises. Nor is a possessor of land under any such duty to one who has ceased to be an invitee.

d. The duty to protect the other against unreasonable risk of harm extends to risks arising out of the actor's own conduct, or the condition of his land or chattels. It extends also to risks arising from forces of nature or animals, or from the acts of third persons, whether they be innocent, negligent, intentional, or even criminal. (See § 302B.) It extends also to risks arising from pure accident, or from the negligence of the plaintiff himself, as where a passenger is about to fall off a train, or has fallen. The duty to give aid to one who is ill or injured extends to cases where the illness or injury is due to natural causes, to pure accident, to the acts of third persons, or to the negligence of the plaintiff himself, as where a passenger has injured himself by clumsily bumping his head against a door.

e. The duty in each case is only one to exercise reasonable care under the circumstances. The defendant is not liable where he neither knows nor should know of the unreasonable risk, or of the illness or injury. He is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate, or to give aid to one whom he has no reason to know to be ill. He is not required to take any action where the risk does not appear to be an unreasonable one, as where a passenger appears to be merely carsick, and likely to recover shortly without aid.

f. The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured. He is not required to take any action beyond that which is reasonable under the circumstances. In the case of an ill or injured person, he will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained. He is not required to give any aid to one who is in the hands of apparently competent persons who have taken charge of him, or whose friends are present and apparently in a position to give him all necessary assistance.

Illustrations:

1. A, a passenger on the train of B Railroad, negligently falls off of the train, and is injured. The train crew discover that he has fallen off, but do nothing to send aid to him, or to notify others to do so. A lies unconscious by the side of the track in a cold rain for several hours, as a result of which his original injuries are seriously aggravated. B Railroad is subject to liability to A for the aggravation of his injuries.

2. A, a passenger riding on the train of B Railroad, suffers an apoplectic stroke, and becomes unconscious. The train crew unreasonably assume that A is drunk, and do nothing to obtain medical assistance for him, or to turn him over at a station to those who will do so. A continues to ride on the train in an unconscious condition for five hours, during which time his illness is aggravated in a manner which proper medical attention would have avoided. B Railroad is subject to liability to A for the aggravation of his illness.

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3. A is a guest in B's hotel. Without any fault on the part of B, a fire breaks out in the hotel. Although they could easily do so, B's employees fail to call A's room and warn him to leave it. As a result A is overcome by smoke and carbon monoxide before he can escape, and is seriously injured. B is subject to liability to A.

4. A, a child six years old, accompanies his mother, who is shopping in B's department store. Without any fault on the part of B, A runs and falls, and gets his fingers caught in the mechanism of the store escalator. B's employees see what has occurred, but unreasonably delay in shutting off the escalator. As a result, A's injuries are aggravated in a manner which would have been avoided if the escalator had been shut off with reasonable promptness. B is subject to liability to A for the aggravation of his injuries.

5. A, a patron attending a play in B's theatre, suffers a heart attack during the performance, and is disabled and unable to move. He asks that a doctor be called. B's employees do nothing to obtain medical assistance, or to remove A to a place where it can be obtained. As a result, A's illness is aggravated in a manner which reasonably prompt medical attention would have avoided. B is subject to liability to A for the aggravation of his illness.

6. A is imprisoned in a jail, of which B is the jailor. A suffers an attack of appendicitis, and cries for medical assistance. B does nothing to obtain it for three days, as a result of which A's illness is aggravated in a manner which proper medical attention would have avoided. B is subject to liability to A for the aggravation of his illness.

7. A is a small child sent by his parents for the day to B's kindergarten. In the course of the day A becomes ill with scarlet fever. Although recognizing that A is seriously ill, B does nothing to obtain medical assistance, or to take the child home or remove him to a place where help can be obtained. As a result, A's illness is aggravated in a manner which proper medical attention would have avoided. B is subject to liability to A for the aggravation of his injuries.

Reporter's Notes

This Section has been added to the first Restatement.

Illustration 1 is based on Yazoo & M.V.R. Co. v. Byrd, 89 Miss. 308, 42 So. 286 (1906); Layne v. Chicago & Alton R. Co., 175 Mo.App. 34, 157 S.W. 850 (1913); Cincinnati, H. & D.R. Co. v. Kassen, 49 Ohio St. 230, 31 N.E. 282, 16 L.R.A. 674 (1892); Yu v. New York, N.H. & H.R. Co., 145 Conn. 451, 144 A.2d 56 (1958); Continental Southern Lines, Inc. v. Robertson, 241 Miss. 796, 133 So.2d 543, 92 A.L.R.2d 653 (1961), passenger injured through his own negligence.

Illustration 2 is taken from Middleton v. Whitridge, 213 N.Y. 499, 108 N.E. 192, Ann.Cas. 1916C, 856 (1915). Cf. Kambour v. Boston & Maine R. Co., 77 N.H. 33, 86 A. 624, 45 L.R.A. N.S. 1188 (1913); Jones v. New York Central R. Co., 4 App.Div.2d 967, 168 N.Y.S.2d 927 (1957), affirmed, 4 N.Y.2d 963, 177 N.Y.S.2d 492, 152 N.E.2d 519 (1958); Yu v. New York, N.H. & H.R. Co., 145 Conn. 451, 144 A.2d 56 (1958).

Compare, as to the duty of a carrier to protect its passengers from dangers arising from the conduct of third persons: Hillman v. Georgia Ry. & Banking Co., 126 Ga. 814, 56 S.E. 68, 8 Ann.Cas. 222 (1906); Nute v. Boston & Maine R. Co., 214 Mass. 184,

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Restatement (Second) of Torts § 315 (1965)

Restatement of the Law - Torts | June 2020 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

Title A. Duty to Control Conduct of Third Persons

§ 315 General Principle

Comment:
Case Citations - by Jurisdiction

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Comment:

a. The rule stated in this Section is a special application of the general rule stated in § 314.

b. *Distinction between duty to act for another's protection and duty to act for self-protection.* In the absence of either one of the kinds of special relations described in this Section, the actor is not subject to liability if he fails, either intentionally or through inadvertence, to exercise his ability so to control the actions of third persons as to protect another from even the most serious harm. This is true although the actor realizes that he has the ability to control the conduct of a third person, and could do so with only the most trivial of efforts and without any inconvenience to himself. Thus if the actor is riding in a third person's car merely as a guest, he is not subject to liability to another run over by the car even though he knows of the other's danger and knows that the driver is not aware of it, and knows that by a mere word, recalling the driver's attention to the road, he would give the driver an opportunity to stop the car before the other is run over. On the other hand, under the rule stated in § 495, the actor is guilty of contributory negligence if he fails to exercise an ability which he in fact has to control the conduct of any third person, where a reasonable man would realize that the exercise of his control is necessary to his own safety. Thus if the actor, while riding merely as a guest, does not warn the driver of a danger of which he knows and of which he has every reason to

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believe that the driver is unaware, he becomes guilty of contributory negligence which precludes him from recovery against another driver whose negligent driving is also a cause of a collision in which the actor himself is injured.

Comment on Clauses (a) and (b):

c. The relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316- 319. The relations between the actor and the other which require the actor to control the conduct of third persons for the protection of the other are stated in §§ 314A and 320.

Case Citations - by Jurisdiction

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Restatement (Second) of Torts § 319 (1965)

§ 319 Duty of Those in Charge of Person Having Dangerous Propensities

Comment:
Reporter's Notes
Case Citations - by Jurisdiction

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

See Reporter's Notes.

Comment:

a. The rule stated in this Section applies to two situations. The first situation is one in which the actor has charge of one or more of a class of persons to whom the tendency to act injuriously is normal. The second situation is one in which the actor has charge of a third person who does not belong to such a class but who has a peculiar tendency so to act of which the actor from personal experience or otherwise knows or should know.

Illustrations:

1. A operates a private hospital for contagious diseases. Through the negligence of the medical staff. B, who is suffering from scarlet fever, is permitted to leave the hospital with the assurance that he is entirely recovered, although his disease is still in an infectious stage. Through the negligence of a guard employed by A, C, a

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delirious smallpox patient, is permitted to escape. B and C communicate the scarlet fever and smallpox to D and E respectively. A is subject to liability to D and E.

2. A operates a private sanitarium for the insane. Through the negligence of the guards employed by A, B, a homicidal maniac, is permitted to escape. B attacks and causes harm to C. A is subject to liability to C.

Reporter's Notes

This Section has been changed from the first Restatement by eliminating the word "voluntarily," so that the Section now includes those who "involuntarily" take charge of third persons, if that be possible. None of the decisions supporting the Section has laid stress upon the defendant's voluntary conduct in taking charge, and it would appear that his protests against being required to do so would not be material to the rule stated, so long as he does so.

Illustration 1 is based on Missouri, K. & T. R. Co. v. Wood, 95 Tex. 223, 66 S.W. 449, 56 L.R.A. 592, 93 Am.St.Rep. 834 (1902); Cf. University of Louisville v. Hammock, 127 Ky. 564, 106 S.W. 219, 14 L.R.A.N.S. 784, 128 Am.St.Rep. 355 (1907); Scolavino v. State, 187 Misc. 253, 62 N.Y.S.2d 17 (1946), modified, 271 App.Div. 618, 67 N.Y.S.2d 202 (1947), affirmed, 297 N.Y. 460, 74 N.E.2d 174 (1947); Sylvester v. Northwestern Hospital of Minneapolis, 236 Minn. 384, 53 N.W.2d 17 (1952).

Illustration 2 is based on Austin W. Jones Co. v. State, 122 Me. 214, 119 A. 577 (1923); University of Louisville v. Hammock, 127 Ky. 564, 106 S.W. 219, 14 L.R.A.N.S. 784, 128 Am.St.Rep. 355 (1907); Webb v. State, 91 So.2d 156 (La.App.1956). Cf. St. George v. State, 203 Misc. 340, 118 N.Y.S.2d 596 (1953), reversed on other grounds, 283 App.Div. 245, 127 N.Y.S.2d 147 (1953), affirmed, 308 N.Y. 681, 124 N.E.2d 320. Contra: Henderson v. Dade Coal Co., 100 Ga. 568, 28 S.E. 251, 40 L.R.A. 95 (1897); Hullinger v. Worrell, 83 Ill. 220 (1876); cf. Green v. State, 91 So.2d 153 (La.App.1956).

In some cases the defendant has been held not liable because the type of misconduct after escape was regarded as unforeseeable, and not within the defendant's duty of protection. Ballinger v. Rader, 153 N.C. 488, 69 N.E. 497 (1910); Fisher v. Mutimer, 293 Ill.App. 201, 12 N.E.2d 315 (1937); Williams v. State, 308 N.Y. 548, 127 N.E.2d 545 (1955). See § 302B and Comments; Green v. State, 91 So.2d 153 (La.App.1956).

Case Citations - by Jurisdiction

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Restatement (Third) of Torts: Phys. & Emot. Harm § 29 (2010)

Restatement of the Law - Torts | June 2020 Update

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

Chapter 6. Scope of Liability (Proximate Cause)

§ 29 Limitations on Liability for Tortious Conduct

Comment:
Reporters' Note
Case Citations - by Jurisdiction

An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.

Comment:

a. *History.* No serious question exists that some limit on the scope of liability for tortious conduct that causes harm is required. The difficulties arise in working out the framework for this limit, both between no-duty limitations and scope-of-liability limits, and in the form that scope-of-liability rules take. The limits on liability contained in this Chapter reflect limitations contained in two different places in the Restatement Second of Torts. The requirement that the harm be within the scope of the risk was stated in § 281, which provided the elements of a negligence claim, and in other Sections that addressed specific tort claims. See, e.g., Restatement Second, Torts § 519. Overlapping and additional limitations were contained in the Chapter on legal cause for negligence actions in the Restatement Second of Torts §§ 430-462. Consistent with modern usage, all of these limitations are consolidated in this Chapter, rather than considered separately as an aspect either of duty or of the elements of a negligence or other tort claim for physical or emotional harm.

The "substantial factor" requirement for legal cause in the Second Restatement of Torts has often been understood to address proximate cause, although that was not intended. Because the rules in this Chapter address the grounds for limiting liability with greater precision than the substantial-factor standard, this Restatement does not use that term. One provision does address insignificant causes when overdetermined outcomes (§ 27) exist; the concept of "substantiality," or perhaps more accurately, "insubstantiality," is useful for capturing the concerns in that specific and confined context. See § 36, Comment *b*. This Section also includes limits on the effect of a victim's contributory negligence in apportioning liability. See Comment *s*.

Although scope of liability is an element of a prima facie case, facts beyond those established for the other elements of the tort are almost never involved. Ordinarily, the plaintiff's harm is self-evidently within the defendant's scope of liability and requires no further attention. Thus, scope of liability functions as a limitation on liability in a select group of cases, operating more like an affirmative defense, although formally it is not one.

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b. Proximate-cause terminology and instructions to the jury. As mentioned in the Special Note at the outset of this Chapter, the term "proximate cause" is a poor one to describe limits on the scope of liability. It is also an unfortunate term to employ for factual cause or the combination of factual cause and scope of liability. Even if lawyers and judges understand the term, it is confusing for a jury. Courts should craft instructions that inform the jury that, for liability to be imposed, the harm that occurred must be one that results from the hazards that made the defendant's conduct tortious in the first place. Employing the term "proximate cause" implies that there is but one cause—the cause nearest in time or geography to the plaintiff's harm—and that factual causation bears on the issue of scope of liability. Neither of those implications is correct. Multiple factual causes always exist, see § 26, Comment *c*, and multiple proximate causes are often present. An actor's tortious conduct need not be close in space or time to the plaintiff's harm to be a proximate cause. And proximate cause is only remotely related to factual causation. Thus, the term "causation" should not be employed when explaining this concept to a jury.

Unfortunately, most standard jury instructions use the term "proximate cause" and include within it instructions on both factual cause and scope of liability. This often results in the submission of an issue to the jury that is not genuinely in dispute and that could have been eliminated from the case by one of several appropriate procedural devices. In some cases, there is no real dispute that the harm is within the scope of the defendant's responsibility. Conversely, in some cases scope of liability may be a genuine issue, but factual cause is not. Jury instructions that separate these two components of the case facilitate focus on the appropriate matter. Even in cases in which both issues are disputed, separate instructions and separate consideration of each issue should clarify the requisite inquiries for the jury.

Illustration:

1. Alan was performing maintenance inside a tunnel that contained two lanes of roadway for vehicular traffic. While stooping to pick up waste scraps at the edge of the road, Alan was hit from behind by an automobile driven by Pat. Alan sues Pat alleging that Pat's negligence caused the collision and Alan's injuries. If the factfinder determines that Pat was unreasonably inattentive in driving his vehicle and that the negligence was a factual cause of Alan's injuries, there is no scope-of-liability issue with respect to Pat's negligence for the factfinder to decide. Striking a nearby pedestrian is one of the potential harms that made Pat's driving negligent.

Scope-of-liability principles are also applicable to a plaintiff's contributory negligence. Similar to the principle explained above, there may be no genuine scope-of-liability issue for a plaintiff's contributory negligence.

Illustration:

2. Same facts as Illustration 1. In addition, Pat claims that Alan was contributorily negligent for failing to wear a reflecting vest or other brightly colored clothing to warn approaching cars of his presence. If the factfinder determines that Alan was contributorily negligent and that his negligence was a factual cause of his harm, there is no scope-of-liability issue with respect to Alan's contributory negligence for the factfinder to decide.

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The reason for wearing a reflecting vest is to alert nearby drivers of the pedestrian's presence so as to avoid an accident.

c. *Scope.* This Restatement covers liability for physical and emotional harm, and this Chapter provides limits on the scope of liability for such cases. Chapters 8 and 9 contain limited-duty rules for pure emotional harm and land possessors. Generally, no- or limited-duty rules have been employed to limit liability for other harms, such as economic loss, for which tort law has historically provided less protection. Economic loss, especially, given the interdependent economy and the variety of financial relationships, can spread quite broadly, far more so than physical harm from a single tortious act. Courts have relied on proximate cause to place limits on the scope of liability for statutory claims where the statute contains general protections against a broad array of (especially economic) harms to a potentially large group of injured persons. Thus, the provisions on scope of liability in this Chapter, which are centered on liability for physical and emotional harm, may not be appropriate in other contexts. Conversely, scope-of-liability limitations imposed in other contexts may be inappropriate for use in physical-harm cases covered by this Restatement.

d. *Harm different from the harms risked by the tortious conduct.* Central to the limitation on liability of this Section is the idea that an actor should be held liable only for harm that was among the potential harms—the risks—that made the actor's conduct tortious. The term "scope of liability" is employed to distinguish those harms that fall within this standard and, thus, for which the defendant is subject to liability and, on the other hand, those harms for which the defendant is not liable. This limit on liability serves the purpose of avoiding what might be unjustified or enormous liability by confining liability's scope to the reasons for holding the actor liable in the first place. To apply this rule requires consideration, at an appropriate level of generality, see Comment *i*, of: (a) the risks that made the actor's conduct tortious, and (b) whether the harm for which recovery is sought was a result of any of those risks. Risk is explained in § 3, Comment *e*, as consisting of harm occurring with some probability. The magnitude of the risk is the severity of the harm discounted by the probability that it will occur. For purposes of negligence, which requires foreseeability, risk is evaluated by reference to the foreseeable (if indefinite) probability of harm of a foreseeable severity. If a strict-liability claim does not require foreseeability, the concept of risk can be determined by examining the severity and probability in retrospect. See Comment *j*.

Thus, the jury should be told that, in deciding whether the plaintiff's harm is within the scope of liability, it should go back to the reasons for finding the defendant engaged in negligent or other tortious conduct. If the harms risked by that tortious conduct include the general sort of harm suffered by the plaintiff, the defendant is subject to liability for the plaintiff's harm. When defendants move for a determination that the plaintiff's harm is beyond the scope of liability as a matter of law, courts must initially consider all of the range of harms risked by the defendant's conduct that the jury *could* find as the basis for determining that conduct tortious. Then, the court can compare the plaintiff's harm with the range of harms risked by the defendant to determine whether a reasonable jury might find the former among the latter.

The standard imposed by this Section is often referred to as the requirement that the harm be "within the scope of the risk," or some similar phrase, for liability to be imposed. For the sake of convenience, this limitation on liability is referred to in the remainder of this Chapter as the "risk standard."

Illustrations:

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3. Richard, a hunter, finishes his day in the field and stops at a friend's house while walking home. His friend's nine-year-old daughter, Kim, greets Richard, who hands his loaded shotgun to her as he enters the house. Kim drops the shotgun, which lands on her toe, breaking it. Although Richard is negligent for giving Kim his shotgun, the risk that makes Richard negligent is that Kim might shoot someone with the gun, not that she would drop it and hurt herself (the gun was neither especially heavy nor unwieldy). Kim's broken toe is outside the scope of Richard's liability, even though Richard's tortious conduct was a factual cause of Kim's harm.

4. James Transport Co. provides a company-owned automobile to Henry for personal and business use. While driving on vacation, Henry is speeding, loses control of the vehicle, and destroys a roadside billboard owned by Nannouncements, Inc. Nannouncements sues James Transport, claiming that it negligently entrusted an automobile to Henry, despite his history of several speeding and other moving violations, as well as a number of recent accidents, all of which were known by James. If the factfinder determines that James was negligent in providing the vehicle to Henry, Nannouncement's harm is within the scope of James's liability for its negligence, as a matter of law, because the risk that made James negligent was that Henry would drive poorly and cause an accident.

5. As in the previous Illustration, James provides a company-owned automobile to Henry for personal and business use, despite his poor driving record. While on vacation, Henry goes out with Michelle and, at the end of the evening, asks her to drive home. While Michelle is driving, she negligently runs into Vivian, a pedestrian. Vivian introduces no evidence that Henry had a propensity to lend his car to other poor drivers. Vivian's harm is outside the scope of liability of any negligence by James in entrusting the automobile to Henry, as a matter of law. (Whether James is liable as the owner of the automobile is a different matter not addressed by this Illustration.)

Tortious conduct may be wrongful because of a variety of risks to a number of different classes of persons. Thus, driving a vehicle negligently poses risks to persons and property who might foreseeably be harmed in a number of ways—by a collision with another vehicle or pedestrian, by the vehicle leaving the road, by the consequences of a narrowly averted collision, by the confusion and distraction of an accident scene, or by other consequences. Some of those risks may be more prominent than others, but all are relevant in determining whether the harm is within the scope of liability of the actor's tortious conduct.

Illustration:

6. Parker's automobile is run off a narrow, hilly road by Wilson, who is driving a semitrailer negligently. Because the accident scene involves an unusual configuration of the semitrailer and Parker's vehicle, Deborah, who is driving by, stops her car at the side of the road to observe the scene. While parked at the side of the road, Deborah is hit by another vehicle driven carelessly into Deborah's car. Whether Deborah's harm is within the scope of liability created by Wilson's negligence in causing the accident with Parker is a question for the factfinder.

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Determining the risks that made the defendant's conduct tortious may require consideration of whether that conduct includes risks also posed by the tortious conduct of another person. Thus, identical injuries, if they occur in different ways or at different times, may be treated differently under this Section, despite the general rule contained in Comment *o*.

Illustrations:

7. Arthur owns a convenience store located within an exclusive, gated community. Sandy, who lives in the community, tripped on a curbstone in the store's parking lot one night after emerging from the store. Sandy suffered a skull fracture in the fall. Sandy sues Arthur for negligence in failing to have light to illuminate the parking lot, which is otherwise pitch dark. If the factfinder determines that Arthur's failure to light the parking lot was negligent and a factual cause of Sandy's harm, Sandy's harm is within the scope of Arthur's liability, because the risk of someone falling in the parking lot due to darkness is among the risks that made Arthur negligent for failing to provide lighting in the parking lot.

8. Same facts as Illustration 7, except that Sheldon, a thief, to gain entrance to the grounds, digs a tunnel underneath a fence, owned and maintained by the homeowners' association, that surrounds Sandy's community. Sheldon sees Sandy emerge from Arthur's store. As Sandy walks through the parking lot, Sheldon is able to approach Sandy undetected because of the darkness. Sheldon trips Sandy from behind, and in the resulting fall, Sandy suffers a skull fracture. No prior assaults had occurred at Arthur's store. Sheldon's role in causing Sandy's harm is relevant to whether that harm is outside the scope of Arthur's liability for Arthur's failing to light the parking lot. The factfinder may decide that the harm Sandy suffered arose from the risk of a criminal attack due to darkness and that this was not a foreseeable risk that made Arthur's failure to provide lighting negligent because it occurred in a gated community without any previous criminal history.

Many jurisdictions are sensitive to imposing liability for failing to protect others from the risk of criminal attacks and often require some prior criminal actions before permitting liability to be imposed. Those jurisdictions might decide that Sandy's harm is outside the scope of Arthur's liability as a matter of law. Even in those jurisdictions that would not decide Arthur's scope of liability as a matter of law, Sheldon's role in causing the harm would be appropriate for argument by the attorneys and consideration by the factfinder with regard to Arthur's scope of liability. Thus, Illustrations 7 and 8 reveal the fact-intensive nature of the scope-of-liability issue. In each case, the inquiry requires assessment, based on the particular circumstances of the case, of the legally cognizable risks that existed and that made the actor's acts or omissions with regard to those risks tortious. In a negligence action, prior incidents or other facts evidencing risks may make certain risks foreseeable that otherwise were not, thereby changing the scope-of-liability analysis.

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e. Rationale. Limiting liability to harm arising from the risks created by the tortious conduct has the virtue of relative simplicity. It also provides a more refined analytical standard than a foreseeability standard or an amorphous direct-consequences test. Furthermore, the standard adopted in this Section imposes limits on liability by reference to the reasons for holding an actor liable for tortious conduct in the first place. The risk standard appeals to intuitive notions of fairness and proportionality by limiting liability to harms that result from risks created by the actor's wrongful conduct, but for no others. It also provides sufficient flexibility to accommodate fairness concerns raised by the specific facts of a case.

Critiques of the over- and underbreadth of the risk standard as the limit on scope of liability have been voiced, as has the criticism that the risk standard is indeterminate for a significant class of cases. Nevertheless, the indeterminacy—which might also be characterized as flexibility—in the risk standard can be understood as a virtue that assists in ameliorating the over- and underbreadth criticism. The risk standard can be employed to do justice in a wide range of cases in which the particular facts require careful consideration and thereby resist any rule-like formulation. Yet it does so within an understandable and coherent framework that avoids standardless determinations. Finally, some of the inadequacies of the risk standard are addressed in other Sections and Comments in this Chapter, which identify specific areas in which courts have modified the standard contained in this Section. See Comment *m* and §§ 31- 33.

Courts have increasingly moved toward adopting a foreseeability test for scope of liability in negligence cases. Currently, virtually all jurisdictions employ a foreseeability (or risk) standard for some range of scope-of-liability issues in negligence cases. When properly understood and framed, the foreseeability standard is congruent with the risk standard adopted by this Section for negligence cases. At least some courts have employed language that veers closer to the formulation of the risk standard provided in this Section than does a foreseeability test. See Reporters' Note to Comment *d*. The risk standard nevertheless is preferable to a foreseeability standard for reasons explained in Comment *j*. The primary alternative rule to the risk standard for limiting a tortfeasor's liability is the direct-consequences test. That rule permits liability to be imposed even for harm that is beyond the scope of the risk in negligence actions, including harm that is unforeseeable. Thus, the direct-consequences test sometimes permits a wider scope of liability. But impose some limitation it must, and the term "direct consequences" provides an even vaguer and more amorphous limit on liability than the risk standard. And, when other than background forces intervene after an actor's tortious conduct, the direct-consequences test may produce a much narrower scope of liability than the risk standard, results that most courts reject. See § 34.

f. Relationship with duty limitations. This Chapter is about limits on the liability of an actor whose tortious conduct is a factual cause of harm. There are two primary legal doctrines for limiting liability: duty and scope of liability. Some courts use duty in situations in which other courts would use proximate cause. The classic case of Palsgraf v. Long Island Railroad Co., revealed the potential for interchangeability between duty and scope of liability, although proximate cause was the term employed at the time. Judge Cardozo employed duty, while Judge Andrews employed proximate cause, to determine whether the defendant was liable for harm to a particular plaintiff. *Palsgraf*'s legacy has been a tension in tort law about the proper balance between duty rules and proximate-cause limits to circumscribe appropriately the scope of liability.

One significant difference between these two doctrines is helpful in determining their appropriate spheres of application. Duty is a question of law for the court, see § 7, while scope of liability, although very much an evaluative matter, is treated as a question of fact for the factfinder. Hence, duty is a preferable means for addressing limits on liability when those limitations are clear, when they are based on relatively bright lines, when they are of general application, when they do not usually require resort to disputed facts in a case, when they implicate policy concerns that apply to a class of cases that may not be fully appreciated by a jury deciding a specific case, and when they are employed in cases in which early resolution of liability is particularly desirable. See § 7. Duty is usefully employed when a court seeks to make a telling pronouncement about when actors may or, on the other hand, may not be held liable. Thus, the liability of social hosts for providing alcohol to their guests is best treated as a duty issue, rather than as a matter of scope of liability. On the other hand, when the limits imposed require careful attention to the specific facts of a case, and difficult, often amorphous evaluative judgments for which modest differences in the factual circumstances may change the outcome, scope of liability is a more flexible and preferable device for placing limits on liability. Its use is also consistent with the role of the jury in tort cases.

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Consistent with these observations, Chapter 3 of this Restatement recognizes a general duty of reasonable care to avoid causing physical harm and also recognizes that courts have carved out a small number of enclaves of no duty and more limited duties in actions based on negligence. See § 7(b), §§ 47- 48, and Chapter 9. Limitations of liability based on the specific facts of a case—for example, the relationship of the actor's tortious conduct to the victim's harm or the unusual, wanton, or extraordinary way in which the harm occurred—are matters courts denominate as proximate cause and are addressed as scope-of-liability limits in this Chapter.

One more good reason for preferring scope of liability to duty to deal with the range of problems addressed in this Chapter stems from the fact that most often the scope-of-liability issue does not involve the problem posed in *Palsgraf*; that is, where the plaintiff was outside the scope of harm. Rather, most cases involve persons within the foreseeable scope of some harm, but who have suffered harm that arose from risks other than those that made the defendant's conduct tortious. Although pronouncements of no duty to unforeseeable plaintiffs have some appeal, there is awkwardness in stating that the actor had a duty not to cause a certain range of harm, but had no duty to avoid causing the type of harm that actually occurred. In short, an unforeseeable-plaintiff rule is not very helpful in addressing most scope-of-liability issues.

g. Decoupling legal cause. The first and Second Restatements of Torts were influenced by causal thinking that has long been repudiated. This Restatement, by contrast, treats factual cause and scope of liability separately for several reasons. The most important is that decoupling the two concepts permits the court and factfinder to focus on the issue that is truly in dispute without having to invoke a doctrine that is not in dispute. Even when both issues are in dispute, clearly differentiating the predominantly historical question of factual cause from the evaluative question of scope of liability makes for a clearer, more focused analysis. Finally, separation enables courts to employ instructions that avoid causal language when explaining scope-of-liability limitations to the jury.

Thus, common instructions on proximate cause that employ language requiring that the tortious conduct cause the harm in a "natural and continuous sequence," sometimes accompanied with the additional requirement that the causal sequence "be unbroken by any efficient intervening cause," do not reflect the risk standard adopted in this Section. Nor do these instructions reflect the limitations on scope of liability, provided in § 34, when there are intervening causes. Comment *d* contains an explanation of the scope of liability adopted in this Section, as well as language from which appropriate jury instructions might be crafted that reflect the risk standard.

h. Risk to particular interests. Under the risk standard, an actor's liability may extend to certain harms that occur to another person but not to other harms suffered by the same person. The question is not whether persons have different interests that are protected. Instead, the question is whether the harm that occurred is among the harms the risks of which made the actor's conduct tortious. Thus, if in Illustration 3, Kim had dropped Richard's gun on Alphonso, Kim's father who was standing nearby, Richard would not be liable to Alphonso despite Richard's negligence in entrusting the gun to Kim, which posed a risk of an accidental shooting to Alphonso. And, if Kim had dropped the gun on a box containing fragile crystal, breaking it, and the gun went off injuring Alphonso, the owner of the crystal could not recover for its loss, even if Alphonso owned it and even though Alphonso could recover for his personal injury. Indeed, in Illustrations 7 and 8, Arthur is negligent toward Sandy and Sandy suffers the same physical injury in both Illustrations, yet Arthur may not be subject to liability for the injury in Illustration 8 and is subject to liability in Illustration 7. In assessing whether the scope of an actor's liability extends to a given harm, the critical matter is the context in which the actor is tortious, including the facts establishing the risks that exist at the time of the actor's conduct and the manner in which the actor's conduct was deficient.

The risk standard adopted in this Section and in this Comment is contrary to § 281, Comment *j*, of the Restatement Second of Torts. That Comment made an actor who threatened harm to a legally cognizable interest of another liable for all harm to the other, regardless of whether the harm was different from the harms whose risk made the actor's conduct tortious. That Comment in the Second Restatement reversed the position of the first Restatement of Torts § 281, Comment *g*, which distinguished between interests in bodily integrity and interests in property, and provided that an actor whose negligence threatened harm only

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to one such interest would not subject the actor to liability if harm to the other interest occurred. This Section and, in particular, this Comment return to the approach of the first Restatement, but eschew any principle that it is different interests of a person that are critical to the determination, as explained above.

The risk standard cannot coexist with a rule such as the one in § 281, Comment *j*, of the Second Restatement, although that Restatement provided a limitation of liability when the harm suffered was outside the scope of the risk. See Restatement Second, Torts § 281, Comment *f*. In order to accommodate this modification of the first Restatement, the Second Restatement was forced to modify an Illustration contained in the first Restatement, taken from the *Palsgraf* case, in which a package falls on railroad tracks, explodes, and causes injury to the passenger carrying the package. The Illustration in the first Restatement provided that the railroad was not liable for the damage the explosion caused to the passenger's eyes. See Restatement of Torts § 281, Illustration 3. In the Second Restatement, the facts of the Illustration were changed to the facts in *Palsgraf* so that the explosive harm occurs to a person other than the owner of the package. See Restatement Second, Torts § 281, Illustration 1. Courts continue to adhere to the risk standard, even when, as in Illustration 3 of the first Restatement of Torts, the same person suffers harm outside the scope of the risks that made the actor's conduct tortious.

The primary ground in support of the Second Restatement position that interests should not be distinguished is the concern that many interests (or harms) might be defined so narrowly as to require many very difficult questions, such as whether the tortious conduct posed a risk of harm to, say, the plaintiff's foot, eyes, fingers, or shoulder. But the problem of the appropriate level of generality at which to define the harm exists more broadly than this limited context. Indeed, whenever an injured person is exposed to risk within the scope of the harm and suffers other harm outside the scope, the question of the appropriate level of generality to describe the risks and harms occurs. See Comment *i*. If the problem can be confronted and resolved satisfactorily in these other instances, including when different persons are involved, as it must, then it can be addressed and resolved in the single-plaintiff context.

The rule addressed in this Comment is subject to qualification when a person has a preexisting condition that, in combination with the tortious conduct, results in harm that is outside the harms risked by the tortious conduct. See § 31.

i. Understanding and characterizing the risk of harm. The risk standard is defined with respect to risks of harm, while the "type of harm" can be described at varying levels of generality. It can also be described by including some degree of detail about how the harm occurred. In both Illustrations 2 and 3, the risk of harm might have been described generally as a risk of personal injury. Alternatively, it might have been described more specifically—as cuts, bruises, and internal injuries resulting from concussive forces that propelled metal into Alan in Illustration 2, or as a broken toe due to the force of a dropped shotgun that fell onto the toe in Illustration 3. Illustration 2 employs the general characterization, while Illustration 3 employs a narrower characterization, closer to the one provided in this Comment.

No rule can be provided about the appropriate level of generality or specificity to employ in characterizing the type of harm for purposes of this Section. Nevertheless, some guidance can be obtained by careful reference to the risks that made the actor's conduct tortious. In Illustration 2, the risk that made Alan contributorily negligent was that the driver of an automobile would, due to distraction or otherwise, not see him and drive into him. That the accident occurred because the driver was distracted due to a cranky child in the backseat, talking on a cell phone, or listening to music with the volume turned up, is detail that is not relevant to the risks created by Alan's contributory negligence. Courts often respond to efforts by advocates to employ excessive detail in characterizing the type of harm in order to make it appear more unforeseeable with the dictum that the manner of harm is irrelevant. Factfinders, no doubt, respond to these efforts with their own judgment and common sense to decide the appropriate specificity with which to assess the scope of liability. Conversely, in Illustration 3, characterizing the type of harm as merely physical harm and therefore arising from the risks posed by negligently entrusting a gun to a child fails to acknowledge the more limited risks posed by the negligent act—namely, those that might occur due to an accidental firing of the gun within the geographic range in which any bullet might travel. Different types of harm may be threatened by different tortious acts; a risk of a gunshot wound is different from a risk of a chemical burning, a traumatic collision, an electrical shock, or a snarling pit bull.

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In addition to the difficulty of determining the appropriate level of generality with which to describe the type of harm, courts also confront the problem that the risks that are encompassed within the actor's tortious conduct may not be readily apparent. To be sure, some legal rules make the specific evils with which they are concerned readily apparent. Thus, some negligence per se cases, in which the actor's conduct violated a safety statute directed at preventing a specific, identifiable kind of harm, present much easier contexts in which to decide whether the harm that occurred was produced by a risk that the statute was intended to avoid. However, the negligence standard is quite general in the risks that it addresses. Thus, greater uncertainty and difficulty occur in negligence cases in determining whether the harm that resulted arose from the risks that made the actor's conduct unreasonable.

Many cases will pose straightforward or manageable determinations of whether the type of harm that occurred was one of those risked by the tortious conduct. Yet in others, there will be contending plausible characterizations that lead to different outcomes and require the drawing of an evaluative and somewhat arbitrary line. Those cases are left to the community judgment and common sense provided by the jury. Certain recurring factual circumstances are sometimes dealt with by a legal rule; those are addressed in §§ 31- 33 and 35.

j. Connection with reasonable foreseeability as a limit on liability. Many jurisdictions employ a "foreseeability" test for proximate cause, and in negligence actions such a rule is essentially consistent with the standard set forth in this Section. Properly understood, both the risk standard and a foreseeability test exclude liability for harms that were sufficiently unforeseeable at the time of the actor's tortious conduct that they were not among the risks—potential harms—that made the actor negligent. Negligence limits the requirement of reasonable care to those risks that are foreseeable. See § 3, Comment *g*. Thus, when scope of liability arises in a negligence case, the risks that make an actor negligent are limited to foreseeable ones, and the factfinder must determine whether the type of harm that occurred is among those reasonably foreseeable potential harms that made the actor's conduct negligent.

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

A foreseeability test for negligence cases risks being misunderstood because of uncertainty about what must be foreseen, by whom, and at what time. When courts pose the foreseeability inquiry as whether the harm was foreseeable at the time the defendant acted or as whether an intervening act was foreseeable, attention is deflected from the crux of the risk-standard inquiry. Moreover, the risk standard deals more comfortably with scope of liability when the defendant is an actor for whom the law modifies the objective standard of care. Thus, the risk standard would adapt the scope of liability for a child who is not expected to anticipate the same scope of harms as an adult.

For the strict-liability bases for liability, see §§ 20- 23, the standard in this Section is more cogently applied than a foreseeability standard. The greater generality and therefore flexibility of the risk standard contained in this Section make it readily adaptable to cases in which the tort does not require that the harm is foreseeable. Thus, for wild animals, in the rare case in which the owner is justifiably ignorant and reasonably believes the animal tame, the risk standard can be applied without any modification; if the dangerous quality of the animal is the cause of harm, liability exists. Similarly, strict liability is imposed for manufacturing defects. Focusing on the risks created by a manufacturing defect, rather than attempting to manipulate the concept of foreseeability, better illuminates the requisite analysis. To be sure, many strict-liability torts include some requirement

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of foreseeability, although it is more refined than that for negligence. Typically, strict-liability torts require that some form of physical harm be foreseen. Strict liability for abnormally dangerous activities, § 20, Comment *i*, and for abnormally dangerous animals, § 23, Comment *e*, both contain some aspect of foreseeability, and there is thus a more appropriate role for foreseeability and a greater congruence between the risk standard and a foreseeability standard.

k. Consistency with negligence per se. The risk standard in this Section is congruent, as well, with scope-of-liability limitations employed for statutory violations that constitute negligence per se. Liability for statutory violations is limited to harms that the statute was enacted to prevent and to persons who were intended to be protected from those harms. See § 14, Comments *f* and *g*. As the latter Comment explains, for most cases in which the scope of liability for a statutory violation is at issue, attention to the safety concerns the statute addresses will also be sufficient to exclude liability to plaintiffs who were not within the class protected. Thus, scope-of-liability limitations for statutory violations, while focused on the more specific harms addressed by the legislature, employ the same framework of inquiry.

l. Strict liability. The principle set forth in this Section is equally applicable to scope-of-liability limits on strict liability. See §§ 20- 23. This limit has been specifically discussed in § 21, Comment *g*; § 22, Comment *f*; and § 23, Comment *g*; inasmuch as the principle applies so as to limit strict liability under those Sections. The same principle applies to strict liability imposed pursuant to § 20. Thus, even if it is assumed that the defendant, in storing packages of explosives, is carrying on an abnormally dangerous activity, should the stored packages tumble and land on the plaintiff, injuring the plaintiff without exploding, the plaintiff cannot recover in strict liability under § 20. In addition, consider the defendant whose blasting activity produces vibrations that, in turn, induce mother minks in a nearby mink farm to destroy their offspring. Because harm such as this is no part of the characteristic risk that leads the law to regard the activity of blasting as abnormally dangerous, the defendant blaster does not bear strict liability for that harm. While this explanation suffices for purposes of the denial of strict liability, an additional explanation is that the harm in question is due as much to the unusually vulnerable activity of the plaintiff as it is to the unusually abnormally dangerous activity of the defendant.

In each of these two examples, the denial of strict liability leaves open the possibility of negligence liability. The defendant may be negligent, for example, in how the packages of explosives have been stacked. Moreover, if the prospective blaster knows that a mink farm is nearby, negligence law may oblige the defendant to notify the mink-farm owner of its blasting plans, so that the owner can take appropriate precautions: for example, temporarily separating mother minks from their offspring.

Other principles in this Chapter are also applicable to strict-liability claims. For example, the risk that is characteristic of an abnormally dangerous activity referred to in § 20 or of an animal covered by §§ 21- 23 may materialize in a way that produces a harm arising from the risks that made the activity or animal-keeping subject to strict liability—which in turn leads to a further injury. In such cases, scope-of-liability doctrine can be relied on in assessing the extent of the defendant's liability. If, for example, an instance of blasting causes a nearby building to collapse upon one of its occupants, and if the plaintiff then suffers a personal injury in attempting to rescue that occupant, scope-of-liability rules govern the plaintiff's claim against the defendant who has engaged in the blasting activity.

m. Additional limits on scope of liability. While the risk standard furnishes an appropriate limit for the scope of liability in the large run of cases, and its flexibility permits some appropriate adjustments at its rougher edges, a few alterations or qualifications, both expansive and constrictive, exist. See §§ 31- 33, 35- 36. In addition to others described in this Chapter, there are cases in which the scope of liability would be too vast, in light of the circumstances of the tortious conduct, if a risk standard governed liability. One example of this situation would be a negligent jailer who permitted a dangerous criminal to escape. While liability might extend to some of the escaped criminal's immediate victims, courts would be loathe to extend the jailer's liability to include hundreds or thousands of victims across the country over a period of decades, if the criminal were not recaptured. Another example is the risk that a drug like DES, while posing a foreseeable risk of causing harm to the fetus of a woman taking the drug, also poses a risk of a genetic defect that could replicate itself generation after generation, the possibility of which was raised in the third-generation DES cases. Courts have used a variety of techniques to cabin liability in such circumstances, including no-duty rules, unforeseeable-plaintiff rules (see Comment *n*) constricting the risk standard to exclude victims some distance in time

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or geography from the escape, and declaring that, at some point, the actor's negligence was no longer "operating." Whatever verbal formulation is employed in these rare cases of unacceptably overwhelming liability in light of the tortious conduct, courts should appreciate that there are such occasions when the risk principle may require supplementation.

At the same time, some tortious conduct may threaten, in a very clear way, massive harm and merely the fact that the scope of liability is huge is not, of itself, a ground for imposing limits on it. Asbestos-products manufacturers exposed hundreds of thousands to asbestos fibers, but no court has suggested the manufacturers' scope of liability should be confined because of the number of injured claimants or the magnitude of the aggregate damages. Similarly, a negligent operator of a nuclear plant would not have its liability limited based on the number of persons who were exposed to an escape of radiation or the magnitude of the damages, in the absence of legislation imposing such limits.

n. Unforeseeable plaintiffs. No express limitation in this Section places harm to unforeseeable plaintiffs outside the scope of an actor's liability. The limitations on duty for negligence actions, § 6, and the definitions of the strict-liability torts, §§ 20- 23, also contain no such express limitation. Ordinarily, the risk standard contained in this Section will, without requiring any separate reference to the foreseeability of the plaintiff, preclude liability for harm to such plaintiffs.

Illustration:

9. Betsy, a passenger on the Xavier Railroad company, is attempting to board a train while carrying a bulky and apparently fragile package. Bob, an employee of Xavier, attempts to assist Betsy in boarding a crowded train and does so in a careless fashion that creates a likelihood Betsy will drop the package or otherwise damage it. Betsy does drop the package, which contains explosives, although there is nothing in the appearance of the package that would have so indicated. The package explodes upon impact, and the force of the explosion knocks over a platform scale 30 feet away. The scale falls on a waiting passenger, Heather, injuring her. Heather's harm is not within the scope of Bob's liability for his negligence as a matter of law; neither Bob nor Xavier is liable to Heather.

While Heather might be characterized as an unforeseeable plaintiff, a straightforward application of the risk standard in this Section reveals that that characterization is unnecessary to the outcome. The risks posed by Bob's negligence do not include the results of concussive forces due to an explosion; any harm that was posed by Bob's negligence was to the package, due to its apparent fragility and the consequences of it falling to the ground, or perhaps, physical injury to Betsy.

Generally, application of the risk standard should avoid much of the need for consideration of unforeseeable plaintiffs, as revealed above. In those cases in which the plaintiff was, because of time or geography, truly beyond being subject to harm of the type risked by the tortious conduct, but the plaintiff somehow suffers such harm, the defendant is not liable to that plaintiff for the harm.

o. Manner of harm. Courts commonly state that the manner in which the harm occurs is irrelevant to scope of liability so long as the harm is foreseeable or within the risk standard. Properly understood, this is a helpful guideline, but it must be appreciated in conjunction with the risk standard. Some aspects of the manner in which the harm occurs *are* relevant to a determination of the scope of an actor's liability. Thus, for example, that the harm occurred through an explosion in Illustration 9 is critical to

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the harm being beyond the scope of liability, given that there was no foreseeable risk from explosives when Bob was careless about the package falling. Similarly, in Illustrations 7 and 8, the tortious conduct and harm in each are identical, but there is a critical difference in the manner in which the harm occurred: in one case the skull fracture was due to a fall caused by a lack of light, while in the other, the harm was caused by an intentional tort by an intruder. Thus, the manner of harm can be of critical importance in determining whether the harm is within the scope of liability even though in both cases the victim's skull injury was made possible by a lack of light.

Nevertheless, in many cases there is value to the common wisdom about the unimportance of the manner of harm. Every outcome is a unique combination of many causes that concur to bring it about. Many varied, odd, and extraordinary acts, forces, and events may concur to produce a given harm, such that it can readily be said that the manner of harm was unusual, extraordinary, or unforeseeable. Such a statement is unhelpful in a scope-of-liability analysis, which focuses on the risks that make the conduct tortious and on the type of harm, as Comment *d* cautions. Mechanisms are important so long as they bear, in a general and reasonable way, on the risks that were created by the tortious conduct in the circumstances that existed at the time. Beyond that, details of the causal forces that concurred to cause the harm and their individual or combinational foreseeability are unimportant to the inquiry on the scope of liability.

p. Extent of harm. If the type of harm that occurs is within the scope of the risk, the defendant is liable for all such harm caused, regardless of its extent. Even when a foreseeability standard is employed for scope of liability, the fact that the actor neither foresaw nor should have foreseen the extent of harm caused by the tortious conduct does not affect the actor's liability for the harm. One of the primary applications of this rule occurs when the injured person has a preexisting condition creating an unusual susceptibility. In some such cases, the extent of the harm is unforeseeable; the actor is nevertheless subject to liability for the full extent of the harm. See § 31 and Illustration 3.

It is difficult to reconcile this rule with the principle that scope-of-liability limitations are designed to avoid, so far as possible, a disparity between degree of culpability and extent of liability. Nevertheless, other policies are at work, including the fact that the injured person may be wholly without any culpability. The rule in this Comment may be justified by the empirical intuition that cases rarely arise where the harm is within the scope of the risk but the extent of it is unforeseeable. Also, the administrative convenience of avoiding the sometimes uncertain and indeterminate inquiry into whether the extent of the harm was unforeseeable justifies the refusal to attempt to identify and treat differently this modestly sized class of cases.

q. Judge and jury. Scope of liability is a mixed question of fact and law, much like negligence. As with negligence, the court's role is to instruct the jury on the standard for scope of liability when reasonable minds can differ as to whether the type of harm suffered by the plaintiff is among the harms whose risks made the defendant's conduct tortious, and it is the function of the jury to determine whether the harm is within the defendant's scope of liability.

r. Scope of liability in affirmative-duty cases. Chapter 7 contains a variety of duties that do not arise because of the actor's conduct creating risk. Instead, the duties in Chapter 7 arise out of relationships or undertakings that require an actor to exercise reasonable care to avoid or ameliorate risks posed to another by natural forces or others. In such cases, this Section applies, and the actor's scope of liability is limited to harms that are different from the harms that were risked by the actor's failure to exercise reasonable care to ameliorate or eliminate risks that the affirmative duty required the actor to attend to.

s. Scope of plaintiff responsibility. The rules contained in this Section regarding the scope of liability for tortious conduct are the same for determining when a plaintiff's contributory negligence will reduce the recovery based on comparative responsibility. Thus, even if a plaintiff's contributory negligence is a factual cause of harm, if the risks posed by the plaintiff's negligence are different from the type of risk that produced the plaintiff's harm, no apportionment of liability is made to the plaintiff.

Reporters' Note

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Restatement (Third) of Torts: Phys. & Emot. Harm § 40 (2012)

Restatement of the Law - Torts | June 2020 Update

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

Chapter 7. Affirmative Duties

§ 40 Duty Based on Special Relationship with Another

Comment:
Reporters' Note
Case Citations - by Jurisdiction

(a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.

(b) Special relationships giving rise to the duty provided in Subsection (a) include:

- **(1) a common carrier with its passengers,**
- **(2) an innkeeper with its guests,**
- **(3) a business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises,**
- **(4) an employer with its employees who, while at work, are:**
  - **(a) in imminent danger; or**
  - **(b) injured or ill and thereby rendered helpless,**
- **(5) a school with its students,**
- **(6) a landlord with its tenants, and**
- **(7) a custodian with those in its custody, if:**
  - **(a) the custodian is required by law to take custody or voluntarily takes custody of the other; and**
  - **(b) the custodian has a superior ability to protect the other.**

Comment:

a. History. Restatement Second of Torts § 314A imposed affirmative duties of reasonable care on actors with certain special relationships with others. This Section replaces § 314A. In addition, § 344 of the Second Restatement imposed a duty of reasonable care on businesses for risks to persons on the premises caused by the conduct of third parties. This duty overlapped with § 314A, and this Section also replaces § 344. Chapter 9 contains the ordinary, non-affirmative duties of land possessors to entrants on the land. Section 41 addresses duties owed by an actor to another based on the actor's special relationship with a third person causing the harm.

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b. Court determinations of no duty based on special problems of principle or policy. Even though an affirmative duty might exist pursuant to this Section, a court may decide, based on special problems of principle or policy, that no duty or a duty other than reasonable care exists. See § 7(b).

c. Relationship to ordinary duty of reasonable care when creating a risk of harm. In some cases, the duty imposed by this Section is a pure affirmative duty because the actor had no role in creating the risk of harm to the other, as in Illustration 1 below. In other cases, the actor's conduct might have played a role in creating the risk to the injured party, such as by hiring an employee with known dangerous propensities. In these cases, the source of the duty of reasonable care is § 7. See § 37, Comment *d*.

In some cases, such as a business located in a dangerous area, determining whether a case is governed by § 7 can be problematic, requiring an inquiry into what would have happened if the actor's conduct, such as opening a business, had never occurred. Numerous possible scenarios, requiring significant speculation, might be conjured in answering this counterfactual inquiry. This Section obviates the need for such inquiries. Regardless of whether the actor played any role in the creation of the risk, a special relationship with others imposes a duty of reasonable care.

d. Duty of reasonable care. The affirmative duty recognized by the Restatement Second of Torts § 314A(1)(b) was limited to providing first aid and temporary care to ill or injured persons until appropriate medical care could be obtained. This Section adopts a more general duty of reasonable care, thereby recognizing both the variety of situations in which the duty may arise and advancements in medical technology that may enable an actor to provide more than just first aid. Nevertheless, the duty imposed requires only *reasonable* care under the circumstances. One of the relevant circumstances to be considered is whether a pure affirmative duty as described in Comment *c* is involved. For example, an individual with an incipient heart attack does not impose the burden of paying for necessary medical care on a hotel by checking into the hotel. In the case of illnesses, actors will frequently satisfy their duty by ascertaining that no emergency requiring immediate attention exists and by summoning appropriate medical care. However, when the nature of the relationship impedes the ability of the other to take appropriate action, as is true of the guard-inmate relationship, the actor may be required to be proactive or to act more aggressively to satisfy the duty of reasonable care.

When a court is persuaded that, under the particular circumstances involved in the case, no reasonable jury could conclude that the defendant acted unreasonably, the court should find the evidence of negligence insufficient as a matter of law. Such a resolution is preferable to employing a no-duty rule that is based on the particular facts of the case. See § 7, Comment *j*.

e. Special relationship a matter of law. Whether or not a particular type of relationship supports a duty of care is a question of law for the court. If disputed historical facts bear on whether the relationship exists, as with a dispute over whether a plaintiff was a paying guest in a hotel or was a trespasser, the jury should resolve the factual dispute with appropriate alternative instructions.

f. Scope of the duty. The duty imposed in this Section applies to dangers that arise within the confines of the relationship and does not extend to other risks. Generally, the relationships in this Section are bounded by geography and time. Thus, this Section imposes no affirmative duty on a common carrier to a person who left the vehicle and is no longer a passenger. Similarly, an innkeeper is ordinarily under no duty to a guest who is injured or endangered while off the premises. Of course, if the relationship is extended—such as by a cruise ship conducting an onshore tour—an affirmative duty pursuant to this Section might be appropriate.

Illustrations:

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1. While eating lunch alone at the Walkalong restaurant, Joe suddenly suffers a severe asthma attack. Several waiters at the restaurant recognize that Joe is suffering an asthma attack. All of them ignore Joe, and another 10 minutes pass before another patron observes Joe and summons medical care. The delay results in Joe suffering more serious injury than if he had received medical attention promptly after the waiters observed his plight. The Walkalong restaurant is subject to liability to Joe for his enhanced injury due to the delay in his receiving medical care.

2. Same facts as Illustration 1, except Joe suffers his asthma attack after finishing his meal at Walkalong and departing. Rich, a waiter at Walkalong, sees Joe through a window and appreciates that he is suffering an asthma attack but does nothing, thereby delaying appropriate medical care for Joe. Walkalong is not subject to liability for any enhanced injury to Joe due to the delay in his receiving medical care because Joe's asthma attack occurred outside the scope of the relationship he had with Walkalong.

3. Audrey, a passenger on a train of the Duncan Railroad, is negligent in disembarking the train, resulting in a fall and consequent injury. Barbara, a conductor on the train, sees Audrey fall onto the platform and knows that she is unconscious but does nothing to summon aid or notify others about Audrey's predicament. As a result of the delay in Audrey's being discovered and receiving treatment, Audrey suffers enhanced injury. Duncan is subject to liability for Audrey's enhanced injury because Audrey's fall occurred within the scope of her relationship with Duncan.

g. Risks within the scope of the duty of care. The duty described in this Section applies regardless of the source of the risk. Thus, it applies to risks created by the individual at risk as well as those created by a third party's conduct, whether innocent, negligent, or intentional. If the actor's conduct plays a role in creating the risk of harm, § 7 is also a source of a duty, as explained in Comment *c*.

h. Rationale. The term "special relationship" has no independent significance. It merely signifies that courts recognize an affirmative duty arising out of the relationship where otherwise no duty would exist pursuant to § 37. Whether a relationship is deemed special is a conclusion based on reasons of principle or policy.

As explained in Comment *c*, some of the duties imposed by this Section overlap with the general duty of reasonable care addressed in § 7—the former are a specialized application of the latter. To that extent, requiring actors to exercise reasonable care to avoid harming others is justified by deterrence and corrective-justice policies explained more fully in § 6, Comment *d*. No algorithm exists to provide clear guidance about which policies in which proportions justify the imposition of an affirmative duty based on a relationship. The special relationships established by this Section are justified in part because the reasons for the no-duty rule in § 37 are obviated by the existence of the relationship. A relationship identifies a specific person to be protected and thus provides a more limited and justified incursion on autonomy, especially when the relationship is entered into voluntarily. In addition, some relationships necessarily compromise a person's ability to self-protect, while leaving the actor in a superior position to protect that person. Many of the relationships also benefit the actor. Finally, for those cases in which it is unclear whether the risk is one created by the actor's conduct, see Comment *c*, this Section avoids the need to engage in the difficult inquiry into what would have happened if the actor had never engaged in its business or other operations.

These reasons do not consistently explain why courts find some relationships sufficient and others inadequate. Intuition is often misleading; indeed, for most people, the rule that there is no general duty to rescue—not even an easy rescue—is counterintuitive. Some courts have relied on the *ex ante* expectations of the parties to the relationship to determine whether the

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relationship is special. The difficulty with this standard is similar to the problem that results from relying on intuition: almost everyone in virtually any kind of relationship expects that another would engage in an easy rescue in the event of serious peril.

i. Duty of common carriers. In addition to common carriers, others who transport the public may be subject to the affirmative duty provided in this Section. Thus, airport-shuttle vans, courtesy vans, and limousines that are available to transport members of the public are subject to a duty of reasonable care. In some of these cases, the relationship may overlap with other special relationships provided in this Section, such as the custodial relationship in the case of a school bus or the innkeeper-guest relationship in the case of a hotel van.

j. Duty of business or other possessor of land who holds its premises open to the public. The general duty of a possessor of land to others on the land for conditions or activities on the land is addressed in Chapter 9 of this Restatement.

This Section imposes an affirmative duty on a subset of land possessors for certain risks that do not arise from conditions or activities on the land. Businesses and other possessors of land who hold their land open to the public owe a duty of reasonable care to persons lawfully on their land who become ill or endangered by risks created by third parties.

Illustrations:

4. Carol is shopping at Brown's Dress & Gown store when she suffers heart palpitations and faints. A Brown's sales clerk observes Carol's condition and ignores her for 15 minutes while the clerk finishes serving another customer. The 15-minute delay in summoning medical care for Carol results in her suffering enhanced injury. Brown's owes a duty of reasonable care to Carol pursuant to this Section and is subject to liability for Carol's enhanced injury.

5. Same facts as Illustration 4, except as Carol falls she strikes a sharp, pointed object that had been left on the floor by a salesclerk setting up a display. Carol suffers a concussion when her head hits the floor and a deep puncture wound in her thigh due to the sharp object. As a result of a sales clerk's ignoring Carol's condition, medical care is delayed for 30 minutes, which increases the neurologic harm Carol suffers. Brown's owes a duty of reasonable care to Carol pursuant to this Section with regard to Carol's enhanced head injury. Brown's duty to Carol for the puncture wound is governed by the applicable law for possessors of land with respect to conditions on the land. See Chapter 9.

k. Duty of employers. Workers' compensation has displaced most common-law occupational tort claims. Where workers' compensation is applicable, it governs employer liability for employees' occupational injuries. In those limited instances in which it is inapplicable, § 7 provides the ordinary duty of reasonable care owed by employers to employees based on risks created by the employment environment. This Subsection provides for a limited affirmative duty owed by employers based on the employment relationship.

The circumstances in which the affirmative duty imposed in this Subsection might apply have been largely limited to the risk to an employee of a criminal attack by a third party that occurs at the place of employment, an illness or injury suffered by an employee while at work (but not resulting from employment) that renders the employee helpless and in need of emergency

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care or assistance, and the occasional case that falls through the cracks of workers'-compensation coverage and implicates an affirmative duty as opposed to the ordinary duty imposed by § 7. The cases that fall through the cracks are quite varied because of the variations that exist in different states' workers'-compensation statutes.

The Restatement Second of Torts § 314B addressed the affirmative duty of an employer to an employee by incorporating the provisions contained in the Restatement Second of Agency § 512, which had been published earlier. There has been little development in this area because of workers' compensation and its exclusive-remedy provision. This Subsection replaces § 314B.

This Subsection retains the requirements of imminent danger and helplessness contained in the Restatement Second of Torts. However, this Subsection rejects the requirement of knowledge or foreseeability of the danger as an aspect of the duty determination. This is consistent with the treatment of foreseeability throughout this Restatement as a matter encompassed within the negligence determination, and not as an aspect of the threshold question of duty. See § 7, Comment *j*.

l. Duty of schools. The affirmative duty imposed on schools in this Section is in addition to the ordinary duty of a school to exercise reasonable care in its operations for the safety of its students and the duties provided in Chapter 9 to entrants on the land. The relationship between a school and its students parallels aspects of several other special relationships—it is a custodian of students, it is a land possessor who opens the premises to a significant public population, and it acts partially in the place of parents. The Second Restatement of Torts contained no provision that specifically identified the school-student relationship as special. However, a generally ignored passage in § 320, Comment *b*, which imposed an affirmative duty on custodians to control third parties in order to prevent them from harming the one in custody, observes that the custodial relationship is also applicable to schools and their students. Despite the Second Restatement's limited treatment of affirmative duties of schools, such a duty has enjoyed substantial acceptance among courts since the Second Restatement's publication. As with the other duties imposed by this Section, it is only applicable to risks that occur while the student is at school or otherwise engaged in school activities. And because of the wide range of students to which it is applicable, what constitutes reasonable care is contextual—the extent and type of supervision required of young elementary-school pupils is substantially different from reasonable care for college students.

m. Duty of landlords. The prominent case of Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970), began a trend toward recognizing an affirmative duty of reasonable care owed by landlords to their tenants and to their tenants' guests with respect to common areas under the landlord's control. Courts have not been unanimous in recognizing this duty, and some that have recognized a duty have used a variety of devices to limit its scope. Nevertheless, the rationale for imposing a duty on landlords is similar to the rationale for other special relationships in this Section. In addition, the landlord has control over common areas, has superior means for providing security, and derives commercial advantage from the relationship. The landlord also has an ongoing contractual relationship with the tenant, and the lease itself could allocate responsibility for exercising care. Because the landlord usually is in a better position than individual tenants to exercise control over common areas and, with respect to individual units, to provide locks and other security devices, imposing a duty on the landlord replicates the result that might be reached if landlords and tenants with similar bargaining power addressed this matter.

Reasonable care cannot prevent every breach of security. Courts have been protective of landlords in these circumstances, often by employing no-duty rulings based on the particular circumstances of the case. These decisions do not undermine the general duty imposed by this Section but are better understood as a determination by the court that no reasonable jury could find negligence under the particular circumstances.

The affirmative duty imposed by this Section applies to common areas and other areas of the premises over which the landlord has control. It applies to both residential and commercial landlords. The circumstances of a commercial lease might affect the degree of care reasonably expected of the landlord, indeed might even affect the existence of a duty, such as when a single tenant exercises sole control over the premises. The duty also applies to others who act functionally as landlords, such as condominium associations.

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A landlord owes an affirmative duty to tenants for risks that occur within common areas of the apartment complex, similar to the duty owed by businesses and other possessors of land under Subsection (b)(3). Thus, if a tenant suffers a heart failure in a common area, the landlord and its agents owe a duty of reasonable care. If no one is present or otherwise aware of the tenant's predicament, no breach of the duty occurs.

The duty imposed by this Section is not exclusive. Landlords might also have an affirmative duty to their tenants under § 41. They have a duty to tenants with regard to the safety of the leasehold conditions under Restatement Second of Torts §§ 355-362. They have a duty for their own risk-creating conduct under § 7. And they, as possessors of and lessors of land, are also subject to the duties in § 53 of Chapter 9.

n. Duty of custodians. Section 320 of the first Restatement of Torts imposed a duty on custodians to protect persons in their charge from risks posed by third parties. When the Second Restatement added § 314A, it subsumed the more circumscribed duty set forth in the old § 320. This Section retains the general affirmative duty owed by custodians to persons in their custody. The custodial relationships that courts have recognized as imposing an affirmative duty include day-care centers and the children for whom they care, hospitals and their patients, nursing homes with their residents, camps and their campers, parents and their dependent minor children, and, of course, the classic jailer-inmate relationship. Section 41 imposes a duty of reasonable care on custodians to protect others from risks created by those in custody. In addition to state tort law, federal constitutional provisions provide affirmative duties on behalf of those who are involuntarily in the custody of governmental officials.

The duty imposed by this Section is conditioned on a legal obligation or on voluntarily assuming custody. It does not extend beyond the temporal limits of the custodial relationship, for example to a nursing-home resident taken home for Thanksgiving by his children. Similarly, no duty exists pursuant to Subsection (b)(7) if an infant is abandoned in a restaurant by a troubled parent.

o. Nonexclusivity of relationships. The list of special relationships provided in this Section is not exclusive. Courts may, as they have since the Second Restatement, identify additional relationships that justify exceptions to the no-duty rule contained in § 37.

One likely candidate for an addition to recognized special relationships is the one among family members. This relationship, particularly among those residing in the same household, provides as strong a case for recognition as a number of the other special relationships recognized in this Section. To date, there has been little precedent addressing the family relationship as a basis for an affirmative duty, although family immunities have long been removed as an impediment to this development. Family exclusions in liability insurance may have stunted doctrinal development in this area. However, bases do exist for affirmative duties that overlap with a duty imposed by an intra-family special relationship. Thus, parents owe an affirmative duty to their children based on the custodial relationship. Statutes imposing duties on parents to provide for their children are another potential source for an affirmative tort duty pursuant to § 38.

Reporters' Note

*Comment a. History.*This Chapter is organized differently from the first and Second Restatements of Torts. The first Restatement imposed no general affirmative duties on actors in a special relationship with another. It addressed only duties to control the conduct of third parties based on a special relationship with them or with the injured person. The Second Restatement, in § 314A, added general affirmative duties to another based on a special relationship with the other. This created a redundancy between the general duty owed to the person in the special relationship and the duty owed to the person in the special relationship to control the conduct of third parties. This Chapter describes general duties owed to persons with whom the actor has a special relationship (this Section) without regard to whether the harm is caused by a third person and duties owed by actors to third parties (§ 41) based on a special relationship between the actor and another causing harm. It thus eliminates the redundancy in the Second Restatement.

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I hereby certify that on the 11th day of September, 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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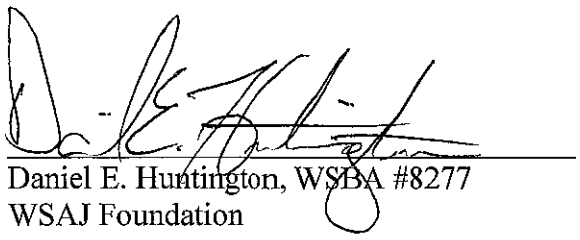

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