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By Tory A. Weigand

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DUTY, CAUSATION AND PALSGRAF: MASSACHUSETTS AND THE RESTATEMENT (THIRD) OF TORTS

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I. INTRODUCTION

The Restatement (Third) of Torts: Liability for Physical and Emotional Harm (Third Restatement) ushered in the American Law Institute’s (ALI) third “restating” of tort principles in the last 85 years. Its goal includes the establishment of greater clarity in nomenclature, avoidance of inconsistencies and “achievement of balance between the functions of judge and jury in negligence cases.” In that effort, it reshapes traditional negligence principles and parlance and attempts to put to rest the duty versus causation divide that has lingered since it was first so vividly captured in the famous opinions of Justices Cardozo and Andrews nearly 90 years ago.

The influence of the ALI’s Restatement is undeniable. Its black-letter statements, comments, illustrations and reporter’s notes have long been frequently referenced by courts as a persuasive, and sometimes controlling, source of authority. Massachusetts is no exception. Yet, it remains unclear whether the Third Restatement’s restructuring of duty and causation will be adopted in Massachusetts. The banishment of foreseeability from duty and causation and the purging of the terms “proximate” and “substantial factor” from scope of duty in California needs to be limited or will become a source of uncertainty and incoherence; John C.P. Goldberg and Benjamin C. Zipursky, The Restatement (Third) and the Place of Duty in Negligence Law, 54 Vand. L. Rev. 657 (2001) (disagreeing with approach of Third Restatement to diminishing elemental status of duty); Alani Golanski, A New Look At Duty In Tort Law: Rehabilitating Foreseeability and Related Themes, 75 Alb. L. Rev. 227 (2012) (reviewing the various academic views as to duty and the role of foreseeability and disagreeing with removal of foreseeability from duty determinations); Larry S. Stewart, Clarifications On The Duty To Exercise Care, 57 Wm. Mitchell L. Rev. 1492, 1493 (2011) (“the role of duty in modern tort law has not been without controversy”); David G. Owen, Figuring Foreseeability, 44 Wake Forest L. Rev. 1277 (2009) (disagreeing with Third Restatement’s removal of foreseeability from duty analysis); W. Jonathan Cardi, The Hidden Legacy of Palsgraf: Modern Duty in a Microcosm, 91 B.U. L. Rev. 1873, 1873 (2011) (“duty law, an area so rife with inconsistency and contradiction that it often bears more resemblance to constitutional law than to the quintessential common-law doctrine that we expect from tort cases”; otherwise surveying state law comparing debate between Judges Andrews and Cardozo in Palsgraf); Aaron D. Twerski, The Cleaver, The Violin and The Scalpel: Duty and The Restatement (Third) of Torts, 60 Hastings L.J. 1, 1 (2008) (“I teach my students that duty is a categorical determination that cuts with all the sublety of a cleaver; otherwise agreeing with Third Restatement approach); Benjamin Zipursky, Foreseeability in Breach, Duty and Proximate Cause, 44 Wake Forest L. Rev. 1247 (2009) (“there are serious problems with the Reporters’ treatment of foreseeability: their effort to eliminate foreseeability from duty is unjustifiable; their attempt to squeeze foreseeability of breach into the Hand formula’s ‘P’ component is forced; and their rationale for moving to a scope-of-the-risk conception of proximate cause is scant”); see also William Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1, 14-15 (1953)(duty/no-duty inquiry entails wading through “shifting sands [with] no fit foundation”). According to Professor Cardi in a recent survey of state duty decisions:

Perhaps the most persistent impression left after having reviewed hundreds of duty cases is just how frustratingly inconsistent, unfocused, and often nonsensical is the present state of duty law. All who read the common law are aware of this general shortcoming — common law is made by the accretive steps of individual judges who, as human beings, are imperfect at best. But in duty cases, the problem seems particularly endemic. Courts sometimes apply law
causation’ has, to date, received limited attention in Massachusetts, although recently both approved and rejected, at least in part, by a number of other states. Its utilization of risk and scope of liability terminology and conception is seemingly awkward compared to the traditional terms and expressions. Reduced to its bones, the Third Restatement views the fact-intensive nature of foreseeability unsuitable for the lofty work of duty and questions of law for judges, and mutes its traditional place in causation determinations. Stripped of its former and long-standing role as both a duty and causative work- horse, foreseeability is otherwise relegated to the issue of breach and the work of fact finders.

Whether the Third Restatement’s restructuring is ultimately adopted will turn on how the Supreme Judicial Court perceives the state of negligence adjudication in Massachusetts. It could agree that the approach will add greater clarity, avoid inconsistencies and strike a more refined and needed balance between the roles of judge and jury. It could, instead, find that the Third Restatement’s approach significantly alters, unnecessarily, long standing jurisprudence; that foreseeability’s place in duty determinations is needed and justified, providing an important conceptual tool for judges in their long-standing gate-keeping roles; and that, in short, Massachusetts principles work just fine left alone.

This article revisits Palagreaf as a backdrop to the changes represented in the Third Restatement, and compares and contrasts Massachusetts law with the Third Restatement’s approach as to both duty and causation. It reviews the current status of the Third Restatement both in Massachusetts and those states that have so far addressed the issue. It includes a focus on the respective treatment long overturned by their superiors. Courts use reasoning and reach results diametrically opposed to decisions of their sister courts, almost as if the judges are unaware of each other’s existence. Also, internal contradictions and overlapping inquiries within negligence doctrine lead to sometimes laughable opinions.


7. P. Keeton, et al., Prosser and Keeton on the Law of Torts, 41, p. 263 (West 5th ed. 1984)(“there is perhaps nothing in the entire field of law which has called forth more disagreement or upon which the opinions are in such a welter of confusion”); David G. Owen, The Five Elements of Negligence, 35 Hofstra L. Rev. 1671, 1679 (2007)(“few problems are more intriguing, with solutions more elusive, than causation”).

8. See infra section V.


11. Id. See Michael Traynor, The First Restatements and the Vision of the American Law Institute, Then and Now, 32 S. Ill. U. L.J. 1, 14 (2007), citing The American Law Institute, Capturing the Vice of the American Law Institute: A Handbook for ALI Reporters and Those That Review Their Work (2005)(hereinafter “ALI Handbook”). In addition to the Restatement approach, the ALI, alone or in cooperation with the National Conference of Commissioners on Uniform State Laws (“NCCUSL”), also pursues projects in the form of model legislation, “principles” and “studies.” A Model or uniform code, or statutes and other statutory proposals, is addressed mainly to legislatures, with a view toward legislative enactment. Statutory formulations assume the stance of prescribing the law as it shall be, which may or may not reflect the law as it is. ALI Handbook at 12. “The Institute sometimes produces studies that analyze in depth particular areas of the law. . . . [These studies may lay] the practical and theoretical groundwork for subsequent black-letter propositions.” Id. at 14 n.94.

12. Ibid.

13. Restatement (First) Of Torts at ix (1934).

14. Logan, The Curious Case, supra note 5 at 1455, citing Patrick J. Kelley, The First Restatement of Torts: Reform by Descriptive Theory, 32 S. Ill. U. L.J. 93, 106 (2007)(stating that first restatement broke little new ground or reform) and Benjamin Kaplan, Encounters with O.W. Holmes Jr., 96 Harv. L. Rev. 1828, 1835 (1983) (stating that the first restatements of contracts and torts were “relatively conservative works”).

15. See Geoffrey Christopher Rupp, Torts 2:0: The Restatement 3d and the Architecture of Participation in American Tort Law, 37 Wm. Mitchell L. Rev. 1582, 1583-84 (2011)(noting “ambitions of [Second Restatement] were far more sweeping that those of the [First Restatement] and that [t]he authors of the Second Restatement had grand ambitions—hoping to move American Tort law into a new age, and to leave behind many of the seemingly anachronistic limitations inherited from English tort jurisprudence”).

16. Logan, The Curious Case, supra note 5 at 1456.

17. Id. (noting that the project involved twenty-two preliminary drafts, forty-one council drafts, and twenty-three tentative drafts produced over a period of twenty-two years), citing Michael Greenwald, American Law Institute, 79 Law Libr. J. 297, 302 (1987). A project is developed in a series of drafts prepared by the Reporter and reviewed by the project’s Advisers and Members Consultative Group, the Council and the ALI membership. Preliminary Drafts and Council Drafts are available only to project participants and to the Council. Tentative Drafts, Discussion Drafts and Proposed Final Drafts are publicly available. Once it is approved by the membership at an Annual Meeting, a Tentative Draft or a Proposed Final Draft represents the most current statement of the ALI’s position on the subject and may be cited in opinions or briefs until the official text is published. The vote of approval allows for possible further revision of the drafts to reflect the discussion at the meeting or to make editorial improvements.
The Restatement (Third) of Torts (“Third Restatement”) began in the mid 1990’s and was divided into “projects” due to the complexity of modern tort law and the belief it would be too much to assign to one reporter. The four projects are Product Liability, Apportionment, Liability for Physical Harm, and Emotional and Economic Harm. The Liability for Physical and Emotional Harm project was originally commissioned to be called a Restatement (Third) of Torts: General Principles. The Third Restatement is comprised of two published volumes. The first volume, covering the basic topics of the law of torts, was released in early 2010. The second volume, dealing with affirmative duties, emotional harm, landowner liability and liability of actors who retain independent contractors, was published in November, 2012.

An inherent struggle within the ALI framework is the tension between stating what the law is and stating what the law ought to be. Indeed, each of the Restatements was prepared in a specific moment of time against the forever evolving common law. Further, it has been noted that the ALI is not as “well adapted” as it was at its inception, given that the common or doctrinal law has been clarified.

### III. Revisiting Palsgraf

Few lawyers are unable to recall the lovely Mrs. Palsgraf, the falling scale, the innocuous package, the exploding fireworks upon the rails as well as the hapless railroad employees simply trying to assist two would-be passengers seeking to make the train. The importance of Palsgraf, however, lies in the substance of the dispute between the majority and dissenting opinions of Judge Cardozo and Judge Andrews over the intersection of duty and causation. Four points of dispute arose: Is duty in tort relational or act-risk centered? Is foreseeability a duty inquiry or a matter for proximate causation? Must duty always be categorical? And, what is the proper function of judge and jury in duty and causation determinations?

Judge Cardozo and Judge Andrews disagreed over whether duty was relational and personal or universal and act centered. The teaching of Judge Cardozo passed on to generations of law students since the 1928 decision rings immortal: “The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.” In opposition was Judge Andrews’s retort that “[e]very one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.” Under Andrews’s view, the requisite relationship between the asserted negligence and the alleged injury was a question left to factual and proximate causation. To Cardozo, foreseeability was foundational to duty determinations with duty, in turn, one of law for the court. The debate whether duty is relational or act centered underscored the issue of whether foreseeability as to the particular plaintiff (and/or harm) was properly a matter of duty or causation, and whether it was better suited for a judge or jury.

Since Palsgraf, there remains no unanimity among the courts. In a recent survey, it was determined that: (a) no state relied upon

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22. Volume I is 686 pages and addresses: Liability for Intentional Physical Harm; Liability for Negligence Causing Physical Harm; Duty; Strict Liability; Factual Cause; and Scope of Liability (Proximate Cause).


24. Logan, _The Curious Case_, supra note 5 at 1454 (“There is always the struggle between the law ‘that is’ and the law as it ‘ought to be.’”), citing Shirley S. Abrahamson, _Refreshing Institutional Memories: Wisconsin and the American Law Institute the Fairchild Lecture_, 1995 WIS. L. REV. 1, 17 (1995).

25. Logan, _The Curious Case_, supra note 5 at 1454, citing Richard A. Posner, _The Problematics of Moral and Legal Theory_, 304 (1999). The strengths of the ALI have been described as follows: The Institute’s strengths are its members and its deliberative processes, stature, independence, and dedication to quality. Its resources are limited. It must decide carefully what projects are fitting. It will want to undertake projects that meet the needs of the profession and the public. It can find a medium ground for solid work between stultifying description of the “is” and unduly venturesome pursuit of the “ought.” Its work need not be pigeonholed as either “descriptive” or “normative.” It can identify and pursue work that has a reasonable shelf life and that will be useful for a generation or more.


27. Id.

28. These themes were identified and the subject of an excellent article in the _Boston Law Review_ by Professor W. Jonathan Cardi, W. Jonathan Cardi, _The Hidden Legacy of Palsgraf: Modern Tort Law in Microcosm_, 91 BOSTON L. REV. 1873 (2011). Note also that the mindset of circa 1920s judges, lawyers and scholars focused on duty/no duty categories of legal rights and responsibilities. See W.N. Hohfeld, _Fundamental Legal Concepts As Applied in Judicial Reasoning_, 18 YALE L.J. 710-70 (1917). Hohfeldian analysis still pervades several restatements of the law.

29. Palsgraf, 362 N.E. at 344. According to Justice Cardozo: The conduct of the [railroad] guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to [Mrs. Palsgraf], standing far away. Relatively to her it was not negligence at all . . . If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else . . . What the plaintiff must show is “a wrong” to herself; i.e., a violation of her own right, and not merely a wrong to some one else.

30. According to Judge Andrews:

Is [negligence] a relative concept—the breach of some duty owing to a particular person or to particular persons? . . . Should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. The act itself is wrongful . . . Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain.

31. See Keith Hylton, _New Private Law Theory and Tort Law: A Comment_, 125 HARV. L. REV. 173, 177 (2012). The way to understand Palsgraf is to see it as a power play. Chief Justice Cardozo took a question away from the jury, weakening the jury, and enhancing the power of the judge. The reason for doing so was to create greater certainty in the law. Chief Justice Cardozo was . . . concerned that the foreseeable victim, if left in the hands of juries, could generate inconsistent and unpredictable decisions.
relation as a central or dispositive factor in duty determination; (b) most states employ some version of a multi-factored policy approach to duty determinations; (c) very few have adopted a solely act-risk creating (no foreseeability) duty formulation; (d) most courts include foreseeability into duty determinations; and (e) a majority of courts leave duty-foreseeability determinations to the jury. Such, in a nutshell, is the present legacy of Palsgraf and the backdrop to the Third Restatement.

IV. RESTATEMENT DUTY AND CAUSATION

The Third Restatement addresses each of the fundamental elements of negligence: duty, breach (failure to exercise reasonable care), factual cause, harm and harm within the scope of liability (formerly known as proximate cause). Both duty (generally) and affirmative duty are found in section 7 as well as sections 37–44, while the general principles as to breach and causation (factual cause and scope of liability) are found in sections 3 and 26–29, respectively. The Third Restatement substantially restates duty by creating a presumption and eliminating foreseeability from the duty inquiry.

A. Presumption of Duty

Section 6 of the Third Restatement states the rule for negligence referencing legal duty and the four factual elements of a prima facie case (failure to exercise reasonable care; factual cause; physical harm; and harm within the scope of liability). An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty of reasonable care is inapplicable.

Duty is separately set forth in section 7, which provides:

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

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

The Third Restatement elsewhere maintains the traditional no duty rule as to any obligation to affirmatively prevent harm to another. This no-duty rule is set forth in section 37, providing:

No Duty of Care with Respect To Risks Not Created by Actor

An actor whose conduct has not created a risk of physical harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in sections 38–44 is applicable. Similar to section 7 setting forth a general default duty rule, section 37 reiterates the lack of duty absent the creation of a risk of harm. A duty will be presumed if the actor’s conduct caused a risk of harm, but there will be a presumption of no duty if that conduct did not create a risk of harm. Taking sections 7 and 37 together, they reflect the established co-existence between the general duty and no affirmative duty rules.

The Third Restatement’s formulation of duty (and no duty) is notable in two significant ways. First, as to section 7, it creates a presumption of a duty of care on all actors, which duty can only

32. Cardi, The Hidden Legacy, supra note 6 at 1878.
33. Id. at 1878–90.
34. Id. at 1884 (“foreseeability is nearly ubiquitous and often cited as the most important factor in duty”).
35. Id. at 1873.
36. To date, there have been 12 Massachusetts decisions to specifically cite the Palsgraf decision; four by the Supreme Judicial Court; six by the Appeals Court and two by the Superior Court. Five of the decisions cite Palsgraf for the proposition that duty extends only to foreseeable plaintiffs. See Morrison v. Medaglia, 287 Mass. 46 (1934) (“the question [of] what conduct of third persons a defendant ought to have anticipated may have a further bearing upon the question whether the person injured is a person, or one of a class of persons, to whom defendant owed a duty of care”); Hansen v. Getchell, 70 Mass. App. Ct. 1101 (2007) (no liability whether viewed under duty or causation as liability is limited to persons likely to be injured by act or omission); Matteo v. Livingston, 46 Mass. App. Ct. 657 (1996) (scope of duty is limited to persons likely to be injured by act or omission); Lambley v. Kamen, 43 Mass. App. Ct. 277 (1997) (physician’s duty is limited to those upon whom he practices from foreseeable risks); Miranda v. Anderson, 2006 WL 2006134 (Mass. Super. Ct.) (citing Palsgraf for the proposition that duty is relational and scope of duty obligation is limited to persons likely to be injured by act). One decision focused on causation and foreseeability, Otero v. Fazio, 2007 WL 2705934 (Mass. Super. Ct.) (no liability for “negligence in the air” and “chance combination of the plaintiff falling asleep near a tree and [third party] backing up her vehicle without checking to see if anything or anyone was in its path conclusively breaks the chain of causation from the defendant's [homeowner’s] negligence, if any”). Five decisions cited Palsgraf for the proposition that there is no duty absent foreseeable risk. Leavitt v. Brockton Hosp. Inc., 454 Mass. 37, 45 n.19 (2009) (no breach of duty where risk is not foreseeable); Nycall Corp. v. KPMG Peat Marwick LLP, 426 Mass. 491 (1998) (citation Palsgraf as founder of foreseeability test in tort and refusing to adopt to negligence claims against professional by non-contractual privity claimants); Kaufman v. Boston Dye House, 280 Mass. 161 (1932) (liability on landowner only when damage is natural consequence of the escape of dangerous thing); Herbert v. Enos, 60 Mass. App. Ct. 817, 821 (2004) (whether viewed under duty or causation the resulting harm must be within range of reasonable apprehension); Barnes v. Geiger, 15 Mass. App. Ct. 365 (1983) (holding psychiatric trauma and physical injury to a person who mistakenly believes a close family member to be a victim of an accident is beyond reasonable apprehension). Three of the decisions also cite Palsgraf as to the issue of what is for a jury and what is for a court. See Herbert, 60 Mass. App. Ct. at 821 (where issue is reasonable foreseeability not critical to distinguish between duty and causation, and reasonable apprehension is at times a question for the court and at times a question for the jury); Barnes, 15 Mass. App. Ct. at 365 (foreseeability test under Palsgraf has been dependent “in fair measure on the range of vision of particular judges”); McLaughlin v. Viniios, 39 Mass. App. Ct. 5, 8 (1995) (“the outer limits of foreseeability have long been defined by judges”).
38. RESTATEMENT (THIRD) OF TORTS §37. A similar rule was set forth in both the First and Second Restatements. Restatement of Torts 314 (1934) (“the actor’s realization 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”); RESTATEMENT (SECOND) OF TORTS §314 (1965) (“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”).
39. RESTATEMENT (THIRD) OF TORTS §37.
40. Larry S. Stewart, Clarification On The Duty To Exercise Care, 37 WM. MITCHELL LAW REV. 1492 (2011)(“[p]rominent among its provisions is section 7, which contains the presumption of a duty to exercise reasonable care that is applicable in most cases”); Kevin Reynolds and William C. Scales, Liability for Physical and Emotional Harm, The New Duty and Causation Analysis, 52 For The Defense, No. 11 p. 9 (2010) ("The Restatement Third has broadened the scope of duty by creating a presumption of a generalized duty to exercise reasonable care").
be modified or avoided “in exceptional cases,” where “policy” or “principle” so dictates. Second, the presumption turns on conduct creating risk of physical harm and without regard to foreseeability.41

Section 7(a)’s presumption equates to a default rule setting forth the general principle that all actors have a duty to exercise care to prevent injury to others “when the actor’s conduct creates a risk of physical harm.” This general duty applies to both acts and omissions, as well as to situations where the actor has an affirmative duty to act.42 When combined with section 37, the duty becomes presumed if the actor’s act or omission created a risk of harm, with a presumption of no-duty if the conduct did not create a risk of harm. The sole exceptions to the no duty rule, in turn, are the specific affirmative duties set forth in sections 38 to 44. The result is that if the defendant’s conduct creates a risk, the duty of ordinary care applies, eliminating any need for a court to address the element of duty in the physical harm tort action. It is thought to avoid questionable or confusing efforts to find a basis for a duty, and potentially cotort other elements, when conduct creates a risk of physical harm to others.43

While perhaps less pronounced, the default principle can be seen in both the First and Second Restatements. Section 281 of the Second Restatement, for instance, which delineates the elements of a negligence action, makes no mention of the element of duty.44 In a comment, it is all but stated that a default rule applies in cases involving conduct creating a risk of physical harm:

In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect against an unreasonable risk of harm to them arising out of the act.

The Third Restatement, in its own comments, continued this approach, stating the position more directly:

An actor ordinarily has a duty to exercise reasonable care...[i]n cases involving personal injury, courts ordinarily need not concern themselves with the existence or content of this ordinary duty. They may proceed directly to the [remaining] elements of liability.46

Accordingly, both the Second and Third Restatement of Torts describe the existence of duty as a default rule where a defendant’s “affirmative act” or conduct creates a risk of harm.47 The Third Restatement’s default approach reflects that, in many instances, courts do not address the existence of a duty because it is self-evident.48 This is not because duty is not an element of a negligence action, but because the existence of duty is presumed whenever the defendant’s conduct created the risk.49

B. The Exceptional Case Policy or Principle Limitation

While the “everyone owes a duty of reasonable care” principle is not controversial or new, the presumption, together with section 7(b)’s “countervailing policy or principle” exception limited to “exceptional cases,” has been called transformative.49 It works an express shift in burden. Duty remains a legal question but it no longer is the plaintiff’s burden to prove as part of the prima facie case. Rather, it is incumbent upon the defendant to show that the presumed duty does not apply, or must be modified based on policy or principle.50

As to “exceptional cases,” the Third Restatement seeks to distinguish no-duty rules,52 which are questions of law, and scope of liability (proximate cause), which are usually fact dependent and for jury determination.53 No-duty, or modification of the general default duty determination, is asserted to be limited to “categorical” matters.

41. Restatement (Third) of Torts §7 cmt. j.

42. Restatement (Third) of Torts §6 cmt. ("The conduct that creates the risk must be some affirmative act, even though the negligence might be characterized by a failure to act... By contrast, when the only role of an actor is failing to rescue or otherwise intervene to protect another from risks created by a third person or other events, courts need to give explicit consideration to the question of duty").

43. Id.

44. Restatement (Second) of Torts §281. This is subject to some debate in that section 281 does refer to the requirement of a “legally protected interest,” which has been construed by some to equate to an articulation of duty. John C.P. Goldberg and Benjamin C. Zipursky, The Restatement (Third) and the Place of Duty in Negligence Law, 54 Vand. L. Rev. 657, 673 (2010) [hereinafter Goldberg and Zipursky, The Place of Duty].

45. Restatement (Second) of Torts §302 cmt. a; see also Restatement (Second) of Torts ch. 12, scope note to topic 4 (1965) ("conduct which is negligent in character does not result in liability unless there is a duty owed by the actor to the other not to be negligent. Normally, where there is an affirmative act which affects the interests of another, there is a duty not to be negligent with respect to the doing of the act").

46. Restatement (Third) of Torts §6 cmt. f; see also Restatement (Third) of Torts: General Principles §6 cmt. a (discussion draft 1999) and The American Law Institute, Restatement (Third) of Torts: Physical and Emotional Harm §7, Reporter’s Notes to cmt. a (Proposed Final Draft No. 1 2001) ("While courts frequently say that establishing duty is the first prerequisite in an individual tort case, courts commonly go on to say that there is a general duty to exercise reasonable care to avoid subjecting others to an unreasonable risk of harm or to comply with the legal standard of reasonable conduct").

47. Cardi and Green, Duty Wars, supra note 6 at 694.

48. Restatement (Third) of Torts §6 cmt. b ("[c]oncept in unusual categories of cases in which courts have developed no duty rules, an actor’s duty to exercise reasonable care does not require attention by the court.").

49. See Cardi and Green, Duty Wars, supra note 6 at 701 ("In the overwhelming majority of cases, courts today do not address the existence of duty. This is not because courts failed to see duty as an element of negligence but because they presumed the existence of a duty where defendant’s conduct created a risk").


51. Restatement (Third) of Torts §7, cmt. b ("A defendant has the procedural obligation to raise the issue of whether a no-duty rule or some other modification of the ordinary duty of reasonable care applies in a particular case"); Reynolds and Scales, The New Duty and Causation Analysis, supra note 6 at 10 ("It seems as though the Restatement Third has eliminated one element, or fully 25 percent, of the burden of proof by every plaintiff in every tort case"). The Third Restatement does note that the burden of duty remains on the plaintiff when "disputed adjudicative facts" are in dispute and bear on the existence or scope of the duty. Restatement (Third) of Torts §7 cmt. b. Comment b to section 7 makes clear that the defendant has the burden to establish no duty or a modification to the applicable duty. This is consistent with the presumptive duty approach. It remains that the court is to determine "legislative facts" needed to determine whether a no-duty rule is appropriate in a particular category of cases. Although the facts bearing on the issue of duty are usually not in dispute, when they are in dispute they are to be submitted to the jury with appropriate instructions, and with the burden of proof to establish such facts on the plaintiff.

52. Under the Third Restatement approach, "no duty" rulings exempt actors from the obligation of reasonable care. See Esper and Keating, Putting Duty in its Place, supra note 6 at 1226.

53. Restatement (Third) of Torts §7 cmt. a.
Comment a to section 7 states:

When liability depends on factors specific to an individual case, the appropriate rubric is scope of liability. On the other hand, when liability depends on factors applicable to categories of actors or patterns of conduct, the appropriate rubric is duty. No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases.54

The “policy” or “principle” referenced includes “general social norms of responsibility,”55 relational limitations,56 “institutional competence and administrative difficulties,”57 and governmental discretion.58 But, as addressed below, expressly excludes the concept of foreseeability.

C. Creating Risk of Harm and the Elimination of Foreseeability.

Under the Third Restatement, a duty is deemed to arise whenever there is conduct which creates risk of harm, and regardless of whether the injury or harm that occurred was foreseeable. It makes express the elimination of foreseeability from the duty determination.59 If no risk of physical harm is created, there is no duty of care absent an affirmative duty created by law.

The centerpiece for a duty or no-duty determination (absent the presence of an established affirmative duty) is “conduct that creates a risk of harm.” Despite its status in the Restatement’s architecture, “conduct that creates a risk of harm” is not well defined. The comments are limited, providing only that “the duty of reasonable care is ordinarily limited to risks created by the actor’s conduct,” that “[t]he conduct that creates the risk must be some affirmative act, even though the negligence might be characterized as a failure to act,”60 and that an “[a]ctor’s conduct creates a risk when the actor’s conduct or course of conduct result in greater risk to another than the other would have faced absent the conduct.”61

The elimination of foreseeability from the duty determination is the most controversial aspect of the Third Restatement’s approach, as most states utilize and rely upon foreseeability in duty analysis.62 Foreseeability is viewed as more rightly assessed in determining whether the duty of care was exercised.63 It reflects concern with the fact-specific analysis of the foreseeability of the injury inquiry, which is believed to be more suited for the jury or fact finder as to the issue of breach.64 The Third Restatement is specific and deliberate in its belief that courts too often take cases away from a jury in determining negligence through the rubric of a finding of no duty, when it is truly one of whether the actor exercised reasonable care.65

Sometimes reasonable minds cannot differ about whether an actor exercised reasonable care ... [1] In such cases, courts take the question of negligence away from the jury and determine that the party was or was not negligent as a matter of law. Courts sometimes inaptly express this result in terms of duty. Here, the rubric of duty inaccurately conveys the impression that the court’s decision is separate from and antecedent to the issue of negligence. In fact, these cases merely reflect the one-sidedness of the facts bearing on negligence, and they should not be misunderstood as cases involving exemption from or modification of the ordinary duty of reasonable care.66

Eliminating the foreseeability element from the duty inquiry forces courts to be clear, based on policy or other related principles, in declaring the existence or non-existence of a duty of care under the circumstances. According to the comments accompanying section 7:

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

... Despite widespread use of foreseeability in no-duty determinations, this Restatement disapproves that any obligation of due care at all and saying that it is plainly evident that someone has discharged his obligation of due care—so evident that no reasonable person could think him even a little bit careless.”).

54. Id. See also Esper and Keating, Putting Duty in its Place, supra note 6 at 1226 (“In a sea of general duty, islands of ‘no duty’ must ... be less general than the duty of care they suspend. But even ‘no duty’ rulings must fix the rights and responsibilities of persons with enough generality to govern a discernible domain of conduct.”).

55. Restatement (Third) of Torts §7 cmt. b.

56. Id. at cmt. e.

57. Id. at cmt. f.

58. Id. at cmt. g.

59. Id. at cmt. j.

60. Id. at §6 cmt. f.

61. Id. at §7 cmt. o. Risk-creating conduct can include, inter alia, both exposing another to natural hazards or to the improper conduct of third parties.

62. See Cardi, Purging Foreseeability, supra note 50 at 741 (noting that “[o]ne might argue that it is not the place of the Restatement to effect such a drastic reform in negligence law”).

63. Restatement (Third) of Torts §7 cmt. j (“reasons of policy and principle do not depend on the foreseeability of harm based on the specific facts of the case”); see also Esper and Keating, Putting Duty in its Place, supra note 6 at 1228 (“There is a world of difference between saying that someone is not subject to
practice and limits no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as fact-finder.\^6\^7

As a result, “[a] lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination.”\^6\^8 The lack of a foreseeable risk of harm or injury equates to “a determination that no reasonable person could find that the defendant has breached the standard of care.”\^6\^9 At its core, “[d]eterminations of no duty are categorical while foreseeability cannot be determined on a categorical basis,” and “[a]voiding reliance on unforeseeability as a ground for a no-duty determination and instead articulating the policy or principle at stake will contribute to transparency, clarity, and better understanding of tort law.”\^7\^0

In no uncertain terms, the Third Restatement declares Justice Andrews the winner over Justice Cardozo — by a knock out.

D. Breach and Foreseeability

The Third Restatement sets forth the element of breach in section 3:

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

70. Section 7 cmt. j. The comments further provide:

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

Id. See also Rodriguez v. Del Sol Shopping Ctr. Assoc., L.P., 326 P.3d 465, 467 (N.M. 2014) (“foreseeability cannot be a policy argument because foreseeability is not susceptible to a categorical analysis”).

71. Restatement (Third) of Torts §3 cmt. h (“the jury’s responsibility is to render an informed judgment in light of these variables”).

72. Restatement (Third) of Torts §3 cmt. e (“conduct is negligent if its disadvantages outweigh its advantages, while conduct is not negligent if its advantages outweigh its disadvantages”).

73. Id. at cmt. d.

74. Id. at cmt. e (“conduct is negligent if its disadvantages outweigh its advantages, while conduct is not negligent if its advantages outweigh its disadvantages”).

75. Id.

76. Id. at cmt. h (“negligence law takes into account and credits whatever burdens of risk prevention are actually experienced by the actor and others. While negligence law is concerned with social interests, courts regularly consider private interests, both because society is the protector of private interests and because general public good is promoted by the protection and advancement of private interests”).

77. According to Judge Hand:

Since now there are occasions when every vessel will break from her moorings and since, if she does, she becomes a menace to those about her, the owner’s duty, as in other similar situations to provide against resulting injuries is a function of three variables: (1) the probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be P, the injury L, and the burden B; liability depends upon whether B is less than L multiplied by P; i.e., whether B<P L.

Foreseeability thus has substantial stature in the Third Restatement's breach formulation. This is in keeping with the view that foreseeable risk is not a matter of duty but fact specific, dependent on the particular factual circumstances of the case. A lack of foreseeable risk in any particular case may be a basis for no breach determination but such a ruling is not a no-duty determination.  

Notably, section 3 makes clear that the harm whose severity is to be considered is not limited to the particular harm suffered by the claimant but whatever harms are made likely by the actor's conduct.  

Similarly, the party claiming negligence, while required to show what precaution should have been adopted, is not required to show that the precaution would have eliminated the harm, only that it would have "reduced that risk."  

E. Restating Causation

Traditional causation analysis has consisted of the two-step inquiry of cause in fact, represented by the "but-for" test and proximate cause. Due to concern about the difficulty in the counter-factual inquiry required by but-for,  and the lack of guidance provided by "proximate cause," the First and Second Restatements packed the two, as well as the "substantial factor" notion, together under the concept of "legal cause."  

By the time of the Third Restatement project, it was long deemed a failure.  

Indeed, the Third Restatement expressly states that "[d]espite the venerability of the 'legal cause' term in Restatement history, it has not been widely adopted in judicial and legal discourse, nor is it helpful in explicating the ground that it covers."  

The sections governing causation under the Third Restatement are sections 26 through 29. The Third Restatement's causation formulation is notable in that it drops completely the proximate cause and substantial contributing factor or cause terminology, prevalent in the Second Restatement. Causation is essentially two-fold—factual causation (sections 26 through 28), and harm within the scope of liability (section 29).

i. Factual Cause and the Ban of the Evaluative Substantial Factor Test

Section 26, entitled "Factual Cause," provides:  

Tortious conduct must be a factual cause of harm for

liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under Section 27.

Section 26 represents the Third Restatement's affirmation of the "but for," or sine qua non, test for determining cause in fact.  

The prominence and clarity of the but-for standard in section 26 is particularly notable when it is compared to its treatment in the earlier Restatements, where it was presented passively and in the context of substantial cause language.

Section 27, in turn, addresses the circumstance of multiple sufficient causes, or the well known exception for the "two (or twin) fires," type cases. Under section 27, where multiple acts exist, "each of which under §26 alone would have been a factual cause of the physical harm at the same time in the absence of other act(s), each act is regarded as a factual cause of the harm."  

Section 27 does not apply to all situations where there are multiple responsible causes, but only to the situation where there is more than one set of sufficient causes.

Comments c and f are notable as they arguably usurp the plain language of section 27. Both address causal sets, with comment c providing that "[m]ultiple sufficient causes are also factual causes because we recognize them as such in our common understanding of causation, even if the but for standard does not."  

As such, comment c finds section 27 to "comport[] with deep seated intuitions about causation and fairness in attributing responsibility."  

Comment f, in turn, provides that the insufficiency of a tortious actor's conduct is not necessarily determinative, in that such insufficiency is not fatal to establishing factual causation where "combined with conduct of other persons, the conduct over-determines the harm."  

Comment f expressly states that "[t]he fact that an actor's conduct requires other conduct to be sufficient to cause another harm does not obviate the applicability" of section 27. Other than general reference to asbestos cases and academic law reviews, there is little cited support. As a result, under the Third Restatement's approach, factual cause is established where the harm is caused by a tortious act that either alone or as a necessary part of a combination of other factors would have caused the harm.

84. Rapp, Torts 2.0 supra note 83 at 1591-92.  
85. Restatement (Third) of Torts §26 cmt. a.  
86. Restatement (Third) of Torts §26.  
87. See id; Reporter's Notes cmt. b ("the but-for causal relationship fits more comfortably within the corrective-justice vision of tort law than the normative economics theory. Within the corrective-justice framework, a wrongdoer who causes (in a common or moral sense) harm to another is required to make amends").  
88. See Oliphant, Uncertain Factual, supra note 83, at 1602; Restatement (Second) of Torts §432(1)(1965)("the actor's negligent conduct is not a substantial factor in bringing about the harm to another if the harm would have been sustained even if the actor had not been negligent").  
89. The famous "twin fires" cases are in reference to Anderson v. Minneapolis St. P. & S.S.M. Ry., 179 N.W. 45 (Minn. 1920)(holding defendant's fire was a cause in fact of loss, because it was a material or substantial element in causing plaintiff's damage), and Kingston v. Chicago & Northwest Railway Co., 211 N.W. 913 (Wis. 1927).

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Sections 26 and 27 jettison the use of or reference to “substantial factor or cause” terminology. By the time of the Second Restatement, the “substantial” factor or cause label was intended to provide a “relaxed” factual causation test in the competing force or “two fire” scenario, and to otherwise excuse defendants whose conduct is a but-for cause of harm when the effect of that harm is so insignificant that no ordinary mind would think of it as a [a] cause[]." 95 Although acknowledging its primary historical function, the Third Restatement concluded that "[t]he substantial factor test has not... withstood the test of time, as it has proved confusing and been misused." 96 The problem was found to reside in permitting either a more rigorous or more lenient standard for factual cause. 97 According to the Reporter’s Notes:

The essential requirement, recognized in both Restatements, is that the party’s tortious conduct be a necessary condition for the occurrence of the plaintiff’s harm: the harm would not have occurred but for the conduct. To the extent that substantial factor is employed instead of the but-for test, it is undesirably vague. As such, it may lure the fact-finder into thinking that a substantial factor means something less than a but-for cause or, conversely, may suggest that the fact-finder distinguish among factual causes, determining that some are and some are not “substantial factors.” 98 Thus, use of substantial factor may unfairly permit proof of causation on less than a showing that the tortious conduct was a but-for cause of harm or may unfairly require some proof greater than the existence of but-for causation. 99

The Third Restatement views the fundamental problem with the significant factor or cause rubric to be its “evaluative” character. It serves as a judgmental limitation on liability where factual cause is an all or nothing proposition. Specific conduct is either a cause in fact or it is not. “There are no degrees of factual cause.” 100 By eliminating the evaluative “substantial,” the fact-finder cannot find an otherwise factual cause (but-for) “insubstantial,” and thus not actionable. With reference to section 27 and the multiple sufficient cause scenario, the elimination of the “substantial factor” precludes the fact-finder from picking and choosing, on evaluative grounds, tortious acts that are independently sufficient to cause harm. 101

ii. Scope of Liability (f/k/a Proximate Cause)

Section 29 restates what was formerly deemed “proximate” or “legal” cause into a “scope of liability” framework. Section 29 provides that “an actor’s liability is limited to those harms that result from the risk that made the actor’s conduct tortious.” 102 Not only does this eliminate the use of or reference to either proximate or legal cause, it also purges foreseeability from the scope of liability determinations, as does section 7 relative to duty.

The “risk standard” set forth in section 29 requires consideration of “the risks that made the actor’s conduct tortious,” and “whether the harm for which recovery is sought was a result of any of those risks.” 103 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. 104 The scope of liability standard is deemed a clearer standard that will facilitate a more principled analysis, “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.” 105 It is believed to provide “greater clarity” than the foreseeability test 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.” 106 The risk standard can be applied by fact-finders “with more sensitivity to the underlying rationale than they might with the undorned foreseeable-harm standard,” while “[a] foreseeable standard strictly risks being misunderstood because of uncertainty about what must be foreseen, by whom, and by what.” 107

The Third Restatement approach regards scope of liability as a non-issue in most cases. 108 Scope of liability will be an issue only in those cases involving a somewhat unique fact pattern; i.e., where the claimant was within the scope of some harm but the injury is the result of a risk that was not, or was arguably not, one of the risks that made the actor’s conduct tortious in the first place. 109 Moreover, “[w]hen defendants move for a determination that the plaintiff’s harm is beyond the scope of liability as a matter of law, courts must

95. See Joseph Sanders, Michael Green and William Powers Jr., The Insubstantiality of the Substantial Factor Test for Causation, 73 Mo. L. Rev. 399, 416, 419 (2008)(stating that the role of the substantial factor test at common law was to modify the traditional but-for test in two instances; the two fire scenario and the “trivial” circumstance)[hereinafter Sanders, Green & Powers, The Insubstantiality]. See also Restatement (Second) of Torts §431 cmt. a. Section 432(2) of the Second Restatement provides:

If two forces are actively operating, one because of the actor’s negligence, the other because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor’s negligence may be found to be a substantial factor in bringing it about.

96. Restatement (Second) of Torts §26 cmt. j.

97. Id. (“The element that must be established, by whatever standard of proof, is the but-for or necessary-condition standard of [Section 26]. Section 27 provides a rule for finding each of two acts that are elements of sufficient competing causal sets to be factual causes without employing the substantial-factor language of the prior Torts Restatements. There is no question of degree for either of those concepts”).

98. Id.

99. Id.

100. Id. at §27 cmt. b. Competing causes can be either tortious or innocent conduct. Id. at cmt. d (“conduct is a factual cause of harm regardless of whether it is tortious or innocent and regardless of any other cause with which it concurs to produce over-determined harm”).

101. Restatement (Second) of Torts §29.

102. Id. at cmt. d.

103. Id.

104. Id. at cmt. j. Taking sections 27 and 29 together returns to section 6- the Third Restatement’s definition of negligence: that is, “an actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within scope of liability unless the court determines that the ordinary duty of reasonable care is inapplicable.” Restatement (Third) of Torts §6. The comments reveal the recognition that use of foreseeability for addressing scope of liability is not inconsistent with its approach, but that it deems it preferable. Id.

105. Id.

106. Id. (“when courts pose the foreseeability inquiry as whether harm was foreseeable at the time defendant acted or as to whether an intervening act was foreseeable, attention is deflected from the crux of the risk-standard inquiry.”).

107. Restatement (Third) on Torts §29 cmt. a (“Ordinarily, the plaintiff’s harm is self-evidently within the defendant’s scope of liability and requires no further attention”).

108. Id. at cmt. d.
initially consider all of the range of harms risked by defendant’s conduct that the jury could find as the basis for determining that conduct tortuous."\(^{109}\) At that point, the Third Restatement instructs that the court compare the specific harm suffered with the range of harms risked by the defendant, and ask whether a reasonable jury might find the suffered harm within the range of created risks.\(^{110}\)

The heart of the scope of liability approach can be found in comment i, which provides:

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.\(^{111}\)

The “scope of liability” approach includes intervening and superseding cause issues,\(^{112}\) as well as a “trivial contribution” provision. The trivial contribution provision provides that “[w]hen an actor’s negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of physical harm under [section] 27, the harm is not within the scope of the actor’s liability.”\(^{113}\) The placement of the “trivial contribution” principle in scope of liability as opposed to factual cause is notable in that, according to the comments, it seeks to preserve the historical limitation of the liability aspect of the substantial factor test.\(^{114}\) The comment also makes clear that this trivial contribution exemption sets forth “a narrow rule that courts have developed as a matter of fairness, equitable-loss distribution and administrative cost.”\(^{115}\) Arguably, section 36 addresses the potential over-inclusiveness of section 27, in that a cause does not have to be “substantial” in order to constitute a factual cause in the competing forces scenario. In order to reel in liability in such circumstances, section 36 exempts trivial contributions to an otherwise sufficient cause from liability.

V. Other State Experience With Third Restatement

To date, the state court experience with the Third Restatement has varied.\(^{118}\) At least one state, Iowa, has fully adopted the Third Restatement approach as to both duty and causation; four states, Wisconsin, Arizona, Nebraska and New Mexico, have agreed with the approach to drop foreseeability from the duty analysis; and two states, Tennessee and Delaware, have rejected the Third Restatement approach to duty on the issue of foreseeability.

In Thompson v. Kaczinski,\(^{117}\) the Iowa Supreme Court opted to adopt the Third Restatement approach to both duty and causation. There, a disassembled trampoline had been blown into the street by wind, causing a car accident.\(^{118}\) The trial court entered summary judgment for the homeowner, holding that there was a lack of duty, as the risk of the trampoline’s displacement from the yard to the roadway was not foreseeable.\(^{119}\) On appeal, the Iowa Supreme Court noted that Iowa’s approach to duty rested on three factors: the relationship of the parties; reasonable foreseeability of harm to the person who is injured; and public policy considerations.\(^{120}\) Although it also stated that foreseeability in determining duty was “a fundamental rule of negligence law,”\(^{121}\) it proceeded to adopt the Third Restatement’s position on duty, finding it “compelling.” In holding that the trial court erred in finding no duty, the Court stated that once foreseeability was removed, there was no “principle or strong policy consideration” justifying exemption from the general and presumed duty of care.\(^{122}\)

As to causation, the Thompson court believed that Iowa’s formulation of legal or proximate cause had “been the source of significant uncertainty and confusion.”\(^{123}\) The approach was found to confuse factual determinations (substantial factor in bringing about harm) with policy judgments (no rule of law precluding liability).\(^{124}\) It proceeded to adopt the Third Restatement’s “risk standard” as the operative test for causation or “scope of liability” determination.\(^{125}\)

While it recognized that foreseeability “has previously played an important role in our proximate cause determinations,”\(^{126}\) it agreed

109. Id.
110. Id.
111. Id. at cmt. i.
112. Id. at §29.
113. Id.
114. Sanders, Green and Powers, The Insufficiency, supra note 95 at 421-22 n.90 (noting that this statement in the comment was a mistake).
115. Restatement (Third) of Torts §36 cmt. b. Compare David W. Robertson, Causation in the Third Restatement: Three Arguable Mistakes, 44 Wake Forest L. Rev. 1007, 1020 (2009) (asserting that the trivial contribution exemption is not a scope of liability matter, but one of factual causation); see also Sanders, Green and Powers, The Insufficiency, supra note 95 at 421 (citing cmt. b).
116. Steenson, Minnesota, supra note 3 at 1062 (“State encounters with the Third Restatement approach to negligence cases have varied widely, from open acceptance to tight-lipped rejection.”).
117. 774 N.W.2d at 831; see also Mitchell v. Cedar Rapids Community School Dist., 832 N.W.2d 689 (Iowa 2013) (reaffirming adoption of Third Restatement and elimination of foreseeability in duty analysis); Rodriguez v. Del Sol Shopping Ctr. Assoc., L.P., 326 P. 3d 465 (N.M. 2014) (same).
118. Thompson, 774 N.W.2d at 832. \(^{119}\)
120. Id. at 834 (quotating Sankey v. Ichenberer, 456 N.W. 2d 206, 209-10 (Iowa 1990)).
121. Thompson, 774 N.W.2d at 832 (quotating Sankey v. Ichenberer, 456 N.W. 2d 206, 209-10 (Iowa 1990)).
122. Thompson v. Kaczinski, 774 N.W.2d 829, 835-36 (Iowa 2009) (“we conclude no such principle or policy consideration exempts property owners from a duty to exercise reasonable care to avoid the placement of obstructions on a roadway”). The Iowa Supreme Court has also made clear that “a lack of duty may be found if either the relationship between the parties or public considerations warrants such a conclusion.” McCormick v. Nikkel & Assoc. Inc., 819 N.W. 2d 368 (Iowa 2012).
123. Thompson, 774 N.W. 2d at 836.
124. Id. at 836-37.
125. Id. at 836-39.
126. Id. at 838.
with the Third Restatement that the “risk standard” provides “greater clarity, facilitates clearer analysis . . . and better reveals the reason for its existence.”127 It went on to hold that it was a jury question, as a reasonable fact-finder could conclude that the property owners should have known that high winds do occur in Iowa in September, and that a strong gust of wind could displace an unsecured trampoline located only a short distance from a roadway, thus endangering motorists.128

Wisconsin, Nebraska, Arizona, New Mexico and Utah have likewise either adopted or heavily relied upon the Third Restatement’s approach to duty. A 2010 Nebraska Supreme Court decision agreed that foreseeability should not be considered in the determination of duty, only breach.129 The court reasoned that foreseeability determinations were not truly legal but rather more factual, as they involved application of “common sense, common experience, and application of the standards and behavioral norms of the community,”130 and that eliminating foreseeability from duty would require judges to be clear in setting forth the reasons for their no-duty determinations.131 The court agreed that an actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm, and that under the Third Restatement approach the defendant’s conduct is examined, not in terms of whether he had a “duty” to take particular actions, but, rather, in terms of whether his conduct breached the duty to exercise the care that would be exercised by a reasonable person under the circumstances.132 Accordingly, “[d]uty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases.”133

The Supreme Court of Wisconsin addressed the duty approach of the Third Restatement in 2009.134 There, it was confirmed that Wisconsin followed Judge Andrews’s view of duty in Palsgraf, that “[e]very one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.”135 The court did not adopt section 7 of the Third Restatement, but relied on the reasoning of comments i and j to section 7 in finding that where courts enter judgment as a matter of law due to lack of foreseeability, they are not saying no duty was owed, but rather that there was no breach as a matter of law.136 Somewhat inconsistent with the Third Restatement, the Wisconsin Supreme Court discussed and noted the various policy factors its prior decisions had recognized as informing the duty determination.137 The policy factors identified included the remoteness of the injury from the negligence; disproportion between the recovery and the negligence; whether the harm is highly extraordinary as compared with the negligence; whether recovery would open the door to fraudulent claims, and whether allowing recovery in the area would mean that there is no sensible or just stopping point.138

Wisconsin courts have also held that the public policy necessary to preclude liability must “shock the conscience of society not to impose liability.”139 Further, subsequent appellate decisions in Wisconsin have stated that to the extent the Supreme Court was stating that a finding of “no duty under the circumstances”140 offends the “duty to the world” concept, it “confused” the two components of duty under Wisconsin law: (i) the existence of a duty of ordinary care, and (ii) an assessment of what ordinary care requires under the circumstances. As such, whether a no-foreseeability finding flowing from the second aspect is characterized as no-duty or no-breach is a matter of semantics.141

The Supreme Court of Arizona opted to eliminate foreseeability from the tort duty analysis in a decision rendered in 2007.142 The court agreed with the Third Restatement that allowing courts to consider foreseeability as to duty could undermine the jury’s fact-finding role.143 The issue of duty was properly subject to generalized categories, while the issue of breach was fact specific.144 As such, courts are not to examine the particular facts of the case in order to determine duty.145 Duty, in turn, turned on the relationship of the parties, and public policy which can be found both in the common law and statutes.146

128. Thompson, 774 N.W.2d at 839.
130. A.W. 84 N.W. 2d at 914 (citing Cardi, Purging Foreseeability, supra note 50 at 799).
131. Id. at 917.
132. Id.; see Riggs v. Nickel, 796 N.W. 2d 181, 187 (Neb. 2011); Martensen v. Rejda Bros. Inc., 808 N.W. 2d 855, 863 (Neb. 2012)(reaffirming that Nebraska follows Third Restatement as to purging of foreseeability from duty analysis).
133. Rejda, 808 N.W. 2d at 863.
136. Behrends, 768 N.W. 2d at 575-76.
137. Id. at 577.
138. Id. There were two concurring opinions which disagreed about the role of foreseeability in cases involving nonfeasance. Under one view, where the claim was one of omission, the court must first determine whether the defendant’s general duty to exercise reasonable and ordinary care implied a more specific duty to perform the act that was omitted. Furthermore, if the court determines that the defendant’s general duty to exercise reasonable and ordinary care did not imply a specific duty to perform the omitted act, the defendant as a matter of law cannot be negligent. Under the opposing view, the distinction between misfeasance and non-feasance was a throw back to outdated days, and Wisconsin case law did not support such a distinction.
139. Tesar v. Andersen, 789 N.W. 2d 351, 356 (Wis. App. 2010).
141. Id.
142. Gipson v. Kasey, 150 P.3d 228, 231 (Ariz. 2007). In Gipson, the Arizona Supreme Court held an employee who gave prescription drugs to a co-worker who later died from a drug overdose—based on public policy reflected by criminal statutes that prohibited the distribution of prescription drugs to those not covered by the prescription—to preclude liability must “shock the conscience of society not to impose liability.”143 The court declined to decide whether a general duty to exercise reasonable care exists, subject to exceptions from the duty in particular circumstances. Id. at 233 n.4.
143. Id. at 231 (“foreseeability is not a factor to be considered in resolving duty issues”).
144. Id. See also Steenson, Minnesota, supra note 3 at 1072 (discussing Arizona adoption of Third Restatement). It was later held by an intermediate court that foreseeability plays no role in either the existence of the duty or its scope. Delci v. Guitierrez Trucking Co., 275 P.3d 632, 635 n.2 (Ariz. App. 2012); compare In re New York City Astis Litig., 840 N.E.2d 115, 119 (N.Y. 2005) (cautioning that “foreseeability bears on the scope of a duty, not whether a duty exists in the first place”); Lips v. Scottsdale Healthcare Corp., 229 P.3d 1008, 1010 (Ariz. 2010)(“courts have not recognized a general duty to exercise reasonable care for the purely economic well-being of others, as distinguished from their physical safety or the physical safety of others”).
Arizona has not, however, adopted the Third Restatement’s presumptive duty of care standard. In 2012, the Arizona Appeals Court stated that to so would do more than just modify existing Arizona negligence law, it would substantially change Arizona’s long-standing conceptual approach to negligence law, and effectively eliminate duty as one of the required elements of a negligence action. It was thus left for the Arizona Supreme Court to make such a determination.

Most recently, the Supreme Court of New Mexico expressly adopted the Third Restatement’s ban of foreseeability from the duty analysis. The lower court had relied upon fact-specific foreseeability considerations in determining whether a shopping center had a legal duty to protect shoppers inside the building from a criminally reckless driver in the mall’s parking lot. Seeking to clarify what it found to be conflicting law on the role of foreseeability, the Supreme Court of Mexico reiterated and expressly made clear that New Mexico followed the Third Restatement approach -- that foreseeability considerations should not be used by a judge to determine the scope of duty. According to the New Mexico Supreme Court, “foreseeability is not a factor for courts to consider when determining the existence of a duty, or when deciding whether to limit or eliminate an existing duty in a particular class of cases.” Instead, a court must “articulate specific policy reasons, unrelated to foreseeability considerations, if deciding that a defendant does not have a duty or that an existing duty should be limited.”

What may not be foreseeable under one set of facts may be foreseeable under a slightly different set of facts. Therefore, foreseeability cannot be a policy argument because it is not susceptible to a categorical analysis.Both the Tennessee and Delaware high courts have opted not to adopt the Third Restatement approach, reaffirming their respective tradition of looking to foreseeability as part of the duty determination. In decisions in 2008 and 2009, the Tennessee Supreme Court reiterated its view that foreseeability was an integral part of the duty determination. Under Tennessee law, the issue of duty in tort is resolved by public policy involving considerations of a variety of factors: foreseeability of the harm; the magnitude of the harm; the social value of the defendant’s activity; the usefulness of the conduct of the defendant; feasibility of alternative conduct; the relative costs and burdens; the usefulness of the safer conduct and the relative safety of alternative conduct. Foreseeability alone is not enough to impose a duty, but must be established as a threshold question. If foreseeability is established, the court will then determine whether the risk to the plaintiff was unreasonable, such that “the foreseeable probability and gravity of harm posed by defendant’s conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm.”

In 2009, the Supreme Court of Delaware likewise declined to adopt the Third Restatement’s view as to duty. According to the Delaware Supreme Court, the Third Restatement redefined duty “in a way that is inconsistent with the Court’s precedents and traditions.” As to the Third Restatement’s view that exception to the general duty of care exists only where “an articulated countervailing principle of policy warrants denying or limiting liability in a particular class of cases,” it is for the legislature to decide “these matters of social policy, not the courts.”

The Supreme Court of Utah has not expressly adopted the Third Restatement, but has otherwise cited to it in confirming that under Utah tort law, foreseeability in the duty analysis differs from that as to causation. Duty under Utah law is determined by examination of the legal relationship of the parties, the foreseeability of the injury, the likelihood of injury, public policy as to which party can better bear the loss occasioned by the injury, and other general policy considerations. Foreseeability as to duty is evaluated at a broad categorical level, but is not used to question the specifics of the alleged tortious conduct, such as the specific mechanism of harm.

147. Delci, 275 P. 3d at 637.
148. The court went on to state:

The Third Restatement approach significantly lessens the role of the court as a legal arbiter of whether society should recognize the existence of a duty in particular categories of cases; for this reason, adopting the Third Restatement would increase the expense of litigation. Although restricting the dismissal of negligence actions for lack of duty may be thought desirable as more protective of a litigant’s jury-trial right, such a fundamental change in the common law requires an evaluation of competing public policies that is more appropriately addressed to the Arizona Supreme Court.

Id.

150. Id. at 468.
151. Id.
152. Id. at 467.
153. Id.
154. Id.
155. Giggers v. Memphis Housing Authority, 277 S.W.3d 359 (Ten. 2009); Satterfield v. Breeding Insulation Co., 266 S.W. 3d 347 (Tenn. 2008). In Satterfield, there was a concurring and dissenting opinion stating that Tennessee should follow the Third Restatement approach purging foreseeability from the duty analysis. According to the concurring/dissenting opinion “[a] collection of twelve people representing a cross-section of the public is better suited than any judge to make the common-sense and experience-based judgment of foreseeability.” Steenson, Minnesota, supra note 3 at 1081 (quoting Satterfield, 266 S.W. 3d at 376 (Holder, J. concurring and dissenting) (citing Cardi, Purging Duty, supra note 50 at 799-800)).
156. Steenson, Minnesota, supra note 3 at 1079 (discussing Satterfield, 266 S.W.3d at 365).
158. McCall v. Wilder, 913 S.W.2d 150, 153 (Tenn.1995) (citing Restatement (Second) of Torts, §291 (1964)); see also Satterfield, 266 S.W.3d at 365. Further, Tennessee maintains a distinction between mis- and non-feasance. Hagen v. U-Haul Co. of Tenn., 613 F. Supp. 2d 986 (W.D. Tenn. 2009) (citing Satterfield, 266 S.W. 3d at 355). Specifically, a general duty is imposed for acts of misfeasance but not nonfeasance, and in determining between the two a court should focus on “whether the individual’s entire course of conduct created a risk of harm.” Satterfield, 266 S.W. 3d at 357.
159. Steenson, Minnesota, supra note 3 at 1084-86 (discussing Riedel v. ICI Americas Inc., 968 A. 2d 17 (Del. 2009)).
161. Riedel, 968 A.2d at 21 (“This Court’s charge does not include articulating general social norms of responsibility.”).
162. B.R. ex rel Jeffs v. West, 275 P.3d 228 (Utah 2012).
164. West, 275 P. 3d at 232 (citing Normandeau, 215 P.3d at 158). The court in Normandeau stated that “the appropriate foreseeability question for duty analysis is whether a category of cases includes individual areas in which the likelihood of some type of harm is sufficiently high that a reasonable person could anticipate a general risk of injury to others.” Normandeau, 215 P.3d at 158.
As to the Third Restatement’s causation formulation, Virginia has recently agreed that the “substantial contributing factor” language must be rejected.\(^{165}\) The court agreed that there were problems with substantial contributing factor language for causation including, \textit{inter alia}, potentially reducing the cause-in-fact requirement by referencing a contributing factor rather than an independent but-for cause, as well as potentially meaning anything more than a \textit{de minimus} cause.\(^{166}\) To date, it is the only state to specifically address the issue of whether the Third Restatement’s causation approach should be adopted.

VI. MASSACHUSETTS AND THE THIRD RESTATEMENT

There are only six reported Massachusetts appellate decisions which have so far referenced the Third Restatement in any detail.\(^{167}\) Four addressed the issue of duty, and two either causation or breach.\(^{168}\) None of the decisions, however, in any way addressed whether the Third Restatement’s structure as to either the prescriptive duty to all, the removal of foreseeability from the duty analysis, or the risk standard and the new nomenclature as to causation, will be formally adopted.

In the first reported decision to mention and discuss the Third Restatement Justice Kaplan, writing for the Appeals Court, outlined its basic provisions, remarking that using a risk standard instead of reasonable foreseeability to define the limits of liability (i.e., proximate cause) was “helpful.”\(^{169}\) According to Justice Kaplan:

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The use of “risk,” rather than “reasonable foreseeability,” to define the limitation on liability seems to assist analysis as it sheds confusing terminology often found in discussions of “proximate cause” and nearly exhibits the relationship between negligence …. with scope of liability…. The new dispensation is not aimed intrinsically at different practical results from the old, for reasonable foreseeability dominates [the Third Restatement’s limitation of liability section] by its reference to the “tortious” (i.e., negligent) character of the initial act.

In \textit{Commonwealth v. Carlson},\(^{171}\) decided in 2006, the Supreme Judicial Court also discussed the Third Restatement restructuring. There, however, it was expressly “left for another day, in a case where the matter is appropriately briefed, the issue whether [Massachusetts] should replace the term ‘proximate cause,’ as defined in our case law, with the term ‘scope of liability,’ as defined in the [Third Restatement] and the principles accompanying ‘scope of liability’ set forth therein.”\(^{172}\) The remaining Massachusetts cases discussing the Third Restatement primarily concerned the question of duty to third parties, with no mention of any intent to agree with the purging of foreseeability from the duty determination.\(^{173}\) The general tenor of all the cases referencing the Third Restatement is generally positive, with it certainly deemed, at a minimum, an influential source.

As it stands, Massachusetts courts treat a negligence claim as comprising four elements: (1) legal duty owed by the defendant to plaintiff; (2) a breach of that duty; (3) proximate or legal cause; and (4) actual damage or injury.\(^{174}\) As to nomenclature, “legal” and “proximate” cause are used interchangeably and, in most instances, do not encompass factual causation. “Scope of liability” has been used in terms of both “duty” and “causation,”\(^{175}\) while “substantial contributing factor or cause” is routinely used and referenced within}

166. Id. at 732.
168. Ibid.
169. Or, 62 Mass. App. Ct. at 475. The issue in \textit{Or} was whether there was sufficient evidence to justify a wrongful death verdict against a landlord for the death of a tenant’s child, who was raped and murdered by a custodial worker who had been entrusted with keys to the apartments. Justice Kaplan referenced the Third Restatement’s approach that foreseeability enters into the tort analysis as to the issue of breach, and as a factor in the “limitation of liability” (i.e., proximate cause) evaluation. In a footnote, he accurately noted the Third Restatement’s causation approach “prefers the but-for formulation” and that it “urg[ed] the use of ‘factual cause’ as a clean category disentangled from such expressions as ‘legal cause.’” Id. at 485 n.16 (citing RESTATEMENT (THIRD) OF TORTS §26 cmts. a and b). Justice Kaplan was particularly focused on the issue of causation and the role of the jury. Under either the “conventional” Massachusetts charge as to “proximate cause” or under the Third Restatement, the evidence was found to support the jury’s verdict of liability. Moreover, he reiterated that “juries have a special place and value when it comes to handling the issue of limitation on liability, for here community standards—conceptions about what is right—should and inevitably do play their part.” Id. at 491.
172. Id. at 84 n.5.
173. In \textit{Leavitt}, the issue was whether a special relationship existed between the plaintiff pedestrian and the employer of the motorist who, while driving and intoxicated, struck the pedestrian crossing a street. In finding no special relationship, the court rejected the motorist’s reliance on the Third Restatement. It noted that while the Third Restatement identified a special relationship to exist between employer and employee where “the employer facilitates the employee causing harm to third parties,” it found there was no such facilitation. 457 Mass. 234 (2010). In both \textit{Coombes} and \textit{Leavitt}, the issue involved a hospital’s duty to third parties. The focus was on whether there existed a special relationship resulting in an affirmative duty. In \textit{Coombes}, a duty was found to run from a physician to a third party, not on the basis of any special relationship, but by virtue of the purported risk created by the physician’s own conduct (i.e., the failure to advise of adverse side effects of medication, with patient then hitting and killing another with vehicle). 450 Mass. 182 (2007). In \textit{Leavitt}, the court again relied on the Third Restatement to support its conclusion that there was no special relationship between doctor and patient for purposes of injuries to third parties. The court found no duty owed by the hospital to a police officer injured after he responded to an accident involving a patient allegedly discharged without an escort, in violation of hospital policy for sedated patients. 454 Mass. 37 (2009).
175. Juliano v. Simpson, 461 Mass. 527, 533-34 (2012)(scope of liability discussed as question of extent of legal duty, i.e., “[t]o read together, McGuigan and Langemann acknowledged a common-law cause of action based on a new duty of social hosts, while also putting limitations on the potential scope of liability: a social host could be held liable for injury to third parties caused by the drunk driving of a guest only in cases where the host had actually served alcohol or made it available.”); \textit{Coombes}, 450 Mass. at 182 (as to duty); “[e]xcepting the scope of liability for the benefit of third parties foreseeably put at risk by an unformed patient’s decision to drive alters neither the physician’s medical decision to prescribe medication nor the physician’s legal duty under the \textit{Cotter} decision to warn the patient about adverse side effects.”); \textit{Leavitt}, 454 Mass. at 44-45 (as to causation; “Although causation is generally left to a jury to decide, it may [also] be determined as a question of law where there is no set of facts that could support a conclusion that the plaintiff’s injuries were within the scope of liability.”); Migliori v. Airborne Freight Corp., 426 Mass. 629, 631-33 (1998) (as to causation; “[w]here the mechanism by which injury comes about includes Duty, Causation and Palsgraf / 67
the causation analysis, particularly with multiple sufficient causes. Notably, foreseeability has long held a vigilant role in duty, breach and proximate cause assessment.176

i. Duty

Massachusetts decisions have long held that the claimant bears the burden of proof as to all elements, including duty,177 and that the existence of duty is a legal question for the court.178 A number of appellate decisions have stated that “[a]s a general principle of tort law, every actor has a duty to exercise reasonable care to avoid physical harm to others.”179 To any extent these cases can be deemed to reference the general duty owed to the world principle, they do not relieve the claimant of the burden to establish an applicable duty to the claimant.180 At best, it may be that duty will generally be easily satisfied in the absence of countervailing policies or principles. As stated by the SJC, “[t]here are a limited number of situations, however, in which the other legal requirements of negligence may be satisfied, but the imposition of a precautionary duty is deemed to be either inadvisable or unworkable.”181 Massachusetts’s case law has otherwise been uniform in holding that the question of duty remains one of law, with the burden firmly residing on the claimant.182

Consistent with the Restatement, the duty determination under Massachusetts law has been primarily expressed in terms of policy or social custom.183 The substance or source of this “policy” is ill-defined, reflecting Prosser’s observation that duty constitutes “an expression of the sum of . . . considerations of policy which lead the law to say that the plaintiff is entitled to protection,”184 and that “no better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.”185 Central to the “policy” inquiry is the familiar “cost-benefit” analysis weighing the benefits of such a duty against countervailing costs,186 as well as the determination of the existence or non-existence of pertinent “community values” and “consensus.” The absence of “community consensus,”187 in turn, precludes the

the psychological, both the class of plaintiffs and kinds of claims are greatly and predictably expanded.... We have imposed relational, temporal, and spatial limits on the scope of liability for emotional harm ... [which are] grounded in [the] practical need to draw a determinate line against excessive liability.... [W]e must acknowledge that these requirements of proximity are based more on the pragmatic need to limit the scope of potential liability, than on grounds of fairness or other imperatives of corrective justice.”

176. See Irwin v. Ware, 392 Mass. 745, 762 (1984) (“The foreseeability of the harm is the ‘most crucial factor’ in justifying liability.”).


180. Remy v. MacDonald, 440 Mass. 675, 676 (2004)(“in order to succeed on a claim of negligence, a plaintiff first must establish that the defendant owed a legal duty of care.”).

181. Id. at 677.

182. Id.; see also Ulwick v. DeChristopher, 411 Mass. 401, 408 (1991)(“the plaintiff has the burden of proving each and every element of that claim: duty, breach of duty (or, the element of negligence), causation (actual and proximate) and damages.”).


185. Id. at 148.

186. Medina, 465 Mass. at 102 (issue of whether physician owed duty to third party was “policy based, cost-benefit analysis weighing the benefits of such a duty against the countervailing costs of intruding into the highly personal confidential physician patient relationship”); Jupin, 447 Mass. at 146 (cost benefit analysis employed to determine whether duty of care upon homeowner as to firearm access, with the dangerousness of firearms and the homeowner’s knowledge of unsupervised access to the home by a person with a history of violence and mental instability determining the seriousness of the risk and costs if a duty was not recognized, compared with the “modest” costs in taking precautionary actions; rejecting argument that imposition of a duty would expose such a class of defendants (landowners) to unwarranted and extended liability, and otherwise finding that there was a “significant social benefit” in bestowing the duty, bolstered by legislative enactments recognizing that unauthorized use of firearms is a problem).
imposition or recognition of a duty of care.188

Massachusetts appellate cases have not expressly stated that duty is to be defined as a matter of relation. Yet, party relation as a defining component is evident in many cases.189 There are likewise a number of courts which have utilized the risk quantification routinely expressed in terms of foreseeability both as to the harm and as to the claimant.190

Foreseeability in duty has long-standing roots in Massachusetts decisional law.191 It is a familiar formulation that “a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous”,192 and that “[t]here is no duty owed when the risk which results in the plaintiff’s injury is not one which could be reasonably anticipated by the defendant.”193 This formulation encompasses both harm and the plaintiff within its ambit. Similarly, Massachusetts courts have included foreseeability in the cost-benefit expression of duty in that “duty is an allocation of risk determined by balancing foreseeability, in light of all the circumstances, against the burden to be imposed.”194

The foreseeability formulation, including the balancing of foreseeability against the burden to be imposed component, is at odds with the Third Restatement.195 The drafters of the Third Restatement would likely complain that use of the balancing of risk, foreseeability and burden in duty determinations is a misuse of the balancing approach first captured by Learned Hand in Carroll Towing (i.e., B<PL), which is to be limited to a fact-finder’s determination as to breach. The Supreme Judicial Court has described foreseeability as a “persuasive” but not “conclusive” consideration,196 yet otherwise

188. Schofield v. Merrill, 386 Mass. 244, 246-54 (1982). In Schofield, the Supreme Judicial Court affirmed the traditional rule that landowners owed adult trespassers no duty of reasonable care. In so holding, it held that the traditional rule of a duty of care upon landowners for children and “helplessly trapped” trespassers was workable, because it “assum[ed] a socially accepted moral principle,” and that “[n]o question arises as to whether such responsibility exists because there is community agreement both that it does exist and that the responsibility is recognized by ordinarily prudent landowners.” The court emphasized that it was for the court or legislature to determine duty based on “community values,” and that the lack of “community consensus” precluded the establishment of a new duty. Id. at 248; see also Remy v. MacDonald, 440 Mass. 675, 678 (2004) (“[t]here is no consensus on if and when a duty such as the one sought by the plaintiff should be imposed, and there is considerable debate with respect to a mother’s civil liability for injuries to her unborn fetus, including disagreement over whether the rights of the child should supersede the legal rights of the mother”); Mullins v. Pine Manor College, 389 Mass. 47, 51 (1983) (“we think it can be said with confidence that colleges of ordinary prudence customarily exercise care to protect the well-being of their resident students, including seeking to protect them against the criminal acts of third parties. An expert witness hired by the defendant testified that he had visited eighteen area colleges, and, not surprisingly, all took steps to provide an adequate level of security on their campus. He testified also that standards had been established for determining what precautions should be taken. Thus, the college community itself has recognized its obligation to protect resident students from the criminal acts of third parties. This recognition indicates that the imposition of a duty of care is firmly embedded in a community consensus”); Doc v. Corp. of President of Church of Jesus Christ of Latter Day Saints, 81 Mass. App. Ct. 1126 (2012) (“Nor is there evidence tending to show that in 2004, when these events occurred, there was a community consensus that volunteer babysitters in churches or other religious organizations would have to be screened”); Juliano, 461 Mass. at 561 ("we are reluctant to impose a duty of care in the absence of "clear existing social values and customs" supporting such a step. The plaintiffs point to the imposition of criminal liability under the statute as evidence that the Commonwealth embraces such clear values. However, the legislature’s subsequent refusals to add a civil liability component to the statute challenge that view, suggesting rather that there is not a "community consensus" regarding the proposed expansion of social host liability; see also T.A. Weigand, Lost Chances, Felt Necessities, and the Tale of Two Cities, 43 Suff. L. Rev. 327, 347-49, 364-75, 382-83 (2010) (questioning whether the judicial adoption of the loss of chance theory of liability or re-conception of harm in medical malpractice actions was proper given the lack of consensus in the underlying science, efficacy of five-year survival statistics, and the asserted "unfairness" of the "all or nothing" burden of proof). 189. Young v. Garwicki, 388 Mass. 162, 168-71 (1980)(relationship between residential landlord and tenant’s invitee). 190. Jupin v. Kask, 447 Mass. 141 (2006); Tobin v. Norwood Country Club Inc., 422 Mass. 126, 135 (1996) ("we do not hesitate to impose a duty of care on a person who participates in the creation of a known or knowable risk and who is well-suited to mitigate it”); Foley v. Boston Housing Auth., 407 Mass. 640, 646 (1990)(“there is no duty owed when the risk which results in the plaintiff’s injury is not one which could be reasonably anticipated by the defendant”); McGuigan v. New England Tel. and El., 398 Mass. 152, 157-61 (1986)(“there is no duty owed when the risk which results in the plaintiff’s injury is not one which could be reasonably anticipated by the defendant”); Anderson v. 124

Green Street LLC, 82 Mass. App. Ct. 1113 (2012) dispute between otherwise friendly co-tenants that escalated, leading to death, was not foreseeable risk of renting without a background check, therefore no duty); Hansbury v. National Grid, 2012 WL 4048874 *6 (2012)(duty of care derives from foreseeability of the harm caused to others by a defendant’s acts or omissions”); Husband v. Dubose, 26 Mass. App. Ct. 667, 669 (1988); Glick v. Prince Italian Foods of Saugus Inc., 25 Mass. App. Ct. 917 (1987)(“there is no duty owed when the risk which results in the plaintiff’s injury is not one which would be reasonably anticipated by the defendant”) citing Restatement (Second) of Torts §302 cmt. a. 191. Jones v. Granite Mills, 126 Mass. 84 (1878)(since mill burning was not reasonably to be anticipated by owner, no duty ("obligation") to guard against injury to employees). 192. Afarian v. Massachusetts Elec. Co., 449 Mass. 257, 261-62 (2007); Jupin, 447 Mass. at 141 (quoting Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976); see also Commonwealth v. Florio, 650 Mass. 182, 187-88 (2007). 193. Foley, 407 Mass. at 666; Cracchiolo v. Easter Fisheries, Inc., 740 F.3d 64, 70 (1st Cir. 2014) (issue of duty in Massachusetts turns on whether risks posed are not foreseeable); see also Vintimilla v. Nat. Lumber Co., 84 Mass. App. Ct. 493, 499 (2013)(noting need to examine foreseeability in duty determination). 194. Meridian at Windchime Inc. v. Earth Tech Inc., 81 Mass. App. Ct. 128, 132 (2012)(“In Massachusetts, duty is ‘determined by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed.”’); Vaughan v. Eastern Edison Co., 48 Mass. App. Ct. 225, 229 (1999) (citing White v. Southern Cal. Edison Co., 30 Cal. Rptr. 2d 431, 447 (1994) (duty is ‘determined by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed’); Afarian, 449 Mass. at 262 (same); Vintimilla, 84 Mass. App. Ct. at 499 (noting showing of how imposing duty to perform a license check before delivering hoisting machinery to lessee would be unfair or unjust). In Roe v. Children’s Hospital Medical Center, the Supreme Judicial Court held that a hospital does not owe a duty of care to future patients of doctor who has left the hospital’s employ and resumed practicing at another hospital in another state. In so holding, it held that such a duty would place an onerous burden on employers ‘obligating them to track former employees and warn their future employers or perhaps even customers of such future employers.’ 469 Mass. 710, 719 (2014). 195. The most well-known duty balancing determination test is that announced in Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968). There, the balancing test for determining duty was stated to require consideration of the following: … the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. 443 P. 2d at 564. Rowland was a landowner duty to trespasser case. Id. 196. Jupin v. Kask, 447 Mass. 141, 150 (2006) (“That the harm in this case was reasonably foreseeable or even actually foreseen is persuasive, but not conclusive, of the existence of a duty of care”); Bash v. Clark Univ., 2006 WL 4114297 (Super. Ct.) (Agnes, J.”(the foreseeability of physical harm is not the linch-pin for determining the existence of a common law duty under Massachusetts law.”)
marking it as a “precondition” for any imposition of a duty. In *Jupin v. Kask*, for example, the issue was whether there was a duty upon a homeowner who stored and kept the firearms of her live-in boyfriend in her home. The boy friend’s adult son had taken a fire- arm and shot and killed a police officer during a foot chase. It was alleged that the adult son had a history of violence and mental instabil- ity and was given free and unsupervised access to the home, and that the firearms were not sufficiently secured. Relying upon both foreseeability and policy, the court found it appropriate to impose a duty upon the homeowner. As to the foreseeability “precondition,” it was required that the risk of harm be foreseeable to the defendant upon whom the duty was sought to be imposed. The risk at issue was “that a mentally unstable and violent person, to whom unfet- tered and unsupervised access to [the] home was granted, would take a gun from that home and shoot someone.” This risk of harm was found to be both “foreseeable and foreseen,” based upon the homeowner’s deposition testimony.

A number of decisions, noting foreseeability’s presence in both duty and causation, have indicated ambivalence as to whether the issue of foreseeability is examined as part of determining duty, or as part of proximate cause (scope of liability). In *Whittaker v Saraceno*, for instance, the Court stated:

> The word “foreseeable” has been used to define both the limits of a duty of care and the limits of proximate cause.... As a practical matter, in deciding the foreseeability question, it seems not important whether one defines a duty as limited to guarding against reason- ably foreseeable risks of harm or whether one defines the necessary causal connection between a breach of duty and some harm as one in which the harm was a reasonably foreseeable consequence of the breach of a duty.

These decisions do not seem concerned with whether assessing foreseeability in duty, as opposed to causation, wrongly evades and intrudes upon jury function. While the SJC in *Whittaker* dismissed the distinction as “not important,” it has in other decisions recognized the potential impact on the legal versus factual inquiry. In *Jupin*, for instance, the SJC repeated the principle that issues of breach, extent of harm, and causation are the “special province of the jury,” and noted the argument that foreseeability determinations are likewise better suited for a jury. Nonetheless, it summarily dismissed any concern, reiterating “that insofar as foreseeability bears on the existence of a duty, it is not appropriate to leave such an issue to the jury.” Indeed, even where foreseeability has been viewed solely under the element of proximate cause, its kinship with policy (and thus issues of law) remains, as causation’s ultimate reach re- quires limitation “based on considerations of policy and pragmatic judgment.” Most fundamentally, the case law has declared that foreseeability, whether viewed in terms of duty or causation, “plays a large part in limiting the extent of liability because notions about what should be foreseen are “very much interwoven with our feel- ings about fair and just limits to legal responsibility.”

Foreseeability as to duty determination has likewise retained prominence both as to identifying the “special relationship” excep- tion to the general non-duty rule as to third parties, and claims in- volving tort dutyspringing from contract. For instance, it has been held that “all common-law special relationships are based largely upon a uniform set of considerations, which evolve with social val- ues and customs.” Foreseeability, in turn, has been deemed, by some decisions, as the “foremost” consideration; i.e., “whether a defen- dant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so.” Other decisions reflect more temperance regarding foreseeability, secondary to “existing so- cial values, customs, and considerations of policy.”

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198. *Jupin*, 447 Mass. at 147 (the firearms were in a gun cabinet in the basement, which cabinet was secured with a padlock and hasp. The hasp had exposed screws which allowed someone without a key to the lock to remove the hasp and gain access to the guns).

199. The court reiterated the established principle that the precise harm (shooting an officer during a foot chase) need not be foreseeable, so long as the same general kind of harm was a foreseeable consequence of the defendant’s risk-creating conduct. *Id.* at 149 n.8.

200. Harrison v. Town of Mattapoisett, 78 Mass. App. Ct. 367, 372 (2010) (“Whether analyzed from the standpoint of the officers’ duty of care, or from the standpoint of whether the claimed breach thereof proximately caused the plaintiff’s injury, the requisite foreseeability is the critical factor”); Kelley v. O.E. Plus Ltd., 69 Mass. App. Ct. 1105 (2007) (“the duty of care owed and the foreseeability of risk are part of the same analysis because ‘[w]hether negligent conduct is the proximate cause of an injury depends not on factual causation, but rather on whether the injury to the plaintiff was a foreseeable result of the defendant’s negligent conduct’” (*citing* *lesbono v. Massachusetts Port Authy.*, 376 Mass. 101, 105 (1978)); Klessons v. Building 19 Inc., 81 Mass. App. Ct. 1118 (2012) (noting that foreseeability is relevant in defining “both the limits of duty of care and limits of proximate cause”); *see also* Chiacchiro v. Eastern Fisher- ies, Inc., 740 F. 3d 64, 70 (1st Cir. 2014) (mort duty in Massachusetts is question of law which can be resolved on summary judgment if undisputed facts posed by defendant’s actions were not foreseeable); Dos Santos v. Colea, 465 Mass. 148, 162 n.17 (2013) (foreseeability notion in causation “equally applicable to existence of duty”).


204. *Id.* at 148 n.7.


As to contractual duties, while Massachusetts has long recognized that “failure to perform a contractual obligation is not a tort in the absence of a duty to act apart from the promise made,” one who assumes a duty under contract “is liable to third persons not parties to the contract who are foreseeably exposed to danger and injured as a result of its negligent failure to carry out that obligation.”

Similar is the so-called “Craig rule.;” “a party is liable to a third party for the foreseeable consequences of the negligent performance of a contractual duty that the third party owed to another.”

The reliance must be foreseeable and reasonable.

### ii. Causation

Causation in Massachusetts has two components — factual and proximate cause. The use and reference to “legal cause,” is almost always equated to proximate cause, although sometimes referred to as the equivalent of “substantial factor,” or substantial contributing cause. Some decisions also refer to actual causation, or cause in fact causation, as comprising both but-for cause and substantial factor. As to cause in fact, the “but for” is the classic and necessary inquiry: “without which the harm would not have occurred;” i.e., “[t]he defendant's conduct was a cause of the plaintiff's harm if the harm would not have occurred absent the defendant’s negligence.”

The “practice note” accompanying the MCLE Superior Court Model Jury Instruction states that the “but for” rule is “suitable for use in the ordinary tort case without the complexity of multiple causes or tortfeasors,” and is “often the only test that need be explained to the jury.”

Massachusetts cases have referenced substantial factor, substantial contributing cause, and substantial legal factor interchangeably, with the concept first entering into Massachusetts appellate parlance following — with direct reference to — the publication of the First Restatement, which had expressly incorporated such language. The origins of the “substantial factor” language have additional Massachusetts roots, by virtue of a 1912 Harvard Law Review article by Jeremiah Smith, which intended that it be used for purpose of proximate causation, not cause in fact. The first judicial decision credited to have utilized the substantial factor test as part of cause in fact was the famous “two fires” case, decided by the Supreme Court of Minnesota in 1920.

Massachusetts continued to reference the substantial factor rubric with the advent of the Second Restatement in 1965. The Second Restatement provides that an actor’s negligence is a “legal cause” of harm when it is a “substantial factor” in bringing about the harm, and there is not otherwise an applicable legal rule relieving the actor of liability.

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217. See Jorgensen, 905 F. 2d at 522.

218. MASSACHUSETTS SUPERIOR COURT MODEL JURY INSTRUCTIONS 2.1(a) Practice Note (MCLE ed. 2011) (“Massachusetts Model Instructions”).

219. Id. Massachusetts jury instructions are compared to Third Restatement in online appendix a.


224. Jeremiah Smith, Legal Cause in Actions in Tort, 25 HARV. L. REV. 103, 104 (1912). Notably, it was argued that “substantial factor” should be the test for proximate causation or scope of liability, not factual causation. Id. See also Richard Wright, Once More Into The Bramble Bush; Duty, Causal Contribution, and the Extent of Legal Responsibility, 54 VAND. L. REV. 1071, 1078 (2001)(“Smith wanted to devise a practical alternative to the ‘probability’ or ‘foreseeability’ tests for determining the extent of responsibility for tortiously caused harm, since he believed that those tests were unsound and inconsistent with the results in many cases…..[h]is, the substantial-factor formulation was meant to be used as the test of legal (proximate) cause, but also subsumed the but-for test (and its exception) for cause-in-fact.”).

225. Anderson v. Minneapolis St. Paul & Sault Ste. Marie Railway, 179 N.W. 45 (Minn. 1920). In Anderson, one of the railway’s engines started a fire which destroyed the claimant’s property. The railway defended on the grounds that another fire of unknown origin would have destroyed the claimant’s property. It was argued that since the property would have been destroyed regardless of any negligence of the railway as to the engine fire, there could be no “but for” liability. Id. With little comment, citation or analysis, the Minnesota Supreme Court upheld the trial court’s instruction that liability could be imposed if the railway’s fire was a “substantial factor” in the loss. Id. See also Kingston v. Chicago & North West Railway Co., 211 N.W. 913, 914 (Wis. 1927).

226. RESTATMENT (SECOND) OF TORTS §431.

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of liability. The Second Restatement provided a definition of sorts for the term “substantial,” stating:

The word “substantial” (in the phrase “substantial factor”) is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called “philosophic sense,” which includes every one of the great number of events without which any happening would not have occurred.

It goes on to make clear that the “substantial factor” test is not a substitute for but-for cause, in that a cause could not be found to be a substantial factor “if the harm would have been sustained even if the actor had not been negligent [i.e. but for].” Section 432(2) of the Second Restatement, in turn, specifically addressed the “two fires” circumstance. While providing that an actor’s negligence cannot not generally be a substantial factor in bringing about a harm unless the harm would not have occurred absent the actor’s negligence (i.e. but for), it set out an exception where “two forces are actively operating, one because of the actor’s negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another.”

In addition to this “multiple sufficient cause” scenario, the Second Restatement utilized “substantial factor” for a second purpose, which was to provide a limiting additional requirement aimed at distinguishing between all “but for” causes, i.e. “but for” de minimis causes from “but for” significant or substantial causes. Importantly, this test was not intended to enlarge causation where the but-for test had not been met, or to be otherwise applicable in all multiple cause cases. “Its purpose is to excuse defendants whose conduct is a but-for cause of harm when the effect of that conduct is so ‘insignificant that no ordinary mind would think of [it] as [a] cause.’”

The Second Restatement likewise proffered certain “considerations” as an “aid” in determining what conduct satisfied the substantial factor test.

The Model Instructions have incorporated the “substantial factor” language or “test” for purposes of cause in fact where there are “multiple sufficient causes or tortfeasors.” Under the Model Instruction, a jury is to be instructed that there may be more than one cause present to produce an injury. A substantial factor, in turn, is defined as “not insignificant,” and the defendant’s negligence must “be a material and important ingredient in causing the harm.”

The Model Instructions reference both O’Connor v. Raymark Indust., Inc. and Matsuyama v. Birnbaum, as support for the substantial contributing factor test in O’Connor, the Court found no error in the causation instruction at issue even though, in defining causation, it included the statement that “[i]t means something that makes a difference in the result.” The court found that the statement, in context, “served to distinguish between a ‘substantial factor,’ tending along with other factors to produce the plaintiff’s disease and death, and a negligible factor, so slight or so tangential to the harm caused that, even when combined with other factors, it could not reasonably be said to have contributed to the result.” Quoting Prosser, the court further noted that “[t]he ‘substantial factor’ formulation is one concerning legal significance rather than factual quantum.”

This holding in O’Connor is notable in that it was an asbestos case, which are unique insofar as they involve “the prolonged latency of the induced disease, the multiple points of exposure of the victim, and the indistinguishability of contributory exposures.” Since “the resulting injury may not emerge for years or decades after exposure, the law does not require the plaintiff or his or her witnesses to establish the precise brand names of the asbestos-bearing products, the particular occasions of exposure, or the specific allocation of causation among multiple defendants’ products.” Accordingly, the causation standard has been “adjusted” insofar as a “plaintiff need not produce evidence of ‘but for’ causation on the part of the targeted product, but only of its contribution to causation of the resulting injury.”

Matsuyama, in turn, addressed a “loss of chance” claim where the harm at issue was the loss of a chance (i.e. possibility) of a better
result. It made clear that “but for” causation was required, otherwise noting that the substantial contributing factor test is “useful in cases in which the damage has multiple causes, including but not limited to cases with multiple tortfeasors in which it may be impossible to say for certain that any individual defendant’s conduct was a but-for cause of the harm, even though it can be shown that the defendants, in the aggregate, caused the harm.”243 The court nonetheless found no reversible error in the instruction, even though it was deemed “inautful” and “but for” language was not used.244 In a companion case, the court held that the substantial contributing factor test would be appropriate in a loss of chance action where there is more than one defendant.245

As to proximate causation, Massachusetts has largely followed


244. Id. at 31. The court found no error, stating:

The judge also clarified the “substantial contributing factor” instruction in a way that, while somewhat inartful, suggested that the jury should understand “substantial contributing factor” as indicating that the plaintiff was required to show that Birnbaum’s negligence caused a loss of chance of survival. The judge instructed the jury that the word “substantial” “doesn’t mean that Mr. Matsuyama’s chance of survival was fifty percent or greater, only that there was a fair chance of survival or cure had Dr. Birnbaum not been negligent and had he conformed to the applicable standard of care.” The judge’s formulation did not use the words “but-for cause,” but his definition of “substantial” clearly focused the jury’s attention on the idea that Birnbaum’s negligence, if any, had to be a but-for cause of Matsuyama’s losing a “fair chance of survival.”

Id. at 31-32.

245. Renzi v. Paredes, 452 Mass. 38, 44 n.10 (2008). One could take issue with this, as the substantial factor test still requires that each cause be sufficient. If the additional defendant or defendants’ alleged negligence is not a sufficient or but for cause of the loss of chance, then there can be no liability, and no resort to the substantial factor test. If each defendant’s alleged conduct is a but for or sufficient cause of the same loss of chance, then liability can be imposed if it is determined that one or both was a substantial factor in the loss of chance.

246. See Hoadley v. Northern Transport Co., 115 Mass. 304 (1874); Gilman v. Eastern R. Co., 13 Allen 433 (1866); see also Sherman v. Fall River Iron Works Co., 84 Mass. 524, 526 (1861)(recovery only for the “natural and direct consequences of the wrongful act”). According to the court in Hoadley:

In actions of this description the injury complained of must be shown to be the direct consequence of the defendant’s negligence. This is the only practical rule which can be adopted by courts in the administration of justice. It is not enough that the act charged may constitute one of a series of antecedent events without which, as the result proves, the damage would not have happened. The legal damages which follow any wrong are only such as, according to common experience and the usual course of events, might reasonably be anticipated. The defendant’s liability extends only to natural and probable consequences.

Hoadley, 115 Mass. at 304. In Wallace v. Ludwig, 292 Mass 251 (1935), the Court defined proximate cause as “that which in a continuous sequence, unbroken by any new cause, produces an event and without which the event would not have occurred. It may be assisted or accelerated by other incidental and ancillary matters, but, if it continues as an operative and potent factor, the chain of causation is not broken.” Id. at 254.


249. Lund v. Inhabitants of Tyngsboro, 65 Mass. 565 (1853); Palmer v. Inhabitants of Andover, 56 Mass. 600 (1849); Tisdale v. Inhabitants of Norton, 8 Metcalf 388 (1844).

250. See, e.g., Lynn Gas & Electric Co. v. Meridan Fire Ins. Co., 158 Mass. 570 (1893)(“When it is said that the cause to be sought is the direct and proximate cause, it is not meant that the cause or agency which is nearest in time or place to the result is necessarily to be chosen. The active, efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the direct and proximate cause referred to in the cases’’); Rowell v. City of Lowell, 7 Gray 100 (1856)(“immediate and efficient versus remote cause”); Marble v. City of Worcester, 4 Gray 395 (1855); Scripture v. Lovell Mut. Fire Ins. Co., 64 Mass. 356 (1852)(while for most cases it is practicable to draw the line, and to formalize a rule between the two classes of causes, yet in other cases, according to the general law of nature, the two classes approach and run into one another until the distinction vanishes; and within the limits of this debatable land of differences, it is necessary to apply judicial discretion to the particular questions as they arise, just as it is in the not infrequent inquiry whether a thing, or the use or measure of it, be reasonable or not.”).

251. See generally Curtin v. Wiggins, 36 Mass. App. Ct. 933, 934 (1994), and cases cited (holding that little vitality remained between conditions and causes, with a condition otherwise constituting a factor that no reasonable jury could find to be a proximate cause of the injury).

252. See, e.g., Kidder v. Inhabitants of Dunstable, 7 Gray 104 (1856)(no liability where injury caused by combined effects of unsafe condition of highway and unlawful or careless conduct of third party); Rowell, 7 Gray at 100. Actions for injuries on roadways were governed by statute, imposing liability where negligence was the “sole cause.” Massachusetts cases otherwise recognized early on that a defendant did not escape liability just because he was one of two or more causes acting concurrently. See, e.g., Horne v. Meakin, 115 Mass. 326 (1874). Compare Whitcomb v. Bacon, 170 Mass. 479 (1898)(when there are two or more causing, “the predominating efficient cause must be regarded as the proximate”).

253. Glassy v. Worcester Consul Ry Co., 185 Mass. 315 (1904). The elusiveness of causation was noted early on:

The whole doctrine of causation, considered in itself metaphysically, is of profound difficulty, even if it may not be said of mystery. It was a maxim, we believe, of the schoolmen, “Causa causantis, causa est causati.” And this makes the chain of causation, by successive links, endless. And this perhaps, in a certain sense, is true. Perhaps no event can occur, which may be considered as insulated and independent; every event is itself the effect of some cause or combination of causes, and in its turn becomes the cause of many ensuing consequences, more or less immediate or remote. The law however looks to a practical rule, adapted to the rights and duties of all persons in society, in the common and ordinary concerns of actual and real life; and on account of the difficulty in unravelling a combination of causes, and of tracing each result, as a matter of fact, to its true, real and efficient cause, the law has adopted the rule before stated, of regarding the proximate, and not the remote cause of the occurrence which is the subject of inquiry.

Marble, 4 Gray 395.

254. See, e.g., Higgins v. Dewey, 107 Mass. 494 (1871); see also Lane v. Atlantic Works, 111 Mass. 136 (1872) (“the test is to be found in the probable injurious consequences which were to be anticipated”).
usually happens and what is likely to happen, but is not bound in like manner to guard against what is ... only remotely and slightly probable." 255 Both the “general character and probability of the injury” are examined to see if they were both foreseeable, i.e., within the “range of reasonable apprehension.” 256 As with duty, proximate cause also allows for consideration of policy, as “[t]here must be limits to the scope or definition of reasonable foreseeability based on considerations of policy and pragmatic judgment.” 257 Proximate cause is almost always for the jury, 258 although it can be one of law for the court if a plaintiff has no reasonable expectation of proving that “the injury to the plaintiff was a foreseeable result of the defendant’s negligent conduct.” 259

As to the “risk standard” utilized by the Third Restatement, Massachusetts courts have been receptive and found no material difference, even though foreseeability is technically excluded from the Restatement approach. In Leavitt v. Brockton Hospital, 260 for instance, which addressed whether a hospital bore liability (both duty and causation) to a non-patient for failure to detain a sedated patient, the court discussed the lack of causal relationship in terms of both the Massachusetts standard (“liability for conduct obtains only where the conduct is both a cause in fact of the injury and where the resulting injury is within the scope of the foreseeable risk arising from the negligent conduct”) and the Restatement risk standard. 261 The court viewed the risk standard as “limit[ing] the hospital’s liability to foreseeable harms created by the risk that made the conduct (release of the patient) negligent,” 262 even though the strict inquiry under the risk standard limits an actor’s liability to “harms that result from the risks that made the actor’s conduct tortious.” 263 Relying on comment j to section 29, the court agreed that the risk standard was “essentially consistent” with Massachusetts’s 255. Falk v. Finkelman, 268 Mass. 524, 527 (1929).

256. Glick v. Prince Italian Foods of Saugus Inc., 25 Mass. App. Ct. 901, 902 (1987); Andrews v. Jordan March Co., 283 Mass. 158, 161 (1933); see also Falk, 268 Mass. at 527 (“one is bound to anticipate and provide against what usually happens and what is likely to happen, but is not bound in like manner to guard against what is unusual and unlikely to happen, or what is only remotely and slightly probable.”).


259. See, e.g., Herbert v. Enos, 60 Mass. App. Ct. 817, 821-22 (2004) (awarding judgment as a matter of law, as alleged injuries were “highly extraordinary”; stating, “Although we can envision a variety of foreseeable injuries arising out of a defective toilet, the electric shock to a neighbor when he touches a faucet outside the house is well beyond the ‘range of reasonable apprehension’ and therefore not foreseeable”; see also Kent v. Commonwealth, 437 Mass. 312, 320 (2002) (“Proximate cause may be determined as a question of law when there is no dispute as to the effect of the facts established.”); Hopping v. Whirlaway, 37 Mass. App. Ct. 121, 125 (1994) (“Subject to those comparatively rare situations when the court is able to draw the outer limits, questions of proximate cause are in the province of the jury.”).


261. Id. at 45 n.19. In applying the risk standard the court found that the reason a hospital might be held liable to a third party for releasing a medicated patient is not to protect a police officer injured in an accident unrelated to the patient, foreseeability formulation. 264 265

VII. THE FUTURE OF THE THIRD RESTATEMENT IN MASSACHUSETTS

It is difficult to predict whether Massachusetts will formally adopt any of the fundamental approaches set forth in the Third Restatement. Its aim of greater clarity, including an improved balance between the functions of judge and jury, is admirable and significant. Adoption will turn upon whether the approach is deemed a fundamental change to Massachusetts law, or more of a clarification or workable adjustment of well-established doctrine. Pivotal is whether the Supreme Judicial Court agrees with the Third Restatement’s policy justifications, and believes it provides an improved structure to address negligence claims. 266 With reference to the material aspects of the Third Restatement’s approach (presumed duty based on risk; purging of foreseeability from duty; a pure risk standard for proximate causation; and the use of scope of liability and elimination of substantial factor as the new parlance for causation), some observations are offered.

Presumed Duty and Shifting of Burden of Proof.

The presumed duty (or default rule) under the Third Restatement is an acceptance of Judge Andrews’s dissent in Palsgraf that “[e]very one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.” There is certainly language in a number of Massachusetts decisions that would appear to be consistent with the Third Restatement’s view. Courts have routinely stated that “[a] general principle of tort law, every actor has a duty to exercise reasonable care to avoid physical harm to others.” 267 Massachusetts’s own great jurist, Oliver Wendell Holmes, but to prevent the patient from doing harm to himself or others. 262. Id. at 45 (emphasis added).


264. Leavitt, 454 Mass. at 45 n.20 (quoting Restatement (Third) of Torts §29 cmt. j).

265. A comparison of the Third Restatement and current Massachusetts principles is illustrated by a chart setting out Massachusetts jury instructions/definitions in appendix A to this article.

266. For articles discussing the Third Restatement in terms of a particular state’s law, see Thomas B. Read and Keven Reynolds, The Restatement (Third), Duty, Breach of Duty and Scope of Liability, Vol XIX No. 5 Defense Update, Iowa Defense Counsel Assoc. (Summer 2012); Steenson, Minnesota, supra note 3 (comparing Minnesota law with the Third Restatement); Kelley J. Kirkland, Truths In and Out of Favor: The Supreme Court of Texas and the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, 74 Texas B. J. No. 11 992 (Dec. 2011)(comparing Third Restatement to Texas negligence principles); Hon. Theodore Boehm, A Tangled Web—Reexamining the Role of Duty in Indiana Negligence Law, 37 Ind. L. Rev. 1 (2003).

267. Remy v. MacDonald, 440 Mass. 382-384 (1998); No. 12-1150; scoping Schofield v. Merrill, 386 Mass. 244, 246-54 (1982) (“A basic principle of negligence law is that ordinarily everyone has a duty to refrain from affirmative acts that unreasonably expose others to a risk of harm.”); Johnson v. Rufo, 79 Mass. App. Ct. 1114 (2011)(same); Judge v. Carrai, 77 Mass. App. Ct. 803 (2010); Roe Nos. 1-1150 v. Children’s Hospital Medical Center, 2012 WL 363724; see also Commonwealth v. Figueroa, 83 Mass. App. Ct. 251, 262-63 (2013)(noting that instruction in criminal case as to duty that “ordinarily everyone that takes action owes a duty to everyone who may be affected to act reasonably was at best confusing.”). Wisconsin’s highest court has specifically proclaimed that “everyone has a duty of care to the whole world.” Miller v. Wal-Mart Stores Inc., 580 N.W. 2d 233, 238 (Wis. 1998); see also Cal. Civ. Code 1714(a) (West 2012)(enacted in 1872, stating that everyone owes to everyone a duty of ordinary care).
proclaimed early on that tort law imposes a duty “of all the world to all the world.”

Further, it is certainly a fair comment that in the great many cases, duty is simply not an issue, as people are generally obligated to act with due regard for the safety of others, and the existence of duty is apparent. It would seem to be the rare case where a risk is not within the realm of reasonable foreseeability. There

likewise is a thoughtful symmetry in the Third Restatement as to the presumption and burden shifting, the “act-risk creating” view of duty, and concern for protection of the jury function through use of foreseeability only in breach and not duty.

It remains, however, that no Massachusetts decision has held or stated that duty is to be presumed, or that tort duty runs to everyone, much less placed the burden on a defendant to raise the issue of whether a no-duty rule or some other modification of the ordinary duty of reasonable care applies in a particular case. There remains a fundamental difference between “everyone” owing a duty of care and “everyone” owing a duty of care to “everyone.” Similarly, it seems misleading to refer to duty of care as universal, as opposed to duty specific to the applicable claimant. The viability of the presumed duty to all turns largely on the acceptance of duty being solely and exclusively focused on “act-risk creating,” without any regard to either relation or foreseeability.

More practically, there is little need to adopt the presumed duty and burden shifting set forth in the Third Restatement. Massachusetts has long functioned with the fundamental premise that the claimant bears the burden on all elements of negligence. To adopt a general duty to the world principle, which also serves to place the burden on the defendant to show the absence of duty, needlessly complicates matters. It may be that in many cases the burden of showing duty is easily met because in the circumstances (whether viewed categorically or more fact specifically) a duty of care is owed between plaintiff and defendant. Yet, it should remain the initial burden upon the claimant to show. Clarity of law is served by articulation of the specific duty in play in any particular case, even if it can be said to be without dispute or “well-established.” To hold otherwise diminishes duty’s place in negligence. Moreover, a notable portion of modern negligence cases address duty or no-duty issues relative to third parties. This affirmative duty context requires analysis of relation (i.e., special relationship) as even the Third Restatement recognizes. In the end, to place a burden of showing no duty on the defendant, with the burden as to breach, causation and damages remaining (generally) on the plaintiff, creates unnecessarily complication. Such a shift seems unnecessary for the additional reason that duty issues are questions of law. The issue is thus for the court to determine as a matter of law, which is not impacted in any measurable way by who bears the burden.

Purging Foreseeability from Duty.

The Third Restatement imposes a duty even where the risk created by the defendant’s conduct was not foreseeable. The justifications for this formulation are not insubstantial: Foreseeability is a fact-intensive concept more appropriate for breach and proximate cause, which are determinations centered on the facts of individual cases; fact-laden foreseeability is incompatible with duty determinations, which should address categories of cases and be based on social policy; eliminating foreseeability will force cases to be decided on policy reasons and not be “hidden” within foreseeability principles; and imposing a duty without foreseeability serves to protect the traditional function of the jury as fact-finders.

The argument against adoption of the Restatement’s duty without foreseeability is not without its own force. The argument can perhaps be refined to include the following: (1) the Restatement’s duty formulation represents a significant departure from long-standing Massachusetts precedent; (2) foreseeability is an important conceptual tool for courts, fundamental to moral and legal responsibility; (3) foreseeability in duty is itself a constituent of any policy used for duty/no-duty determinations; and (4) foreseeability as a precondition — and not a substitute — for policy in duty determinations does not encroach upon a jury’s function.

The Third Restatement’s purging of foreseeability from duty runs counter not just to Massachusetts precedent, but to the vast majority of states, all of which rely upon or utilize foreseeability in duty analysis. One survey found that 47 states utilize foreseeability in duty determinations. As such, the Third Restatement is not truly a “restatement” of law, and swims against a tide of nationwide precedent and practice.

Foreseeability in duty analysis is arguably justified, as it is an important conceptual tool tied directly to fundamental notions of moral and legal responsibility. So viewed, foreseeability reflects tort law’s desire to hold actors accountable for harmful consequences resulting from a choice of action. Legal responsibility for harm is directly tied to an actor’s ability to recognize that the choice of inaction or action may result in harm. Ascribing moral character (blame or praise) to a choice to risk or avoid the risk of harm implies the actor’s ability to conceive (“foresee”) its consequences. Through what was or should have been foreseen by an objectively

268. Oliver Wendell Holmes, Codes, the Arrangement of the Law, 5 Am. L. Rev. 1, 5-6 (1870); see also The Theory of Torts, 7 Am. L. Rev. 652, 660 (1873)(unsigned article attributed to Holmes).

269. But see Esper and Keating, Abusing Duty, supra note 6, at 21 (“the prominence of reasonable foreseeability of harm as a test of duty in modern tort law is . . . confirmation of duty’s status as something whose existence can generally be presumed”).

270. Zipursky, Foreseeability in Breach, Duty and Proximate Cause, supra note 6 (“the larger picture is that foreseeability is overwhelmingly embraced by American courts as a vitally important part of duty analysis. The Restatement can only be strengthened by greater openness about this aspect of the positive law of duty”).

271. See Esper and Keating, Putting Duty in its Place, supra note 6 (“foreseeability of harm is fundamental to the expansion of duty throughout the twentieth century,” and “[d]ivorce duty from foreseeability writes great cases out the law of duty...”).

272. Golanski, A New Look at Duty, supra note 6, at 247 (“there is a moral obligation to avoid foreseeable harm. Duty is primarily a matter of moral obligation, not instrumental policy considerations. Therefore, foreseeability is naturally a constituent of duty....”); David G. Owen, Figuring Foreseeability, 44 Wake Forest L. Rev. 1277, 1286 (“tort law properly rests on moral fault . . . foreseeability is a crucial moral cog for responsibility in tort.”); Esper and Keating, Putting Duty in its Place, supra note 6, at 1233 (“Making reasonable foreseeability of harm the touchstone of obligation in tort captures a powerful and sound moral intuition: that the physical integrity of the person is an interest urgent enough to bound both the free use of real property and the free play of market forces”).

273. Owen, Figuring Foreseeability, supra note 6, at 1281-88; Esper and Keating, Putting Duty in its Place, supra note 6, at 1232 n.29 (“We think [foreseeability] cannot be wholly eliminated from duty because people cannot reasonably be asked to guard against a risk of physical injury when they cannot reasonably be expected to foresee any risk of injury at all from their conduct and because a limited role for foreseeability is consistent with the result of some important and celebrated cases.”)
reasonable person, foreseeability "translates the moral predicate of responsibility grounded in the human will and human choice into a legal one."274 Foreseeability is thus "bound up, inextricably, in notions of wrongfulness and how far responsibility for wrongfulness should extend."275 "[T]here is a moral obligation to avoid foreseeable harm."276 Accordingly, Massachusetts's treatment of foreseeability as a "precondition" to duty has perversive force, as it recognizes foreseeability as "a crucial moral cog for responsibility in tort."277

Foreseeability's long-standing moral tether to tort responsibility also arguably demonstrates that it is an important conceptual tool and touchstone for courts in determining whether to impose the obligation of the reasonable care duty. Massachusetts's foreseeability "precondition" is an implicit recognition that "[r]easonable foreseeability of harms is a necessary precondition of reasonable care,"278 and that the very ability of negligence is foreseeable risk. There is measurable awkwardness with the Restatement's structure of duty under section 7(a). The imposition of "a duty to exercise reasonable care when [that] actor's conduct creates a risk of physical harm," without a foreseeability component, leaves the "reasonable care" element measurably empty. As worded, section 7(a) imposes a reasonable care duty whether the risk is foreseeable or unforeseeable. As a commentator has observed, this wording is "incoherent," as an actor would have no reason to utilize reasonable care to avoid or ameliorate unforeseeable risks.279 The Massachusetts approach of imposing a duty of reasonable care as to those risks which were foreseeable gives coherence to the reasonable care duty.280

Massachusetts views foreseeability as providing the minimal relational condition necessary for an obligation of due care.281 It properly provides the outer boundary outside of which there can be no liability, as there can be no duty.

At the root of all duty issues is the question of whether, as a general principle, certain types of actors should or should not be subject to the law of negligence for causing certain types of hazards that threaten certain types of harm to certain types of victims. It is hard to understand why we would demand that judges, in the process of making these important categorical decisions on the scope of responsibility for wrong-doing, exclude from their judicial consideration the possibility that reasonable people in these situations should contemplate the types of risk for which they may be held responsible.282

To the extent there is concern that courts do and will conceal no-duty determinations within the foreseeability element, obscuring what are the true "policy" reasons underlying decisions, the remedy lies in courts "resolv[ing] to say what they mean."283 "If clearer articulation of true motivating reasons is the goal, then this is an issue that may be addressed separately from the foreseeability question." Similarly, it seems presumptuous to assert that limiting no-duty rulings to "policy" or "principle," without reference to foreseeability, will result in greater clarity or not otherwise involve considerations of policy.

Arguably, including foreseeability within the duty determination as a "precondition" does not unfairly or unnecessarily intrude upon a jury's function. The foreseeability constituent in duty serves as a basis for the duty element to be satisfied. If removed, there is thus one less means to satisfy the duty element. Moreover, the foreseeability component of duty is arguably different in nature from the foreseeability used by the fact finder on the issue of causation, as it requires a court to make a general policy determination whether to impose an obligation to foresee the risk involved, as opposed to the factual question of whether the defendant did or should have foreseen the harm. The legal question of an obligation to foresee, in turn, "takes into account 'community moral norms and policy views, tempered and enriched by experience, and subject to the requirements of maintaining a reliable, predictable, and consistent body of law.'"284 It thus can be argued to reflect moral values more broadly than in the causation arena, where foreseeability is premised on hindsight.

The drafters of the Third Restatement would likely take issue with the Massachusetts practice of stating that it is immaterial whether foreseeability is analyzed in duty or causation. Duties are questions of law, while causation is a question of fact. For the same reason, they would likewise have a problem with the practice of incorporating into the duty determination the cost benefit or Learned Hand formulation (P<BL), which they claim is intended for purposes of breach determinations, and runs counter to the need for no-duty rulings to be categorical, not fact specific.286 They will say that as to both practices, the integrity of analysis is compromised, as is the proper demarcation between judge and fact-finder.287

These are not insubstantial observations. However, it might be argued in response that even if foreseeability in duty and causation are viewed as not truly distinct, it remains questionable that Massachusetts practice inevitably intrudes on the jury function. Also, reasonable issue can be taken with the view that duty determinations must always be categorical and not fact specific.

Massachusetts decisions have stated that the foreseeability variable, whether as to duty or causation, is subject to policy and pragmatic judgment limitations imposed as a matter of law. Under either hat, the outer limits are appropriately regulated as a matter of law,

274. Id. at 1289.
275. Id. at 1280.
276. Golanski, A New Look at Duty, supra note 6, at 247.
277. Id. at 1285.
278. Esper and Keating, Putting Duty in its Place, supra note 6, at 1234.
279. Golanski, A New Look at Duty, supra note 6, at 270 (stating Third Restatement section 7(a)'s statement of duty "displays incoherence because a reasonable person would have no reason to avoid unforeseeable dangers").
280. Id. at 273 ("If the concept of duty is stripped of its mental element, and if it thereby encompasses risks that the actor does not and could not be aware of, under any definition of constructive knowledge, then what constitutes reasonable care?").
281. Id. at 274.
282. Owen, Figuring Foreseeability, supra note 6, at 1305.
283. Golanski, A New Look at A Duty, supra note 6, at 267.
284. Id.
285. Id. at 276 (quoting Johnston v. City of Albuquerque, 145 P.3d 76, 80 (N.M. Ct. App. 2006)).
286. See Twerski, The Clearer, supra note 6, at 23 ("foreseeability is the exact type of factor that belongs in the domain of the jury, in making the decisions as to whether defendant's conduct was reasonable. It is the P in the P<BL Learned hand formula"); Rodriquez v. Del Sol Shopping Ctr. Assoc., L.P., 326 P.3d 465, 471 (N.M. 2014) (foreseeability is not a policy argument because fact intensive and not susceptible to categorical analysis)
287. See Esper and Keating, Putting Duty in its Place, supra note 6, at 1250 ("By expanding the domain of law and blurring the line between law articulation and law application, this particularizing of duty also erodes the line between judge and jury.").
based on policy. Leaving aside the arguments surrounding limitations on judicial policy making,\textsuperscript{288} such policy calls are for the court not the jury, regardless if categorical or more fact specific.

Further, not only is the use of the risk benefit variable a useful judicial tool in assessing duty, but duty does not always have to be categorical. The fact that the risk benefit rubric is used in the breach determination does not mean it cannot or should not be used by the court as part of its evaluation of duty, particularly if it remains that policy is the primary determinative. With such a practice, the Third Restatement’s concern that duty rulings must remain “categorical” and not fact specific may be over-emphasized. Many Massachusetts decisions reveal consideration as to the burden or social impact of imposing a particular duty obligation on a class of actors.\textsuperscript{289} As observed, “[t]he key to a rational approach to duty is not in seeking a bright-line category or divining a principle that is sufficiently general to guide future conduct in similar situations…. Rather the key is in identifying the policy factors that stand apart from the risk-utility balancing.”\textsuperscript{290}

As to the complaint that duty determinations are turning too much on the particular facts of the case and are not truly categorical, the response seems to be that courts are engaging in their adjudicatory function. While there are many instances of more fact specific duty determinations, these do not constitute an inappropriate intrusion on jury function, as “particularized duties fit in well with the modern judicial tendency to try to do justice in light of the unique facts of each lawsuit.”\textsuperscript{291} Duty rulings, in many instances, necessarily require considerable focus and reference to the operative facts. Indeed, to require only broad categorical duty determinations seems inconsistent with the judicial function of adjudicating fact specific cases.

The line between law (duty) articulation and law application (breach and causation) is otherwise many times not clear or discernible. Regardless, duty determinations do not all have to provide guidance to future cases, just as the appellate court is not at all times engaged in law declaration. It has an adjudicatory and error correction function as well, centered on the circumstances and facts before it. Such adjudication does not result in any untenable and pervading uncertainty in tort law. It represents the court performing its judicial dispute resolution function based on the circumstances before it. A more fact specific as opposed to pure categorical duty determination can and does provide guidance for future cases.

Fundamentally, there does not appear to be inconsistency or confusion in the foreseeability-plus-policy rubric applied by Massachusetts courts warranting material change. The suggestion that courts are “lazy,” or that there is a need for transparency, would not seem to be supportable. Most modern judges have a heightened sensitivity to the jury/judge demarcation, and to the notion that they are not to decide negligence cases as a matter of law unless reasonable minds could not differ over the application of law to fact. A sampling of recent Massachusetts cases addressing duty supports this proposition.\textsuperscript{292} These cases suggest that Massachusetts decisions, as a whole, reflect a generally steady practice of articulating no-duty

\textsuperscript{288} See, e.g., Weigand, Lost Chances, Felt Necessities, supra note 188, at 346-49 (discussing limitations on judicial policy making as to expansion of duty upon physicians for loss chance of a better outcome or survival).

\textsuperscript{289} Restatement (Third) of Torts §7 (in addressing the issue of duty, “the court may take into account factors that might escape the jury’s attention in a particular case, such as the overall social impact of imposing a significant precautionary obligation on a class of actors. These cases are properly decided as duty or no-duty cases.”).

\textsuperscript{290} Twerksi, The Cleaners, supra note 6, at p. 23.

\textsuperscript{291} Golanski, A New Look At Duty, supra note 6, at 252-54 (contending efficient particularized duty analysis is a good thing).

\textsuperscript{292} Leonard v. PN Bank N.A., 2014 WL 1117990 (D. Mass. 2014)(general no duty rule upon lender to borrower); Medina v. Hochberg, 465 Mass. 102 (2013) (rejects a duty of a physician to non-patients to warn patient of danger of driving in light of patient’s conditions; no duty determined based on policy-based cost benefit analysis, weighing benefits of such duty against countervailing costs of intruding into the highly personal, confidential physician-patient relationship; foreseeability assumed with no duty based on policy); Juliano v. Simpson, 461 Mass. 527 (2012)(refused to expand social host liability based on public policy considerations, including lack of consensus as to social need for imposition of such duty); Vintimilla v. Nat. Lumber Co., 84 Mass. App. Ct. 493 (2013)(tending on both the foreseeability of harm and social values to impose duty upon lumber yard to perform license check before delivery of hoisting machinery to lessee); Meridan at Windchime, Inc. v. Earth Tech, Inc., 81 Mass. App. Ct. 128 (2012)(no duty on professional employed by town to inspect construction in subdivision to developer of such subdivision or its contractors, unless foreseeable and reasonable for developer or its contractors to rely upon professional service to town); Hansburg v. National Grid (USA) Inc. 30 Mass. L. Rptr. 261 (2012) (no duty upon utility provider, as it was not foreseeable that bike path would be constructed directly underneath support cable to utility pole); Scheman v. Hopkinton Basketball Ass’n, Inc., 30 Mass. L. Rptr. 89 (2012)(action arose out of the selection and subsequent removal of the plaintiff, as head coach of his son’s youth basketball team by town basketball association and its board members, and stating that whether there was duty was question of policy; holding no duty as no case no law recognizing an independent legal duty on remotely similar facts); Nye v. Goh’s Garage, Inc., 82 Mass. App. Ct. 1105 (2012)(action against garage claiming it had negligently failed to inform owner of truck which had rolled over and seriously injured plaintiffs of the truck’s faulty brakes following its repair of the truck’s transmission; finding lack of duty or alternatively lack of causation as a matter of law; no duty of garage as to faulty brakes as it was not responsible for brakes or regular repair of truck, and as it has been retained solely to address transmission and undisputed work on transmission had no relationship to accident); Shea v. Caritas Carney Hospital, 79 Mass. App. Ct. 530 (2011) (negligence claim by estate against psychiatrist and social worker after mental health patient killed his step-father, asserting negligent failure to hospitalize or to warn; noting that “[a]lthough juries are uniquely qualified to determine the scope of the duty at issue the existence of a duty including a duty of reasonable care is a question of law appropriate for resolution on summary judgment.”); Johnson v. Rufo, 79 Mass. App. Ct. 1114 (2011)(negligence action against apartment owner who asked plaintiff to make some repairs in apartment and who then injured himself on a table saw not provided by owner; no duty as matter of law as the owner could not have reasonably foreseen the injury by plaintiff; the risk could not have been reasonably anticipated as a matter of law; owner did not provide plaintiff the power saw; plaintiff bought power saw without owner’s knowledge; and the use of a power saw was not required for completing the task; plaintiff admitted to knowing the saw was missing a guard and that he had used the saw without the guard several times in the past: “[t]he undisputed facts of this case make the injuries suffered by the plaintiff [ ] the result of an incident which was not reasonably foreseeable by the defendant and thus not an occurrence from which [the defendant] had a duty to protect [the plaintiff]… ” [citations omitted]; Lay v. Jordan’s Furniture Inc., 80 Mass. App. Ct. 1102 (2011) (plaintiff injured after falling on curb in parking lot and claiming that curb was too tall; found duty but otherwise entered judgment as a matter of law as insufficient evidence of breach of duty, given no evidence of any applicable industry standard, building code, or other regulation that would require any particular curb or any expert testimony on the significance of the curb height, or that the particular curb posed a danger to the public); Deheer v. American Academy of Podiatric Practice Mgmt., 2011 WL 1019911 (issue presented was whether a trade association has a duty of reasonable care in the form of continuing due diligence to ensure that a commercial sponsor, whose products or services it endorses and promotes to its membership, continues to meet certain standards of integrity and/or excellence; noted duty determination not solely governed by relationship between academy and putative sponsor; court found that existing social values, customs, and appropriate social policy did not impose a duty upon a trade association to prevent harm to its members from sponsors it promotes, based on risks of harm which the association should have been aware); Leavitt Duty, Causation and Palsgraf / 77
determinations based on policy and foreseeability, without any apparent or untoward practice of burying no-duty rulings in only foreseeability. Indeed, foreseeability is more often discussed and relied upon in recognizing a duty than in not recognizing a duty. To the extent it is relied upon in no-duty determinations, the dominant and controlling “policy” justification is usually stated and apparent.

**The Risk Standard for Causation.**

The Third Restatement’s risk standard is intended to conceptually eliminate foreseeability from the causation analysis. The drafters prefer the risk standard over the foreseeability analysis because “it provides greater clarity and facilitates analysis by focusing attention on the particular circumstances that existed at the time of the actor’s conduct and the risks that were posed by that conduct,” with the foreseeability test potentially being “misunderstood because of uncertainty about what must be foreseen, by whom, and at what time.” Accordingly, adoption of the risk standard in Massachusetts would, in theory, mark a measurable change in Massachusetts negligence practice and parlance.

Whatever clarity the risk standard is perceived to bring, it can be argued to be a more vapid, mechanical means of causative decision-making. Foreseeability in the causation question brings with it a fairness factor which eludes the pure risk calculation. It provides juries with a conceptual tool with which to draw upon their own common sense and life experiences in determining how far legal responsibility should extend in a particular case. In the more limited cases where causation is being addressed as a matter law, it provides the court with a conceptual tool as well to integrate the policy and pragmatic judgment necessary to fairly limit liability as a matter of law.

Despite the theoretical difference between the risk standard and foreseeability test for causation, in practice they are largely consistent. By virtue of comment j, they are, as noted by the SJC, “essentially consistent.” Both the risk standard and the 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. To any extent the two standards diverge, reading or requiring foreseeability into the risk analysis, as done by the SJC in *Leavitt*, works well. Collapsing the two approaches into a single standard of reasonably foreseeable scope of risk would seem only to potentially improve and refine analysis.

**New Causative Terminology and Eliminating Substantial Factor**

The use of scope of liability by the Third Restatement and the elimination of proximate cause, legal cause and substantial factor would mark a material change in Massachusetts practice. The migration under the Restatements from proximate cause (First Restatement), to legal cause (Second Restatement), to scope of liability phraseology represents a notable quest for clarity. The issue remains whether it truly enhances and improves the state of affairs.

Massachusetts’s proximate cause and even legal cause formulations have their benefits. They have been in play for over a century. The phrase “proximate cause” itself suggests there is more than simply cause in fact that can diminish the scope of liability. Legal cause, in turn, provides separation from factual cause.

There are problems. “Proximity” is misleading in the causative question. Proximate cause likewise has been used to cover both factual and proximate cause, and interchangeably with causation. While legal cause is distinguished from factual cause, the causation question is usually a question of fact. Moreover, the Second Restatement used legal cause as an umbrella term for both factual and proximate cause.

The phrase “scope of liability” has some appeal. It is arguably less murky than the qualifying causation terms of “proximate” and “legal.” The phrase presents the essential issue, i.e., “which of the harms that would not have occurred but for defendant’s breach are among those for which liability in negligence may be imposed.” Stated another way, if it has been found that there was a breach of

v. Brockton Hospital, 454 Mass. 37, 37 (2009) (police officer sued a hospital and two nurses for injuries he sustained when his police cruiser was hit by another automobile as he was responding to an accident involving a sedated patient who had been discharged from the hospital; no duty as no special relationship); Coombes v. Florio, 450 Mass. 182 (2007) (doctor owed duty of reasonable care to third party to warn patient of side effects of treatment which might impair ability to drive safely, where third party was pedestrian foreseeably placed at risk and no policy reason sufficient to preclude such a duty; dissent argued that physician’s liability did not extend to a non-patient, relying on policy principles); Roe Nos. 1-11 v. Children’s Hosp. Medical Center, 2012 WL 3637246 (action against Massachusetts hospital based on sexual assaults committed on plaintiffs by former employee of hospital; held that even assuming that hospital’s failure to report resulted in the foreseeable abuse of patients in another state, the existence of voluntary or ethical standards of conduct for reporting physician wrongdoing is insufficient to create a legal duty to, or special relationship with, alleged victims; despite potential foreseeability, no public policy supported the creation of a duty to plaintiffs, who were allegedly assaulted by defendant in another state after defendant left hospital, obtained a license in the other state, and was hired and supervised by another hospital for a period of 20 years).

293. Judge v. Carrai, 77 Mass. App. Ct. 703 (2010) (imposing on landowner and organizer of neighborhood baseball game a duty of care, as “there is little question in the present case that a rational factfinder could conclude that the risk in the circumstances that a batted ball could strike a person sitting on the hosts’ porch, causing injury, was foreseeable”).

294. Id.

295. See, e.g., Hill v. Damm, 804 N.W.2d 95, 103 (Iowa 2011) (referring to Third Restatement’s scope of liability analysis as “clear as mud”); U.S. v. Monzel, 746 F. Supp.2d 76, 86 n.16 (D.D.C. 2010) (expressing concern whether the Third Restatement’s scope of liability approach “is going to be any easier or clearer for judges who must write appropriate instructions on causation or for juries, who must apply them”); see also Hale v. Brown 38 Kan. App. 2d 495, 499 (2007) (declining to adopt scope of risk approach of Third Restatement); Dew v. Crown Dermis Erectors Inc., 208 SW.3d 448, 452 n.2 (Tex. 2006) (same).

296. Golanski, A New Look at Duty, supra note 6, at 253 (“[c]onclusions of fairness and efficiency motivate the layered foreseeability standards”); Owen, Figuring Forseeability, supra note 6, at 1307 (“by harnessing juries to a sterile yoke of scope of risk for proximate cause decision-making, [the Restatement also rejects Judge Andrews’s valuable insight that juries should be offered a wide range of fairness factors, beginning with foreseeability, in figuring how far responsibility should extend.”).

297. See Golanski, A New Look at Duty, supra note 6, at 243 (“the community’s general norms are a constituent in the fact-finder’s deliberation about the reasonableness of a litigant’s conduct and a conventional ingredient in the American jury system.”).


299. Restatement (Third) of Torts §7 cmt. j.

300. Restatement (Second) of Torts §431 cmt. a

301. Leavitt, 454 Mass. at 45 n.20.

302. Zipursky, Forseeability, supra note 6, at 1258.
the duty of care which factually caused harm, was that harm (or its extent) within the scope of the defendant’s liability? “Scope of liability” allows inclusion of notions of superseding and intervening as well as trivial causes. It likewise portrays a quantifiable realm of liability that has limits. It includes the mixed considerations of logic, common sense, fairness and justice that are inherent and essential to causative determinations.

At the same time, there is concern whether the causation approach of the “Third Restatement truly clarifies.” The “scope of liability” terminology is awkward and would result in substantial discomfort for jurists and litigants alike. Further, section 27 remains unclear, given comment f’s support for the proposition that individual sufficiency is not a prerequisite for cause in fact. Indeed, legitimate criticism of section 27 is its omission of the requirement that a defendant’s conduct alone be sufficient and substantial, and that “[a]ny standard less than but-for . . . represents a decision to impose liability without causation.”

Elimination of substantial factor usage would be a significant change in Massachusetts practice. To be sure, substantial factor is currently ingrained in Massachusetts causative law and jury presentation. Yet the Third Restatement’s concerns are understandable and pertain to Massachusetts practice. There remains a discernible uncertainty with substantial contributing factor (or cause) language for causation including, inter alia, potentially reducing the cause-in-fact requirement by referencing a contributing factor rather than an independent but-for cause, as well as potentially meaning anything more than a de minimis cause. Similarly, Massachusetts courts have tended to use substantial factor analysis in any multiple defendant or cause case, in lieu of but-for cause, which is inappropriate and inconsistent with its intention. The position that substantial factor applies whenever there is more than one defendant is imprecise. It is not the presence of multiple defendants or causes but the presence of multiple sufficient causes. Indeed, even with another unrelated force or cause, it should remain that the allegedly wrongful conduct be sufficient to result in the harm, with it otherwise not being excused by the presence of another sufficient but unrelated cause. This is a far cry from saying that cause is proven if there are multiple sufficient causes.

Further, in Renzi, if the loss of chance at issue was different in any degree or amount between the two defendants, there would be no basis to substitute “substantial factor” for “but-for,” even under the Massachusetts approach. To be sure, Massachusetts courts regularly define substantial factor to include “without which it would not have occurred.” As such, the necessary “but-for” prerequisite remains. Yet to do so in such a fashion may only heighten the confusion and uncertainty surrounding the meaning of substantial factor.

**Conclusion**

It remains to be seen whether the Third Restatement will be expressly adopted in Massachusetts. The elimination of foreseeability from the duty question and the use of scope of liability and the elimination of substantial factor mark material changes to existing Massachusetts practice and terminology. The problems the Third Restatement’s formulation are intended to address would not, however, appear to readily pervade no-duty rulings in Massachusetts, although the use of foreseeability and cost-benefit balancing beyond breach would certainly cause the drafters of the Restatement to scowl. While it would appear that foreseeability in duty as a “pre-condition” has a rightful and long-standing place in duty analysis under Massachusetts law, the reformation of causation through the elimination of the substantial factor test has significant appeal. Even if never formally adopted, in whole or in part, the Third Restatement will undoubtedly be relied upon and referenced by litigants and courts alike in the midst of advocacy and the continuing search for improved clarity, consistency and proper balance between judge and jury.

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303. See note 292, supra.
305. See generally Drumgold v. Callahan, 707 F.3d 28, 51 n.15 (1st Cir. 2013) (noting the new causation terminology of “Third Restatement and using it to “explain the error in the district judge’s causation instruction,” and otherwise finding it “premature to adopt the new terminology generally.”).

This [substantial factor] linguistic ambiguity has created a ‘doctrine’ which is little more than a jurisprudential Rorschach blot—in one circumstance justifying a relaxed standard of causation, in another supporting a heightened standard, and in yet another providing nothing more than a synonym for the ‘but for’ test.

.Id.
307. See Asher v. OB-Gyn Specialists Inc., 846 N.W.2d 492, 499 (Iowa 2014) (noting that substantial factor language could be construed as either creating a more demanding standard or, in certain situations, “effectively decrease the plaintiff’s burden to show the conduct was within the actor’s scope of liability”); Matsayama v. Birnbaum, 452 Mass. 1, 31 (2008) (noting that substantial contributing factor requirement arguably imposed higher burden on plaintiff); see also David W. Robertson, The Common Sense of Cause in Fact, 75 Tex. L. Rev. 1765, 1779-80 (1997). Professor Robertson states:

The real trouble begins when courts go a step further and start treating the relatively vague substantial factor vocabulary as an improvement upon the but for test with respect to any multiple causation case in which analysis appears difficult. As we have seen, the only multiple causation cases that are legitimately solved by the substantial factor test are the “combine force” situations in which we are morally certain that the but-for test stubbornly persists in yielding the wrong answer. When courts begin turning to the substantial factor vocabulary in a broader range of cases, valuable precision of analysis is lost and nothing is gained.

308. See Drumgold v. Callahan, 707 F.3d 28, 48-49 (1st Cir. 2013); see also Yanez v. Plummer, 221 Cal. App. 4th 180, 189-90 (2013)(substantial factor “subsumes” but for and, as such, “conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct”); Givens v. All Pro Courts, LLC, 2013 WL 5569402 *3 (Tex. App. Houston 2013) (test for cause in fact is whether breach was a substantial factor in bringing about injury and whether injury would not have occurred without the breach).
310. Robertson, Common Sense, supra note 307 at 1779; see also Joseph Sanders, Michael D. Green, William C. Powers, The Insubstantiality of the Substantial Factor Test for Causation, 73 Mo. L. Rev. 399, 430 (2008). The professors there state:

The ambiguity surrounding the substantial factor test leads to inconsistent results, at least across jurisdictions. More importantly, the test gives no clear guidance to the fact-finder about how one should approach the causal problem. It also permits courts to engage in fuzzy-headed thinking about what sort of causal complications should be imposed on plaintiffs especially in cases that present complications in the availability of causal evidence. The but-for test, on the other hand, offers a road map on how to think about causation.

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## APPENDIX A

### SUMMARY DEFINITION/INSTRUCTION COMPARISON

<table>
<thead>
<tr>
<th>Massachusetts</th>
<th>Third Restatement</th>
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<tbody>
<tr>
<td><strong>Negligence</strong></td>
<td>Negligence is doing something that a reasonably prudent person in the ordinary course of human events would not do, or failing to do something that a reasonable person of ordinary prudence would do. Negligence is the failure of a responsible person, either by omission or by action, to exercise that degree of care, diligence, and forethought which, in the discharge of the duty then resting on [him/her], the person of ordinary caution and prudence ought to exercise under the particular circumstances. It is a want of diligence commensurate with the requirement of the duty at the moment imposed by the law. Negligence is the performance or the omission of some act in violation of a legal duty.†</td>
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<tr>
<td><strong>Duty</strong></td>
<td>Question of law for the court. The first element the plaintiff must prove by a preponderance of the evidence is that a duty was owed to [him/her] by the defendant. You are to interpret the word “duty” as an obligation. Duty means an obligation to conform to a particular standard of conduct toward another person which is recognized and enforced in the law. It is for you to determine whether the defendant did exercise the required care or whether the defendant breached this duty. The law defines negligence as the failure of a person to exercise that degree of care which a reasonable person would exercise in the circumstances. Ordinarily, where a duty of care is established by law, the standard by which a party’s performance is measured is the conduct expected of a reasonably prudent person in similar circumstances. The standard is not established by the most prudent person conceivable, nor by the least prudent, but by the person who is thought to be ordinarily prudent. The same standard is frequently expressed in terms of “reasonable care.”§</td>
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† Massachusetts Superior Court Model Jury Instructions §2.1.2 (MCLE 2d. ed. 2011).
‡ Restatement (Third) of Torts §6.
§ Massachusetts Superior Court Model Jury Instructions §2.1.1 (MCLE 2d. ed. 2011).
¶ Restatement (Third) of Torts §6 cmt. b.
1. Id.
2. Id.
3. Id. at §7.
4. Id. at §7 cmt. o.
5. Id. at §37.
The second element which the plaintiff must prove by a preponderance of the evidence is that the defendant did not exercise the required amount of care under the circumstances, that the defendant breached [his/her] duty of care, or, in other words, was negligent. Since there is a duty to exercise [reasonable] care, the plaintiff must prove by a preponderance of the evidence that the defendant failed to exercise the required amount of care. The standard of care in negligence cases is how a person of reasonable prudence would act in similar circumstances. The amount of care that the prudent person would exercise varies with the circumstances, the care increasing with the likelihood and severity of the harm threatened. Therefore, based on the facts you find from the evidence submitted in this case, you are to determine how a person of reasonable prudence would act in these circumstances. Your determination of how a prudent person should act in these circumstances will form the basis of what is reasonable care under the facts of this case. [Describe circumstances of the case.] After making this determination, you are to compare the standard of reasonable care of a prudent person with the type of care exercised by this defendant. In determining whether or not the defendant acted with reasonable care, you are to consider not only whether [he/she] knew of the risks involved, but also whether [he/she] should have known of the risks. The test is an objective one. If you find that the defendant did exercise the amount of care which a prudent person would exercise under the same circumstances, namely, reasonable care, then you must find that the defendant did not breach [his/her] duty of reasonable care to the plaintiff, and your verdict will be for the defendant. If, however, you find that the defendant did not exercise the amount of care which a reasonably prudent person would have exercised under the same circumstances, then you must find that the defendant breached [his/her] duty of care to the plaintiff.10

A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person’s conduct lacks reasonable care are the foreseeable likelihood that the person’s conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.11 This requires a balancing approach, where the risk is the overall level of the foreseeable risk created by the actor’s conduct and the benefit is the advantages that the actor or others gain if the actor refrains from taking precautions.12 Conduct is negligent if its disadvantages outweigh its advantages. The greater the burden of precautions facing the actor the less appropriate is a finding of negligence.13 To establish negligence, it is not enough that there be a likelihood of harm: the likelihood must be foreseeable to the actor at the time of the conduct.14

10. Massachusetts Superior Court Model Jury Instructions §2.1.3 (MCLE 2d. ed. 2011).
11. Restatement (Third) of Torts §3.
12. Id. at §3 cmt. e.
13. Id. at §3 cmt. f.
14. Id. at §3 cmt. g.
### Factual Cause

If you decide that the defendant was negligent, you must then consider whether the defendant’s negligent conduct [caused/enhanced] the plaintiff’s injuries. Even if you find that the defendant was negligent, the defendant is not liable to the plaintiff unless [its/his/her] negligence caused the plaintiff’s harm. To meet [his/her] burden, the plaintiff need only show that there was greater likelihood or probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause. The defendant’s conduct was a cause of the plaintiff’s harm if the harm would not have occurred absent the defendant’s negligence. In other words, if the harm would have happened anyway, the defendant is not liable.

(If multiple sufficient causes:)

There may be more than one cause present to produce an injury, and more than one person legally responsible for an injury. The plaintiff does not have to prove that the defendant’s negligence was the only or even the predominant cause of the injury. If two or more causes operating together contributed to the plaintiff’s injury so that, in effect, the damages suffered were inseparable, then it is enough for the plaintiff to prove that the defendant’s negligence was a substantial contributing factor in causing the injury. By “substantial” I mean that the defendant’s contribution to the harmful result, i.e., the defendant’s negligence, was not an insignificant factor. The defendant’s negligence must contribute along with other factors to the result; it must be a material and important ingredient in causing the harm. If the defendant’s negligence was a substantial factor, then it is considered a cause of the plaintiff’s injury, and the plaintiff is entitled to recover. If it was not a substantial factor, if the negligence was only slight or tangential to causing the harm, then even though you may have found the defendant negligent, [it/he/she] cannot be held liable to pay damages to the plaintiff on this claim.15

Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct.16 One must ask what would have occurred if the actor had not engaged in the tortious conduct. The framework is two steps: identify the relevant harm for which recovery is sought and then identify the tortious conduct of the actor and ask whether the harm would have occurred if the actor had not acted.17

(If multiple sufficient causes:)

An actor’s tortious conduct need only be a factual cause of the other’s harm. The existence of other causes of the harm does not affect whether specified tortious conduct was a necessary condition for the harm to occur. Those other causes may be innocent or tortious, known or unknown, influenced by the tortious conduct or independent of it, but so long as the harm would not have occurred absent the tortious conduct, the tortious conduct is a factual cause.18 If there are multiple potential causes and each alone would have been a but for cause of the harm, each act is a factual cause.19

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15. Massachusetts Superior Court Model Jury Instructions §2.1.8 (a) and (b) (MCLE 2d. ed. 2011).
17. id. at §26 cmt. f.
18. id. at §27.
19. id. at §27 cmts. a, d, e.
Furthermore, to establish causation, the plaintiff must show that the general type of harm was reasonably foreseeable to someone in the defendant’s position at the time of the defendant’s negligence. The plaintiff does not have to establish that the defendant foresaw, or should have foreseen, the precise manner in which the harm occurred; but the plaintiff must show that [his/her] harm was a natural consequence of the defendant’s negligence. The defendant is liable for those injuries that are a reasonably foreseeable consequence of [his/her] negligence. When we say that something is foreseeable, we mean that it is a predictable consequence of the defendant’s conduct.\(^{20}\)

You must decide whether the claimed harm to plaintiff is within the scope of defendant’s liability. The claimed harm is within the scope of the defendant’s liability if that harm arises from the same general types of danger that the defendant should have taken reasonable steps to avoid. In determining whether the harm arises from the same general types of danger that the defendant should have taken reasonable steps to avoid, you may consider the following: (a) the risk that the defendant was seeking to avoid; (b) the manner in which the injury came about; and (c) whether the type of injury was different from the injury that was contemplated or foreseen by anyone. You are to consider whether repetition of defendant’s conduct makes it more likely harm of the type plaintiff claims to have suffered would happen to another. If not, the harm is not within the scope of liability.\(^{21}\)

\(^{20}\) Massachusetts Superior Court Model Jury Instructions §2.1(c) (MCLE 2d. ed. 2011).

\(^{21}\) Restatement (Third) of Torts §29; Iowa Civil Jury Instructions 700.3A (IDCA 2004).
CASE COMMENT


In July, 2013, the Massachusetts Supreme Judicial Court ("SJC") held in Flagg v. AliMed Inc.,1 that the Massachusetts anti-discrimination statute, Massachusetts General Laws chapter 151B, prohibits employers from discriminating against a non-handicapped employee based on the handicap of his or her spouse. This holding, which adopts in part the rationale that the Massachusetts Commission Against Discrimination has applied for decades, relies on the broad remedial purpose of chapter 151B and draws upon interpretation of analogous federal laws. The scope of the decision is yet to be determined, as a concurrence by Justice Gants suggests that the court's holding is a narrow one. Regardless, this recognition of a new genre of handicap discrimination claims has the potential to significantly expand the reach of chapter 151B.

Factual and Procedural Background

The plaintiff, Marc Flagg, appealed from the dismissal of his complaint alleging employment discrimination and defamation by his former employer, the defendant AliMed Inc. ("AliMed"). The complaint, filed in Norfolk Superior Court, alleged that AliMed terminated Flagg in February, 2008, after Flagg had worked there for 18 years.2 As part of his employee benefits, Flagg and his family received medical insurance through AliMed’s policy.3 In December, 2007, Flagg’s wife underwent surgery for the removal of a brain tumor, and thereafter was receiving rehabilitative care.4 Following his wife’s surgery, Flagg took on additional family responsibilities, which included picking his daughter up from school.5 Due to this task, with permission from his manager, Flagg was absent from work on certain days for approximately 25 minutes in the afternoon.6 On Feb. 4, 2008, AliMed terminated Flagg, purportedly because Flagg had failed to punch out on certain days when he left to pick up his daughter, and therefore was being paid for hours that he had not actually worked.7 Flagg’s complaint alleged that this proffered reason was false, and that his termination was actually because his wife had a very serious and expensive medical condition for which AliMed, through its health plan, was financially responsible.8

AliMed moved to dismiss Flagg’s complaint pursuant to Massachusetts Rule of Civil Procedure 12(b)(6).9 After a hearing, Judge Patrick Brady allowed the motion to dismiss, ruling that the claim of defamation was not pleaded adequately, and that the plaintiff’s claim of employment discrimination did not state a claim on which relief could be granted, because “the theory that [AliMed] fired plaintiff because his wife was handicapped is not recognized in the Commonwealth.”10 The dismissal was entered on December 28, 2010, and the plaintiff filed an appeal in the Appeals Court, which the SJC took up sua sponte.11

Statutory Framework

Massachusetts General Laws chapter 151B, section 4(16) prohibits employers from taking adverse action against “any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation,” if such adverse action was taken “because of [the employee’s] handicap.”12 The statute defines a “qualified handicapped person” as a “person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap.”13 The statute’s protection is limited to those persons who: (a) have a physical or mental impairment which substantially limits one or more major life activities; (b) have a record of having such an impairment; or (c) have been regarded as having such an impairment.14

Chapter 151B’s proscription against discrimination on the basis of handicap (including the definitions within sections 1(16) and 1(17)) was explicitly modeled after the federal Rehabilitation Act when it was added to chapter 151B in 1983.15 In its 1974 incarnation, on which chapter 151B was based, the Rehabilitation Act did not prohibit discrimination based on association with a handicapped person. However, in 1990, Congress enacted the federal Americans with Disabilities Act (“ADA”), which included an explicit prohibition against discrimination against those associated with disabled persons.16 Two years later, in 1992, Congress amended the Rehabilitation Act to state that it should be interpreted consistently with the ADA.17

In the years since the 1983 enactment of the handicap discrimination provisions of chapter 151B, the Massachusetts Legislature made more than one modification to the definitions provided in section 1(16), but did not explicitly amend the statute in a manner analogous to Congress’s amendment of the Rehabilitation Act.18

Pre-Flagg Associational Discrimination Claims in Massachusetts

The central issue in Flagg (whether chapter 151B prohibits associational discrimination on the basis of handicap) was addressed in at least two cases in recent years. Both of those cases, however,

1. 466 Mass. 23 (2013).
2. Id. at 25.
3. Id.
4. Id.
5. Id.
7. Id.
8. Id.
9. Id. at 26.
10. Id.
11. Id.
13. Id. §1(16).
14. Id. §1(17).
held that a claim for associational handicap discrimination was not cognizable.

In Brelin-Penney v. Encore Images Inc., one Massachusetts Superior Court rejected the plaintiff's claim, holding that "[n]either the [Massachusetts Commission Against Discrimination ("MCAD")], nor the court, can add a category for 'associated persons' that the Legislature did not include in the statute." The Massachusetts Appeals court affirmed the judgment in that case.20

The United States District Court for the District of Massachusetts reached the same outcome in Ayanna v. Dechert LLP. In that case, the plaintiff alleged that he was discriminated against due to his association with his wife, who suffered from chronic mental illness. The district court echoed Brelin-Penney, concluding that chapter 151B unambiguously does not provide for associational discrimination claims: "The MCAD's construction aggrandizes the statute's plain language and creates a new class of protected persons not contemplated by the statute. If there is to be a cause of action for 'associational' discrimination, it ought to emanate from the Massachusetts legislature."21

Both of these cases departed from the MCAD's interpretation of section 4(16). The MCAD is the agency charged with enforcing chapter 151B. Even before Flagg, the MCAD had long extended chapter 151B to associational handicap discrimination in both housing and employment.22 The MCAD based its interpretation of chapter 151B on its interpretation of "other similar discrimination statutes," including Title VII of the Civil Rights Act of 1964, which prohibits associational discrimination on the basis of race, color, religion, sex or national origin.23

**SJC in Flagg: Chapter 151B Prohibits Associational Discrimination on the Basis of Handicap**

In Flagg, the SJC took a different course from the Superior Court and the U.S. District Court, holding that "interpreting § 4(16) to encompass a claim of associational discrimination finds support in the language and purpose of that section and c. 151B more generally in the longstanding and consistent interpretation given to the statute by the [MCAD], and in the analogous provisions of Federal antidiscrimination statutes."24

The SJC began its analysis by examining the language of section 4(16) "in the context of the overarching purpose of the statute itself."25 In particular, the court noted the legislature's objectives and purposes in enacting chapter 151B in 1946 (to eradicate discrimination), and the fact that the legislature expressly directed that chapter 151B "be construed liberally for the accomplishment of its purpose."26

Reading the statutory language broadly in light of its remedial purpose, the court reasoned:

When an employer subjects an otherwise satisfactory employee to adverse employment decisions premised on hostility towards the handicapped condition of the employee’s spouse, it is treating the employee as if he were handicapped himself—that is, predicated on discriminatory animus, the employer treats the spouse’s handicap as a characteristic bearing on the employee’s fitness for his job. The employee is thereby subjected to the type of prejudice, stereotypes or unfounded fear relating to handicapped individuals that ch. 151B, § 4(16), seeks to protect against.28

On this basis, the SJC found that those employees who are the victims of stereotype due to the impairments of their immediate family members fall into the category of “being regarded as having such impairment,” which is included in the statutory definition of “handicap.”29 Therefore, the SJC concluded that “the language of § 4(16) is properly read to accommodate the concept of handicap discrimination based on association.”30

The SJC also found footing in the MCAD’s interpretation of section 4(16), noting that “for over thirty years, the [MCAD], through its decisions, has interpreted ch. 151B, § 4, to protect against employment discrimination based on association, including associational discrimination based on handicap.”31 The SJC described the MCAD’s interpretation as “illuminating guidance,” and subsequently accorded it “the deference to which it is due.”32

The SJC’s holding was also buttressed by the fact that analogous federal antidiscrimination statutes, Title VII and the Rehabilitation Act of 1973, have been interpreted to cover claims of associational discrimination, “despite a lack of specific reference in the statutory language.”33 In particular, the SJC noted that Title VII had been extended to encompass associational claims in order to “carry out the clear congressional mandate . . . to eliminate discrimination,” and found that “[t]he specific directive in ch. 151B, § 9, to interpret the statute liberally to effectuate its remedial purposes instructs us that we have a similar duty when construing the handicap discrimination provisions of § 4(16).”34 The SJC also gave weight to the fact that the Massachusetts legislature explicitly patterned portions of chapter 151B after the Rehabilitation Act, and that therefore the court had previously looked to interpretations of the Rehabilitation Act for guidance.35 Since Rehabilitation Act decisions recognize associational discrimination claims, the SJC reasoned that those cases also support its interpretation of section 4(16).36

The SJC rejected AliMed’s argument that the ADA specifically includes associational discrimination in the employment context, suggesting that chapter 151B’s failure to specifically include such coverage was intentional. The SJC reasoned that, since the ADA
was enacted after the Massachusetts legislature amended chapter 151B to add section 4(16) and related sections, the proper analogy is not to the ADA, but rather to the Rehabilitation Act, “on which, as stated, chapter 151B’s handicap discrimination provisions were actually based.”

After recognizing the viability of an associational handicap claim, the SJC held that Flagg’s complaint adequately alleged a plausible set of facts for relief, and reversed the dismissal of the claim.

GANTS’S CONCURRENCE: FLAGG’S HOLDING IS NARROW

Justice Gants wrote a concurring opinion, in which he emphasized the limited scope of the court’s holding. The concurrence acknowledged that the plain language of section 4(16) “does not suggest that it was intended to protect an employee from dismissal because of a family member’s handicap, where the employee himself is not handicapped.” He also diminished the significance of the MCAD’s interpretation of the statute, finding that the MCAD’s decisions contained “little analysis that warrants any deference.”

Despite this, Gants found two grounds that supported Flagg’s section 4(16) claim. First, he found that “at least with respect to an employer’s concern with the cost of health insurance premiums, an employee may be regarded by an employer as if he had his family member’s impairment,” because “the potential cost to the employer in higher insurance premiums is the same regardless of whether the medical expenses are incurred by the employee or a family member,” and therefore where an employer takes adverse action against an employee in order to curtail those health insurance costs, such action is precluded by section 4(16).

Second, Gants agreed that federal court cases that interpreted the Rehabilitation Act to cover associational handicap discrimination “in certain circumstances” support the SJC’s interpretation of chapter 151B.

Gants took pains to address “the special nature” of the facts in Flagg’s complaint, pointing out that the court’s finding of a cognizable claim “is not based on any allegation that he was fired because the employer refused to accommodate his need to devote greater time to family matters because of his wife’s handicap.” In connection with this observation, Gants noted that the federal courts and the Equal Employment Opportunity Commission have concluded that the ADA does not require employers to provide employees with reasonable accommodations because of a relative’s or associate’s disability. Thus, associational discrimination cases litigated under the ADA “are sharply limited.” For example, ADA associational discrimination cases include facts similar to Flagg’s, where a family member has a disability that is costly to the employer because the family member is on the employer’s health plan, and “disability by association” cases where an employer fears that a presently nondisabled employee will become disabled because of his association with a disabled person, “such as through contact with a person carrying the human immunodeficiency virus (HIV) or because of common
genetic components, such as where a relative suffers from a genetically caused disease.”

Gants concludes by confirming that the SJC has not indicated whether associational handicap discrimination will be interpreted to expand beyond Flagg’s type of case, and cautions that the SJC should be reluctant to interpret chapter 151B to be more expansive than the ADA.

IMPLICATIONS OF FLAGG

The SJC’s decision in Flagg opens the door to an entirely new category of claims pursuant to chapter 151B. The two cases that have applied Flagg, however, have both resulted in the dismissal of a claim for associational discrimination.

On August 9, 2013, the holding of Flagg was followed by the Massachusetts Appeals Court in Lashgari v. Zoll Medical. Nevertheless, after citing the Gants concurrence, the Appeals Court found that it need not decide whether associational discrimination claims extend beyond the context of Flagg, because the plaintiff’s complaint in Lashgari failed to allege facts sufficient to support a causal connection between the plaintiff’s son’s autism and adverse employment action taken against the plaintiff.

In November, 2013, the U.S. District Court for the District of Massachusetts also applied Flagg. In Perez v. Greater New Bedford Voc. Tech. Sch. Dist., the district court held that, based on the SJC’s reasoning in Flagg, section 4(16) does not extend to a claim brought by a plaintiff who allegedly was fired by her employer, a school district, because she advocated for the interests of disabled children in her role as special-education coordinator. The district court dismissed Perez’s claim because, unlike Flagg, she did not allege facts that show that “she was subject to the same prejudice, stereotypes or unfounded fear that accompanies discrimination against the handicapped,” or that she was not rehired “because she was regarded as having a mental or physical impairment by proxy.”

Neither Lashgari nor Perez gives much insight into the scope of associational handicap claims under chapter 151B. Therefore, it is yet to be determined whether state courts will heed the explicit caution of Gants’s concurrence, and limit the reach of 151B to the types of cases described in the concurrence.

CONCLUSION

The SJC’s decision in Flagg v. AliMed reverses course from previous judicial interpretations of chapter 151B, section 4(16), and opens the door to employment discrimination claims on the basis of association with a handicapped person. What remains to be seen, however, is whether these claims will encompass facts other than those pleaded in Flagg. Regardless, employers are now on notice that employees could have a state law claim if the employer takes adverse action against employees due to the increased costs presented by an employee’s family member’s handicap.

—Kristyn Bunce DeFilipp

37. Id. at 37.
38. Id. The SJC affirmed, however, the judgment dismissing the defamation claim. Id. at 38.
39. Id. at 39 (Gants, J., concurring).
41. Id. at 40.
42. Id.
43. Id. at 41.
CHAPTER 93A’S HANNON RIGHT BECOMES THE LATEST CASUALTY OF ARBITRATION SUPREMACY

McInnes v. LPL Financial LLC

On August 12, 2013, the Supreme Judicial Court of Massachusetts (“SJC”) decided McInnes v. LPL Financial LLC.1 Justice Gants wrote the decision, which he began with the following:

In Hannon v. Original Gunite Aquatech Pools Inc., we held that, even where a consumer executed a valid contract agreeing to arbitrate all disputes, a plaintiff may not be compelled to arbitrate a claim alleging an unfair or deceptive trade practice in violation of [Mass. Gen. Laws] ch. 93A, § 9. We hold today that such claims must be referred to arbitration where the contract involves interstate commerce and the agreement to arbitrate is enforceable under the Federal Arbitration Act.2

For those who have followed the arbitration decisions of the Supreme Court of the United States (“Supreme Court”) in recent years, Justice Gants’s words were not surprising. Instead, those words just announced the latest casualty of the Federal Arbitration Act (“FAA”).3

I. FACTUAL BACKGROUND

In the case, plaintiff Jane B. McInnes (“McInnes”) brought a number of claims against her former financial planner, LPL Financial LLC (“LPL”), and its principal, Karl G. McGhee Jr. (“McGhee”) (together with LPL, “Defendants”).4 Her complaint included a claim for violation of section 9 of Massachusetts General Laws chapter 93A (“Chapter 93A”).5 The dispute arose out of McGhee’s recommendation that McInnes purchase a certain type of life insurance policy.6 McInnes alleged that the policy she purchased based on McGhee’s recommendation was never an appropriate investment for her, that McGhee had subsequently formed an irrevocable trust for the policy and named himself as both the owner and the trustee, and that he had allowed the policy to lapse.7

After McInnes brought suit in Barnstable County Superior Court, the defendants moved to stay the court proceedings and compel arbitration pursuant to the Massachusetts Arbitration Act (“MAA”).8 In support of their motion, the defendants filed an affidavit of McGhee and an LPL new account application, signed by McInnes in 2003, which included an arbitration clause. Under the heading “Pre-Dispute Arbitration Agreement,” the clause9 provided the following broad language:

In consideration of opening one or more accounts for you, you agree that any controversy between LPL arising out of or relating to your account, transactions with or for you, or the construction, performance or breach of this agreement whether entered into prior, on or subsequent to the date hereof, shall be settled in arbitration in accordance with the rules, then obtaining of the National Association of Securities Dealers Inc.10

In denying the defendants’ motion to stay, the superior court judge, relying on the SJC’s 1982 decision in Hannon v. Original Gunite Aquatech Pools Inc.,11 held that McInnes could not be forced to arbitrate her Chapter 93A claim.12 The defendants then filed a second motion to stay the case and compel arbitration, this time arguing that the FAA controlled the effect of the arbitration clause on the dispute, and that the FAA preempted whatever rights McInnes may have had under Hannon.13 A different superior court judge denied the second motion, finding that there remained viable issues as to the existence and enforceability of the arbitration clause.14 After the second motion was denied, the defendants exercised their right to an interlocutory appeal of each of the denials.15

The SJC accepted the defendants’ application for direct appellate review and vacated both orders.16

II. LEGAL BACKGROUND

Before delving into the SJC’s holding, it is important to understand the legal context in which McInnes and the defendants argued the motions to stay. Unlike section 11 of Chapter 93A, which controls disputes where both parties are engaged in trade or commerce,17 Chapter 93A’s section 9 contains the following provision:

(6) Any person entitled to bring an action under this section shall not be required to initiate, pursue or exhaust any remedy established by any regulation, administrative procedure, local, state or federal law or statute or the common law in order to bring an action...

2. Id. at 257 (internal citations and abbreviation definitions omitted).
3. 9 U.S.C. §1 et seq.
5. Id. at 257. The other claims were for fraud, intentional misrepresentation, breach of fiduciary duty, intentional infliction of emotional distress and violation of the Massachusetts Securities Act, Mass. Gen. Laws ch. 110A, §410. McInnes, 466 Mass. at 257.
7. Id.
8. Id. at 258. The MAA is codified at Mass. Gen. Laws ch. 251, §§1 et seq.
10. Id. at 259.
13. Id.
14. Id. at 259-60.
15. Id.
16. Id. at 260, 267.
under this section or to obtain injunctive relief or recover damages or attorney’s fees or costs or other relief as provided in this section. Failure to exhaust administrative remedies shall not be a defense to any proceeding under this section, except as provided in paragraph seven. 21

The legislature added this provision (“Paragraph 6”) as part of the 1973 amendments to section 9 of Chapter 93A. 19

As later explained by the SJC, the 1973 amendments were designed “to preclude stays in the absence of … limited circumstances.” 20 Those circumstances focus on instances where a governmental agency is involved and an adjudicatory hearing is required in order to later pursue a Chapter 93A claim. 21 To the SJC, this framework made it clear that the legislature designed the 1973 amendments, and Paragraph 6 in particular, to “allow” consumers access to the courts to vindicate their rights, without first exhausting other remedies. 22

The SJC did not address Paragraph 6 until Hannon in 1982. 23 Hannon was a dispute between an in-ground swimming pool installation company and a consumer who had purchased the company’s services. 24 After the complaint was filed, the defendant moved to stay the proceedings pursuant to the MAA and an arbitration clause contained in the parties’ pool installation contract. 25 The judge allowed the motion. 26 The plaintiff argued on appeal that Paragraph 6 made the judge’s ruling improper. 27 The SJC agreed, holding that the consumer was not required to submit his Chapter 93A claim to arbitration. 28 Although arbitration did “not fall neatly into the categories” listed in Paragraph 6, the SJC viewed “it as comprehended within either ‘common law’ or statutory remedies.” 29 To the SJC, the holding was consistent with the legislative intent of the 1973 amendments. 30 With that, the so-called Hannon right — the right to bring a section 9 claim to court even in the face of a valid, predispute arbitration clause — was born.

After the decision, Massachusetts courts understood consumers to have a Hannon right. 31 Although the motion to stay in Hannon was argued under the MAA, 32 the decision contained no language limiting its application to arbitration clauses governed by that statute. 33 At the time, the Supreme Court had not even affirmatively stated that the FAA could apply in state courts. 34 Within two years of Hannon, the Supreme Court 35 expressly found that it could both apply in state court and preempt conflicting state law. 36

The reason that the distinction between the MAA and FAA matters is that the FAA controls any agreement to arbitrate “involving commerce.” 37 By the mid-1990s, the Supreme Court firmly interpreted this language to mean that the FAA’s reach was as far as the Commerce Clause would permit. 38 Of particular interest here, “involving commerce” meant that state statutory provisions that were in conflict with the FAA, including ones designed to protect consumers, would be preempted. 39 Although not yet challenged, Paragraph 6, as interpreted in Hannon, was clearly such a provision because it prohibited outright the arbitration of Chapter 93A claims. 40

By the 2000s, Massachusetts courts were left trying to figure out what, if anything, remained of the Hannon right. Courts freely acknowledged that it still existed, 41 but it was clear that the Hannon right would almost always be preempted by the FAA. 42 For example, when faced with plaintiffs trying to assert their Hannon right in a dispute with their stockbroker, Judge Van Gestel wrote, “[t]his Court does not read Hannon … as State law that can preclude arbitration in circumstances covered by the FAA.” 43

Although the focus here is on the impact on Hannon, the Supreme Court’s decisions on FAA supremacy are both numerous and, as a few recent examples illustrate, much broader in scope. In 2009, the Supreme Court held that employees could not bring their individual age discrimination claims in court where their union’s collective bargaining agreement provided for arbitration of discrimination claims. 44 In 2012, it overruled West Virginia’s highest court, which had refused to enforce arbitration clauses contained in nursing home admission agreements as violating public policy after the facilities were sued for negligence causing personal injury and wrongful death. 45 The Supreme Court has also enforced class action agreements.

23. See id. at 816, 825-27.
25. Id. at 814-15.
26. Id.
27. Id. at 816.
28. Id.
30. Id. at 826, 828.
33. See id. at 814-29.
35. See Moses H. Cone, 460 U.S. at 26 n.34.
39. Id. at 280-82.
40. See id. at 271; see also AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1747 (2011).
waivers contained in consumer arbitration clauses even though such waivers were unconscionable under settled California law.\textsuperscript{46}

More recently, the Supreme Court has articulated a so-called Effective Vindication Exception, which would invalidate an arbitration provision that essentially serves as a prospective waiver of a party’s right to pursue a claim.\textsuperscript{47} The Supreme Court explained that this exception "would certainly [invalidate] a provision in an arbitration agreement forbidding the assertion of certain statutory rights . . . [a]nd it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable."\textsuperscript{48} This exception is limited, however, as the Supreme Court has also stated that "the fact that [a claim] is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy."\textsuperscript{49} Although the articulation of the Effective Vindication Exception does serve as a slight retrenchment by the Supreme Court, the scope of the exception is narrow and its application in particular circumstances is unclear.\textsuperscript{50}

When it comes to conflicting state law, the Supreme Court has made it clear that the FAA truly is "the supreme Law of the Land."\textsuperscript{51} The SJC is acutely aware of this truth, as evidenced by its most-recent decision in Feeney v. Dell Inc.\textsuperscript{52}

III. The McInnes Decision

It was in this context that McInnes sought to invoke her Hannon right after the defendants initially moved to stay the court proceeding pursuant to the MAA.\textsuperscript{53}

The SJC first laid out the MAA’s legal framework.\textsuperscript{54} Unless the contract affects interstate commerce, the MAA controls.\textsuperscript{55} If a party challenges the validity of the arbitration agreement, the MAA requires the judge to first determine if there is a material factual dispute on the issue, and, if so, then conduct an expedited evidentiary hearing on the issue and decide it as a matter of law.\textsuperscript{56}

If the underlying contract affects interstate commerce, however, the SJC explained that the arbitration clause is governed by the FAA instead.\textsuperscript{57} On a validity challenge, the FAA requires the judge to sever the arbitration provision from the rest of the contract, determine its legitimacy and leave the validity of the remainder of the contract to the arbitrator.\textsuperscript{58} Of particular importance to the case, the SJC then quoted the Supreme Court for the proposition that "when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."\textsuperscript{59}

The SJC turned to the first judge’s denial of the defendants’ motion to stay pursuant to McInnes’s Hannon right.\textsuperscript{60} Because McInnes was a resident of Massachusetts and McGhee worked in Pennsylvania, the dispute clearly involved interstate commerce, thereby triggering the FAA.\textsuperscript{61} The SJC then clarified Hannon by explaining that "[b]ecause our holding in Hannon does not apply to any arbitration agreement governed by the FAA, the judge erred in relying on that holding to deny the defendants’ first motion to stay proceedings and compel arbitration."\textsuperscript{62} Interestingly, the SJC was noncommittal about the future of the Hannon right when the MAA, rather than the FAA, controls the arbitration clause.\textsuperscript{63}

On the second motion’s denial, the SJC explained that the judge incorrectly treated it as if the defendants had sought summary judgment.\textsuperscript{64} Initially, if the judge was concerned about the enforceability of the arbitration clause, he should have ordered and conducted an expedited evidentiary hearing as required by the FAA.\textsuperscript{65} In this case, however, there was no evidence to support McInnes’s contention that the agreement had been procured by fraud.\textsuperscript{66} Again citing recent Supreme Court precedent, the SJC explained that it was not enough for McInnes to have alleged that the arbitration provision was part of an adhesion contract to invoke the so-called "Effective Vindication Exception."\textsuperscript{67} She was not "prevented from pursuing a remedy" by being compelled to arbitrate, because she had not waived any statutory or common law remedy, the fees did not make access to the forum impracticable (especially where she was seeking more than $330,000 in damages), and the arbitrator had the same power as a court to award damages, attorney fees and multiple damages if she were to prevail on her Chapter 93A claim.\textsuperscript{68}

\textsuperscript{46} See AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1744-53 (2011).

\textsuperscript{47} See American Express Co. v. Italian Colors Rest., 133 S.Ct. 2304, 2310-11 (2013).

\textsuperscript{48} Id.

\textsuperscript{49} Id. at 2311 (emphasis in original).

\textsuperscript{50} Compare Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 921, 925-27 (9th Cir. 2013) (invoking exception to invalidate arbitration clause where unconscionable provision required putative employee to split arbitrator fee evenly with defendant employer), with Pla-Fit Franchise LLC v. Patricko Inc., No. 13-cv-470, 491-507 (2013).

\textsuperscript{51} The SJC then quoted the Supreme Court for the proposition that "when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."\textsuperscript{59}

\textsuperscript{52} Id.

\textsuperscript{53} Id.

\textsuperscript{54} Id.

\textsuperscript{55} Id.

\textsuperscript{56} Id.


\textsuperscript{58} Id. at 260-62.

\textsuperscript{59} Id. at 260.

\textsuperscript{60} Id. at 261-62.

\textsuperscript{61} Id. at 262.

\textsuperscript{62} Id. at 262-63 (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011)).

\textsuperscript{63} Id.

\textsuperscript{64} Id.

\textsuperscript{65} Id.

\textsuperscript{66} Id.

\textsuperscript{67} Id. at 265-67 (citing American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 1310 (2013); AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1750 n.6 (2011)).

\textsuperscript{68} Id.
Accordingly, the SJC vacated both orders and remanded the case, directing the superior court to stay the proceedings and compel arbitration. The case subsequently settled in January, 2014.

IV. THE END OF HANNON

Although the SJC’s decision in McInnes was not surprising, it is the latest example of the FAA’s staggering ability to preempt state law. After McInnes, it is not entirely clear what, if anything, could possibly remain of the Hannon right.

For the FAA not to control the effect of an arbitration clause, the relationship between the parties cannot be one “involving commerce.” The Supreme Court interprets this phrase to mean that the FAA reaches to the full extent of the Commerce Clause. In theory then, the Hannon right could only still exist in a dispute arising out of a wholly intrastate consumer transaction, where the MAA would control the effect of the arbitration clause, but the SJC declined to confirm even this principle in McInnes.

Given the reach of the Commerce Clause, the reality is that whether or not the Hannon right technically still exists in circumstances controlled by the MAA does not make much of a difference. By way of example, albeit from the civil rights context, the sale of a hot dog at a snack bar in the middle of Arkansas affected interstate commerce because some of the ingredients contained in the bun were produced and processed in other states. If this consumer transaction affects interstate commerce, and thereby would trigger the FAA, it is difficult to even articulate a hypothetical wholly intrastate consumer transaction that could give rise to a Chapter 93A claim. Such a hypothetical transaction could not affect interstate commerce, but the consumer plaintiff would still need to prove that the defendant was engaged in “trade or commerce.” The need to both avoid interstate commerce and establish commercial activity makes it difficult to imagine circumstances that will be controlled by the MAA.

Given this difficulty, as a practical matter, the Hannon right to have section 9 claims tried in court no longer exists. The Hannon right is simply the latest casualty of the scope of the FAA.

— Matthew S. Furman

69. Id. at 267.
70. See McInnes v. LPL Fin. LLC, Barnstable County Superior Court, No. 11-00570, Docket Entry No. 21 (January 31, 2014).
74. See McInnes v. LPL Fin. LLC, 466 Mass. 256, 264 n.9 (2013).
Book Review

Redeeming the Dream: The Case for Marriage Equality

Sadly, sharp-elbowed tactics in civil litigation have become commonplace. Opposing counsel often see themselves as enemies, and otherwise good lawyers tend to lose sight of the import of the age-old description of advocates: that we “[s]trive mightily, but eat and drink as friends.” People will differ about the various attributes of a good lawyer but, in addition to civility and decency, one of them is the ability to see an opponent’s side of any given cause. Indeed, really good lawyers can anticipate, make, and better an opponent’s argument, and can do so well. Perhaps this is what was meant by the suggestion that “the test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function.”

We see former opponents who can argue both sides of their case work as co-counsel in Redeeming the Dream, the autobiographical saga of the five-year effort to overturn California’s referendum banning same-sex marriage. More than a well-written description of a marathon case, this book speaks well of our profession as it demonstrates how former adversaries — indeed, opposing counsel in one of the more polarizing cases in modern times, Bush v. Gore — can work together effectively. It shows that opponents do not have to be enemies.

The authors begin by explaining the background of the case: how in 2008, the California Supreme Court, as the Massachusetts Supreme Judicial Court had five years earlier, held that same-sex marriage was a protected right under the state constitution. Within six months of that decision, a coalition of religious and other interest groups came together and, in that short span of time, financed a $40 million initiative petition campaign to amend the California constitution with a provision that would eliminate same-sex couples’ right to marry. The referendum, Proposition 8 (“Prop. 8”), passed by a 52 to 48 percent majority vote in November, 2008; ironically, the same day a majority of Californians voted for a presidential candidate who was the son of a mixed-race marriage — a marriage that would have been illegal in many states as recently as 1967. Within days of the election, Hollywood celebrity Rob Reiner and his wife Michelle, who had been instrumental in the “Vote-No on Prop. 8” campaign and figure prominently in the book, met with other political operatives to develop a plan to respond to the defeat.

One of their number suggested that her former brother-in-law Ted Olson, who had been Solicitor General and was then a partner in the Washington D.C. office of Gibson, Dunn & Crutcher, might be the one to bring a federal action to challenge the constitutional amendment. At first glance, the suggestion seemed odd; Olson had staunch conservative credentials, having come up through the Republican ranks in California, then worked for President Ronald Reagan in the Office of Legal Counsel and served as Solicitor General under President George W. Bush after successfully arguing Bush v. Gore. Indeed, Olson describes himself as having a “free-market, low-tax, less-government” orientation. But Reiner sent his campaign operative to Washington to meet with Olson to see if he was interested in the case — Olson was. Later, after Olson met with others from the Vote-No on Prop. 8 campaign in California, Reiner is quoted as expressing his shock that “Ted Olson is at my house.”

Despite his political leanings, Olson saw sexual orientation “in the same category as race, nationality, or gender,” and felt that the state-wide vote was “wrong, morally and legally, and contrary to the spirit” with which he had been brought up in California. Though his law firm had more than a thousand lawyers and could provide the resources necessary to take on a case of this caliber and magnitude, he still needed help; he wanted the right person for his co-counsel. Olson explains that he needed someone with the proper credentials who would complement his skills. It did not take him long to decide to call his former opponent in Bush v. Gore, David Boies.

Boies’s background is very different than Olson’s; he started practicing in the 1960s with the Lawyers’ Committee for Civil Rights in Mississippi. A life-long Democrat and Fellow in both the American College of Trial Lawyers and the International Academy of Trial Lawyers, Boies had developed a successful career with high-profile antitrust cases such as Westmoreland v. CBS and United States v. Microsoft. He left Cravath, Swaine & Moore to start his own firm so that he could take cases that he thought important to law and justice. With impeccable trial
skills to match Olson’s extensive appellate experience — though both had done enough of the other kind of work to carry his own before any tribunal — Boies seemed to Olson to be the ideal co-counsel. He would bring more than his considerable skills to the case; the fact that the two of them appeared to be on different sides of the political divide made them an “odd couple,” and the ironic contrast would strengthen the case in the public eye. The way Boies remembers getting the call from Olson, his decision whether or not to get involved in the case was a foregone conclusion.

The book is very well written, with plenty of momentum — you know the end but it really is a page-turner — and recounts their entire ordeal. Throughout, they explain their interaction with the media and the political forces in play. Olson and Boies switch back and forth narrating the story: they describe marshalling the resources and staff, selecting the right plaintiffs, dealing with interveners and political factions (e.g., some gay rights groups thought that taking the offensive was the wrong strategy), and litigating against well-financed opponents.

First, they explain what they went through to fund, prepare, and try a constitutional question to the bench. Their case had three central themes: 1) marriage is a fundamental right which we all share; 2) proscribing same-sex marriage causes indelible injury to gays, lesbians, and their children; and 3) outlawing same-sex marriage benefits no one. Their core argument was that the Fourteenth Amendment does not tolerate excluding gays and lesbians from life’s most important relationship because with regard to civil rights “all citizens are equal before the law,” and the effect of Prop. 8 on gays and lesbians was not unlike separating school children based on race: it “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” In response to the libertarian suggestion that a state-wide referendum is the voice of the people and, a fortiori, trumps any judicial decree, their counter was that courts are obligated to protect gays and lesbians as “discrete and insular minorities” from “serious oppression [as a] minor party in the community.”

They write about the timing of drafting the complaint, responding to pre-trial orders, and taking thirty-four depositions, lay and expert, in just three months. We learn how Judge Vaughan Walker managed a “rocket-docket” which, with the Magistrate’s rulings, included more than fifty pre-trial orders on discovery disputes. The book includes poignant snippets of expert testimony in such disciplines as history, sociology, psychology, and other social sciences. They tried the case to the court over a few weeks in January, 2010, less than one year after filing the complaint.

The appellate work started early, with an interlocutory appeal of the trial judge’s order allowing cameras in the courtroom; the Supreme Court, by a five to four vote, did not allow them. After the proponents of the ballot initiative appealed the plaintiffs’ victory in the trial court, the Ninth Circuit Court of Appeals certified a question as to their standing to bring the appeal to the California Supreme Court (state officials had refused to take the appeal). The answer was yes, they did have standing. The Ninth Circuit then concluded that the proponents had standing under federal law to defend the constitutionality of Prop. 8, but on the merits, the court affirmed the District Court’s order. The case then went to the United States Supreme Court.

The book contains a riveting description of all that goes into briefing and arguing before the high court: drafting and editing the opening brief and reply, anticipating questions and holding moot courts, and awaiting the decision with clients and colleagues. The authors end with the five to four decision written by Justice Kennedy: the appellants did not have standing and the appeal was dismissed for lack of jurisdiction, leaving in place Judge Walker’s order declaring Prop. 8 unconstitutional and permanently enjoining its enforcement.

A quick read, this book has positive energy; it moves right along and is difficult to put down. It is written for laypersons with few if any legal citations; the descriptions of strict scrutiny, rational basis, standing, and other principles of law are short but accurate, clear and concise, and contain little, if any, jargon. If there is any criticism to be made it is perhaps that the tone of the book is a bit pious, almost self-righteous. But this is understandable in that the authors argue that marriage equality will turn out to be the defining civil rights issue of the first part of the twenty-first century. Boies and Olson tell a good story of a challenging case. More than that, however, their book is an exemplar of a tale of good lawyering. It is further proof that opponents need not be enemies.

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