Liability for Physical and Emotional Harm

The "New" Duty and Causation Analysis

By Kevin M. Reynolds and William C. Scales

Any defense trial lawyer handling tort cases should learn the new calculus and develop techniques accordingly.

All defense counsel working on tort cases should take note of significant sections in the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (2010). Several jurisdictions, including Arizona, Iowa, Nebraska and Wisconsin, have adopted or cited important sections of the *Restatement Third* addressing analyses of duty and causation. The American Association for Justice's (AAJ) flagship publication, *Trial* magazine, featured an article on the new *Restatement*, touting its potential advantages to the plaintiffs' trial bar. Michael D. Green & Larry S. Stewart, *The New Restatement's Top Ten Tort Tools*, 46 TRIAL 44–48 (Apr. 2010). This article will analyze the practice changes brought about by the *Restatement (Third)* and present various strategic considerations for defense counsel going forward.

Section 7 of the Restatement (Third): Liability for Physical and Emotional Harm states:

> Section 7. Duty
>
> (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.

Sections 6, 26 and 29 of the *Restatement (Third)* provide as follows:

> Section 6. Liability for Negligence Causing Physical Harm
>
> 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.
>
> Section 26. Factual Cause
>
> 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.

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Section 29. Limitations on Liability for Tortious Conduct

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

The *Restatement Third* has significantly changed the "duty" and "causation" analyses in every tort case. The *Restatement Third* has broadened the scope of duty by creating a presumption of a generalized duty to exercise reasonable care. This duty will always apply, except in an "exceptional case" with an "articulated countervailing principle or policy" that warrants limiting the presumption. *See Restatement (Third) of Torts: Liability for Physical and Emotional Harm* §7(b) (2010). Additionally, the causation analysis has been redefined by using two elements: (1) factual cause, and (2) scope of liability. *See id.* §6. The terms "proximate cause," and other terms, such as "substantial factor," depending upon the law in the particular state, have started to disappear from the traditional legal landscape. "Scope of liability" is used instead of proximate or legal cause to provide a limit to an actor's liability *solely* to those risks created by the actor's tortious conduct. *See id.* §29.

Several cases have adopted the *Restatement Third*'s new duty and causation analyses, and there appears to be a trend in that direction. *See A.W. v. Lancaster County Sch. Dist. 0001*, 280 Neb. 205, 2010 Neb. LEXIS 88, at * 23 (July 16, 2010) (Nebraska adopts §7 of the *Restatement (Third)*); *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) ("duty" and "causation" analysis adopted; summary judgment for defendant reversed on appeal); *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568 (Wis. 2009) (foreseeability not relevant to the "no duty" determination). At least two cases have cited the *Restatement Third* as persuasive authority. *See Gipson v. Kasey*, 150 P.3d 228 (Ariz. 2007) (incorporating "foreseeability" into the duty analysis expands the judge's function at the expense of the jury's); and *Diaz v. Phoenix Lubrication Service, Inc.*, 230 P.3d 718 (Ariz. App. 2010) (summary judgment for defendant affirmed based on "no duty").

Wholesale adoption has not been unanimous, however. One case has flatly rejected the *Restatement Third*, stating that its invitation to courts to "articulate general social norms of responsibility" is "simply too wide a leap for this Court to take." *Riedel v. ICI Americas Inc.*, 968 A.2d 17, 21 (Del. 2009) ("the General Assembly decides these matters of social policy, not the courts"). The Tennessee Supreme Court has declined to accept the *Restatement Third*'s invitation to remove the concept of "foreseeability" from its duty analysis. *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008).

Iowa has applied the *Thompson* case in at least two subsequent cases of significance. One, *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009), was filed the same day as *Thompson*. In *Van Fossen* the court actually found *no duty* using the new analysis. Two other "no duty" cases citing the *Restatement Third* for support are *Gipson*, 150 P.3d 228 (Ariz. 2007), and *Diaz*, 230 P.3d 718 (Ariz. App. 2010). But *Van Fossen* provides insight into what a court will consider when determining whether an exception to the "duty presumption" exits. In *Van Fossen*, the issue was whether the owners of a power plant should have tort liability for the wrongful death of the spouse of an employee of an independent contractor. The plaintiff alleged that he routinely encountered asbestos in the course of his employment and asserted that his late wife contracted mesothelioma as a consequence of her regular exposure to asbestos dust while laundering his work clothes. The court in *Van Fossen* concluded that this scenario "presents an instance in which the general duty to exercise reasonable care is appropriately modified." 777 N.W.2d at 696. In reaching this determination, the court found that the prevailing case law in other jurisdictions supported this result, as well as the public policy concept that employers of independent contractors have little, if any, control over the employees of a subcontractor, let alone their family members at home.

Royal Indemnity Co. v. Factory Mutual Insurance Co., 2010 Iowa Sup. LEXIS 55 (June 11, 2010, as amended Aug. 5, 2010), also cited and discussed the *Thompson* formula at length. *Royal Indemnity* arose from a warehouse fire that destroyed property, basically new product inventory awaiting shipment, stored by Deere & Company. The plaintiff claimed that the defendant's negligent inspection of the premises either resulted in a subsequent fire, or left the water pressure in the building's extinguishing system so low that it could not extinguish or limit the fire. In *Royal Indemnity*, there were two contexts in which the "scope of liability" inquiry could have been applied. First, the court noted that "[u]nder the *Restatement (Third)* analysis, to impose liability, something FM [the defendant] did or did not do must have increased the risk to Deere's product." *Id.* at *30. Second, the court analyzed "…whether merely moving in increased the risk or created the harm that destroyed Deere's product." *Id.* at *31. Deere, the plaintiff, claimed that had it known the true facts, it would not have moved its product into the building. In both contexts, the plaintiff's case failed because there was no evidence to demonstrate that FM *caused* the damages suffered by Deere. The ultimate result was that a very large, $39.5 million verdict and judgment for the plaintiff was reversed on appeal, and the case was dismissed.

Several cases have adopted the *Restatement Third*'s new duty and causation analyses, and there appears to be a trend in that direction.

Thompson was also cited and discussed in a federal district court decision, *Nationwide Agribusiness v. Structural Restoration, Inc.*, 2010 U.S. Dist. LEXIS 36305, at *36 (S.D. Iowa 2010) (recognizing and applying *Thompson* to a claim based on negligent misrepresentation; collapse of a tank found to be "among the range of harms that [the defendant] risked" when it sent an inspection report to the plaintiff).

The rules set forth in the *Restatement Third* are clear. What is less clear is what the impact of this change will be, and how defense practitioners will react to this development. Do these changes "favor" plaintiffs or defendants? Will it be more difficult for defendants to obtain summary dismissals based on "no duty" or lack of

causation arguments? How does this development affect strategic or procedural considerations in defending tort cases? How will they change jury instructions on the causation element? These are just a few of the questions that the authors will attempt to address.

Are the *Restatement Third*'s "Duty" and "Causation" Analyses Substantive Changes, or Do They Merely Clarify Existing Law?

On the one hand, the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (2010) appears to clarify existing law, rather than change or reverse wholesale existing doctrines. Some courts have taken this view. Accord *A.W. v. Lancaster County Sch. Dist. 0001*, 280 Neb. 205, 2010 Neb. LEXIS 88, at * 20 (July 16, 2010) (adopting §7 but noting, "we do not view our endorsement of the Restatement (Third) as a fundamental change in our law"); *Thompson v. Kaczinski*, 774 N.W.2d 829, at 835 (Iowa 2009) ("we find the drafters' clarification of the duty analysis in the Restatement (Third) compelling, and we now, therefore, adopt it"); *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568, 576 (Wis. 2009) ("though some language in prior Wisconsin cases invokes foreseeability inquiries in connection with duty… the approach set forth in Section 7, comments i and j, is most consistent with the approach we have taken on the issue of duty in the vast majority of our cases"); *Gipson v. Kasey*, 150 P.3d 228, 231 (Ariz. 2007) (citing §7 of the *Restatement Third* as supporting prior state substantive law); *Diaz v. Phoenix Lubrication Service, Inc.*, 230 P.3d 718, 723 (Ariz. App. 2010) ("we derive guidance from the proposed Restatement regarding the scope of the undertaking by the defendant and the distinction between creating a risk and failing to discover a risk").

However, on the other hand, some courts or some judges within courts have taken another view. *See, e.g., Riedel v. ICI Americas Inc.*, 968 A.2d 17, 20 (Del. 2009) ("The drafters of the Restatement (Third) of Torts redefined the concept of duty in a way that is inconsistent with this Court's precedent and traditions"); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008) (retaining the foreseeability test for the "duty" analysis, despite a strong dissent to the contrary, based on the Third Restatement). But to claim that the law has significantly changed is to assume that the law was previously clear, well known and understood, a dubious proposition at best.

The law of "duty" in most jurisdictions has been somewhat disorganized and unpredictable. Trying to forecast when a court would find a legal duty, and when it would not, depended more on who a particular judge hearing the dispositive motion was, as opposed to an established body of legal doctrine. Except in the clearest of cases, when a court would find that some result was "unforeseeable as a matter of law," someone could not help but think that a *factual* determination, better reserved for a *jury's* determination, had been made. The foreseeability "test" was of limited assistance as well, except in its most simple applications. The law was consistent that if a particular result from conduct was not foreseeable, then "duty," and thus, legal liability, would not follow. But knowing this did not make it any easier to predict when and under which circumstances a court would find that some eventuality was "not foreseeable." In addition, the courts have not adopted a common definition of "foreseeable," and many jurisdictions do not have a jury instruction that defines that term. Plaintiffs argue that if something is merely possible, then it is foreseeable. Defense lawyers typically take a more restrictive view, arguing that an event should be reasonably *predictable* to qualify as foreseeable. Defendants also prefer to add the adjective "reasonable" to the term "foreseeable" in an attempt to limit the concept even further. Even in the *Restatement Third*, the most infamous "F" word in the law, "foreseeability," remains essentially undefined. At least under the *Restatement Third*, foreseeability has been removed from the duty analysis.

The law of proximate cause in many jurisdictions has been no less confusing and muddled. "Proximate cause" had different meanings, depending upon the context. Proximate cause has been both a prima facie element of every tort case, and also a subpart of the proximate cause element itself. Defining "legal cause" in terms of a "substantial factor without which the injury or damage would not have occurred" mixed factual—that is, "but for" causation concepts with the policy considerations at the core of legal cause. If using the new terms "factual cause" and "scope of liability" helps to eliminate confusion from sloppy use of the term "proximate cause," then defense lawyers might welcome these changes.

Section 7's generalized duty on the part of every person to exercise reasonable care whenever a risk of harm to another is present tends to create an almost visceral reaction among defense lawyers. Imposing a general duty seemingly without limits is problematic. The "no legal duty" defense was always a potent weapon. This was one strategy that defense lawyers could use to avoid the legal rubric that "questions of negligence and proximate cause are normally reserved for the jury's determination." "Duty" was always a *legal* issue for a court, which meant that a court could decide it on a motion to dismiss or a motion for summary judgment. Although duty is still a legal determination, it appears as though the "no duty" defense strategy has been eroded by the *Restatement Third*. "Duty" was always a prima facie element of every tort action. It was just as much a sine qua non as "breach of duty," "proximate cause" and "damages." Now, it exists in every case unless the *defendant* proves otherwise. It seems as though the *Restatement Third* has eliminated one element, or fully 25 percent, of the burden of proof of every plaintiff in every tort case.

A further concern is that duty was an issue for which *the plaintiff always had the burden of proof*. This made sense: if duty was not established, then the plaintiff would suffer and bear the loss. However, under the *Restatement Third* approach, duty is now *presumed* and will stand as established in a case *unless the defendant, in a so-called "exceptional case," can rebut and overcome the presumption*. This 180-degree shift in the burden of proof and reversal of decades of established law should be of serious concern to all defense counsel and their clients.

Do the New Analyses "Favor" Plaintiffs or Defendants?

In the *Thompson* case in Iowa, a summary judgment in favor of the defendant was granted in the trial court, and this was affirmed by the Iowa Court of Appeals. On further review, the Iowa Supreme Court reversed the summary dismissal and re-

manded the case to the district court for trial. *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009). In *Thompson* it seems clear that the "new" analysis favored the plaintiff. Under the old law, the case was dismissed for two reasons: (1) there was no "duty" because the result, a dismantled trampoline blown into a road by a thunderstorm, subsequently causing a car accident, was not foreseeable as a matter of law; and (2) nothing the defendants did or did not do was a "proximate cause" of the plaintiff's injury.

Yet, two subsequent Iowa cases, *Van Fossen* and *Royal Indemnity*, actually found in favor of *defendants* by using the *Restatement Third*'s analyses. In *Royal Indemnity* a $39.5 million verdict for the plaintiff at trial was reversed on appeal. In another case applying *Thompson* that is unpublished, *Rossiter v. Evans*, 2009 Iowa App. LEXIS 1720 (Dec. 30, 2009), the appellate court affirmed a plaintiff's verdict of $1.5 million, $800,000 of which was for punitive damages. Yet, in *Rossiter* someone could argue that even under the old law the plaintiff's verdict would have been upheld, since the defendant knew or should have known of a risk, which, in turn, was "foreseeable," and, therefore, gave rise to a duty to warn the plaintiff. In *Royal Indemnity* someone could also argue that even under the old analysis, a reversal of the plaintiff's verdict was justified. This is because the plaintiff failed to carry its burden of proof to show what caused a fire in a warehouse, or what caused the building's extinguishing system to fail once the fire had started.

In the Nebraska case, *A.W. v. Lancaster County Sch. Dist. 0001*, the court took care to note that "our disposition of this appeal would have been the same regardless [of the adoption of the *Restatement Third*]"). 2010 Neb. LEXIS 88, at * 23. In *Behrendt v. Gulf Underwriters Ins. Co.*, the Supreme Court of Wisconsin wrote that its decision "clarifies" the law in this area. 768 N.W.2d at 578. In *Gipson v. Kasey*, the Arizona court merely cited Section 7 as supporting preexisting tort law in that state, "rejecting foreseeability as a factor in determining duty." 150 P.3d at 231. Finally, in *Diaz v. Phoenix Lubrication Service, Inc.*, the court affirmed a summary judgment for the defendant, finding that "no duty" existed on the part of a mechanic to check a person's tires, when the only thing the defendant was hired to do was an oil change. In *Diaz* the "actor's conduct did not create the risk of physical harm." 230 P.3d at 723; *see also* §7(a) of the *Restatement Third*.

The legal presumption in favor of a duty to exercise reasonable care probably means courts will less frequently dismiss cases than before because the courts find that, as a matter of law, no duty existed. This result will favor plaintiffs, as will the resulting shift in the burden of proof. Defendants will file and courts will grant fewer motions to dismiss, and courts will grant few, if any, motions for summary judgment on "no duty" grounds. Defense lawyers should expect that courts will sparingly employ the "countervailing principle or policy" exception to override the duty that would otherwise be present. Since courts will dismiss fewer cases on motions, more cases will proceed to mediation, and absent resolution, they will proceed to trial.

Another view is that cases that would not have survived under the old law will also not survive under the new analysis, albeit for different reasons. For example, instead of arguing that defendants had "no duty," based on lack of foreseeability, movants will change the focus, to identifiable, "articulated countervailing principles or policies" in favor of legal immunity under the facts. Yet, this "new" analysis will inject unpredictability into the process. In addition, typically a trial court will not dismiss a case as a matter of law based on the argument that there was *no breach of duty*, unless the facts are undisputed, and no rational fact finder could come to a different conclusion, which will happen in a very rare case, indeed. In the vast majority of cases, a jury, rather than a court, will properly decide the "no breach" issue. If a court denies a pretrial dispositive motion, even under the new regime, a defense lawyer can always argue to the jury that no failure to exercise reasonable care occurred, and thus no "breach" of duty occurred, since the ultimate result in the particular case was not reasonably foreseeable.

Do the *Restatement Third*'s Analyses Apply to Breach of Contract or Other Actions Not Based in Tort?

This issue was discussed briefly in *Royal Indemnity* in Iowa. 2010 Iowa Sup. LEXIS 55 (June 11, 2010, as amended Aug. 5, 2010). In that case the plaintiff pled its claims under alternative tort and contract theories based on the same underlying facts. The plaintiff argued that the defendant was liable for a negligent inspection, and also argued that the defendant breached its contract to inspect the premises. Under Iowa law, "proximate cause" is not an element of a breach of contract action, but rather, the plaintiff must have shown that "the damages resulted from FM's breach and were in the contemplation of the parties." *Royal Indemnity*, 2010 Iowa Sup. LEXIS 55, at * 17 (emphasis added). The contract claim was ultimately dismissed since "it was not in the contemplation of the parties that FM would be called upon to answer for any conceivable fire loss." *Id.* at * 21. Although the plaintiff in *Royal Indemnity* mixed the tort theory with the contract theory in presenting its claim, the *Restatement Third* only governs "causation" in the context of a *tort* case. Also, the *Restatement Third*, by its very title, pertains only to "torts" and to circumstances giving rise to liability for "physical and emotional harm." For these reasons the authors believe that breach of contract actions should remain unaffected by the *Restatement Third* changes.

Will it be more difficult for defendants to obtain summary dismissals based on "no duty" or lack of causation arguments?

Does the *Restatement Third*'s Analysis Apply to Tort Claims for Pure Economic Damage or Reputational Harm?

Although the *Thompson* case in Iowa was a negligence case and its holding could apply to negligence cases only, its analysis would appear to apply to *all* tort actions. *Thompson* does not contain any language that purports to limit its application. *Royal Indemnity*, cites *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726 (Iowa 2009), a fraud

case, in which the Iowa Supreme Court essentially applied a scope of liability analysis to limit the damages recoverable in a fraud action for economic losses. *Royal Indemnity*, 2010 Iowa Sup. LEXIS 55, at *20. *Royal Indemnity*, in applying the scope of liability analysis to the negligence claims, also relies on *Movitz v. First National Bank of Chicago*, 148 F.3d 760 (7th Cir. 1998), which rejected a recovery for a failed investment in a hotel property because the plaintiff suffered pure economic losses. *Id.* at *21–22. No language in *Thompson* or *Royal Indemnity* provides that the causation analysis is limited *only* to cases involving "physical or emotional harm," although those terms are admittedly a part of the *Restatement*'s title. On this question the *Restatement Third* states that it "does not address protection of reputation or privacy, economic loss, or domestic relations." *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*.)

Under the *Restatement Third*, foreseeability has been removed from the duty analysis.

Finally, in any event the "economic loss doctrine" bars many tort claims for pure economic or monetary losses. *See, e.g., Van Sickle Construction Co. v. Wachovia Commercial Mortgage, Inc.*, 2010 Iowa Sup. LEXIS 60 (June 25, 2010) (allowing recovery of economic losses in negligent misrepresentation claims).

What Will the New Jury Instructions on Causation Say?

If the *Restatement Third*'s causation analysis is adopted in a state jurisdiction, it is likely that the uniform jury instructions on causation will need modifying. The Iowa State Bar Association on September 9, 2010, approved new uniform causation jury instructions for use in Iowa tort cases after *Thompson*. The causation element is presented to the jury in two separate instructions. They are set forth below:

700.3 Cause—Defined.

The conduct of a party is a cause of damage when the damage would not have happened except for the conduct.

700.3A Scope of Liability—Defined.

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

Consider whether repetition of the 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.

Explanatory notes and authorities are also provided with each instruction.

In summary, in jurisdictions adopting the *Restatement Third*'s causation analysis the jury instructions formerly addressing "proximate cause" will change in three ways. First, the jurisdictions will eliminate the term "proximate cause." Second, jurisdictions will use two different instructions, if applicable: one for "factual cause" and the other for "scope of liability," and the instructions will have to include definitions of both terms. Finally, if formerly present in instructions, a jurisdiction will eliminate the "substantial factor" language.

How Can Defense Counsel Use the *Restatement Third* to Best Advantage?

Although the April 2010 article in *Trial* magazine emphasized the advantages of these changes to plaintiff's attorneys, these changes present an opportunity for defense counsel as well. Here are some "practice pointers" for defense counsel to keep in mind when confronting these issues in future cases.

Learn the New Analysis and Use the Proper Terminology

"Duty" remains an element of every tort case and is a question of law for a court to decide. A general duty to exercise reasonable care exists in every situation as a "default," unless there is an "articulated countervailing rule or policy." If a defendant can identify an appropriate countervailing policy, such as a statute of repose, then it is possible to achieve dismissal of the case on a "no duty" basis. *Foreseeability* is no longer a consideration in the "duty" inquiry, although it is relevant to the "scope of liability" determination of causation. Foreseeability is also a proper consideration in determining whether a defendant has *breached* the generalized duty to exercise reasonable care. Foreseeability is a jury issue.

"Proximate cause" in tort cases is replaced by the term "causation," which consists of two elements: (1) factual cause, and (2) scope of liability. The "substantial factor" test, if previously applicable, is discarded.

Do Not Argue That No "Duty" Exists Because an Injury or Result Was Not Foreseeable

Reframe "no duty" motions to dismiss or for summary judgment to initially presume that a generalized duty of "reasonable care" exists, and then to identify "articulated countervailing principles or policies" to override and countermand that duty. This is the only remaining circumstance under which a court can conclude that, as a matter of law, no "duty" exists. Alternative strategies that defense counsel can employ to achieve the same result include: (1) arguing that factual causation is absent, discussed in more detail below; or (2) arguing that causation is absent under the "scope of liability" element, since the result was not foreseeable.

Do Not Forget the "Lack of Factual Cause" Defense

Although it might appear that "but-for" causation is easy to prove, defense counsel should not assume that factual cause exists in every case. In many cases and claims this element may be absent and that absence can be case dispositive. Take, for example, a common situation: a product liability case in which a plaintiff has sued a defendant for failure to warn. Assume further that the evidence shows that the plaintiff did not read or look at the warning signs or instructions, for instance, in an operator's manual, that were provided with the product. The plaintiff's expert's testimony criticizes the warnings and instructions in the manual. Since the plaintiff did not read what was provided, there is no proof

that any *different or additional* warning or instruction in the manual would have been read, let alone heeded. As a result, the failure to warn claim fails for lack of factual causation. The "but-for" test is not met as a matter of law. *See*, *e.g.*, *Alfano v. BRP Inc.*, 2010 U.S. Dist. LEXIS 64182 (E.D. Cal. 2010) (since the plaintiff did not read warning that was provided, there could be no proximate cause); *Henry v. General Motors Corp.*, 60 F.3d 1545 (11th Cir. 1995) (the plaintiff's failure to read a warning negated the causation element of the plaintiff's failure to warn claim). Failure to warn is not a proximate cause of injury when it is clear that warning would have made no difference. *Kauffman v. Manchester Tank & Equip. Co.*, 1999 U.S. App. LEXIS 32173, at *10 (9th Cir. 1999) (citing *Anderson v. Weslo, Inc.*, 906 P.2d 336, 341 (Wash. Ct. App. 1995) (failure to warn did not cause injury because the plaintiff "paid so little attention to the warnings that were given, [that] it is unlikely that he would have changed his behavior in response to even more detailed warnings").

A recent example adhering to the *Restatement Third* is *Royal Indemnity*, previously discussed. *See* 2010 Iowa Sup. LEXIS 55. In *Royal Indemnity*, a large plaintiff's verdict was reversed on appeal because the plaintiff did not prove at trial what caused a warehouse fire, or its eventual spread. *See id.* Since cause was undetermined, there was no way of knowing whether the defendant's allegedly negligent inspection was a *factual cause* of the damages. *See id.*

Search For and Create Countervailing Principles or Policies

The generalized duty on the part of everyone to exercise reasonable care is not boundless. The *Thompson* case in Iowa noted that "an actionable claim of negligence requires the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages. Whether a duty arises out of a given relationship is a matter of law for a court's determination." 774 N.W.2d at 834. "Duty" remains a prima facie element of every tort case. However, §7(b) of the *Restatement Third* acknowledges that a duty will not exist if an "articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases." *Id.* In that event a trial court can dismiss a case as a matter of law based on lack of "duty."

The *Van Fossen* case in Iowa provides a good illustration of the §7(b) analysis. In *Van Fossen*, the spouse of an employee of a subcontractor developed asbestosis allegedly as a result of exposure to her husband's work clothes. The court in that case concluded that no duty existed, because a "countervailing policy or principle" existed: employers have limited control over the work performed by subcontractors. The court also was persuaded that other jurisdictions had considered this precise scenario, a family member of a worker contracting asbestosis by virtue of doing the worker's laundry, and the majority had concluded that "no duty" existed. *Id.* at 697.

Many other potential "countervailing principles or policies" exist, and this is a place where defense counsel can use their creativity. We can think of a couple: (1) statutes that provide immunity from liability (*e.g.*, the workers' compensation exclusive remedy bar; because of this an injured worker cannot argue that an employer has a "generalized duty" to exercise reasonable care; and (2) common law doctrines entrenched in the law (*e.g.*, immunity from liability accorded to social hosts).

In the *Thompson* case, Justice Cady of the Iowa Supreme Court provided another example in his concurring opinion. He opined that the result in that case might well have been different, had a recycling container, left on the end of the driveway near the road for pickup on garbage day, instead of a dismantled trampoline, blown into the road and caused an accident. 774 N.W.2d at 840. Someone could argue that since the practice of recycling is to be fostered, a court might well choose to limit or deny liability in such a situation.

Notwithstanding the above, predicting exactly when, where, and under which circumstances a court might find an "articulated countervailing principle or policy" that will vitiate a duty to exercise reasonable care that would otherwise exist, may prove difficult in a particular case.

The General "Duty" Is to Merely Exercise *Ordinary* or *Reasonable* Care, Not "Extraordinary" Care

Defense counsel should work on enhancing their advocacy skills and techniques with juries in arguing what type of conduct constitutes negligence. Negligence is nothing more than the absence of *ordinary* or *reasonable* care. This is a relatively low and very basic, *minimal* standard of conduct. It may be effective to discuss real-life, factual situations to help flesh out these terms in a manner that is helpful to the defense. For example, a driver's failure to inspect a vehicle before driving it is not an act of negligence, unless there is some good reason to believe that something is wrong with the vehicle that would be found by a reasonable inspection. On the other hand, if the car is making loud noises and operating in a strange manner, a decision to continue driving it until an accident occurs might very well be negligent. The law merely requires *reasonable* or *ordinary* care, not *extraordinary* care. Since the *Restatement Third* now imposes a general duty of reasonable care in most situations, defense counsel should invest some effort in developing effective advocacy techniques for arguing to a jury that a "duty" was or was not breached in the particular circumstances.

Although it might appear that "but-for" causation is easy to prove, defense counsel should not assume that factual cause exists in every case.

Study the New Causation Jury Instructions and Develop Techniques to Argue Those Instructions

Both the "factual cause" and "scope of liability" elements of causation under §6 of the *Restatement Third* present opportunities to persuasively argue a defense. As previously noted, factual cause can be a fighting issue in many cases. Especially in product liability, failure to warn cases,

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Judge Lewis

Counsel should be prepared to make a significant investment in a moot court experience if it is going to be done right. This is very important because often millions or even hundreds of millions of dollars are on the line. The fee for most former judges is relatively high, but there are obvious reasons why that is so. In engaging former judges, counsel draws upon a very special sort of expertise that is difficult to find elsewhere. Very few people have sat as federal or state appellate judges, left the bench, and are available to serve as moot court judges for private clients.

Countervailing Considerations

Ms. Winkelman

Moot courts are not for everyone. There are some highly skilled, highly effective appellate advocates who eschew moot courts. Some say that moot courts detract from the spontaneity and authenticity of actual arguments. To that I say, there is a difference between mere spontaneity and effective spontaneity. The latter only comes with thorough preparation.

I accept that people have different preparation styles. But even those advocates who don't hold a formal moot court should have preparation sessions with colleagues who have not worked on a case and can bring that all-important objective, impartial perspective to the table.

Judge Lewis

There are some who believe that a fresh, spontaneous presentation is actually the best kind of presentation. Thelonius Monk used to record his albums that way, to the consternation of his fellow musicians. Monk used to say, "Look, we do everything in one take. If you make a mistake on my record, you're just going to have to listen to that mistake for the rest of your life."

That may have been fine for Thelonius Monk, but finding just the right rhythm and tone in music is different from accomplishing that feat while getting peppered with tough questions at an oral argument.

There is no substitute for extensive preparation, and that includes rehearsal. So, while some have enjoyed wonderful success as oral advocates without ever holding a moot court, for most advocates, the failure to do so risks too much. It is better to be safe than sorry when the stakes are so high. And besides, moot courts are the fun part of preparing for oral argument. At least for the judges!FD

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defense counsel cannot merely assume that a plaintiff would have read, understood and *heeded* the warning or instruction that allegedly would have prevented the accident. This is especially true when all of the other warnings and instructions were obviously disregarded, or a plaintiff generally engages in "risky" behaviors.

"Scope of liability" may be an issue in a particular case as well. The *Royal Indemnity* case in Iowa, which resulted in the notable reversal of an eight-figure verdict for the plaintiff at trial, was decided on this element. This element can be at issue in those accidents with bizarre facts, convoluted fact patterns, or attenuated, unclear or unproven chain of circumstances, or when the results of conduct were not predictable or foreseeable pre-accident from an objective point of view. Be attentive to changes to the causation jury instructions in your jurisdiction. The second paragraph of the new Iowa Uniform Jury Instruction 700.3A, quoted above, recognizes that harm is not within the scope of liability if repetition of the defendant's conduct does not increase the risk of that harm. If the language of the new jury instruction in your jurisdiction is similar to Iowa's, this can be of assistance if an allegedly negligent act or omission and the plaintiff's injury are merely coincidental and unrelated.

Conclusion

Although certain aspects of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010)* and the recent cases following it elicit concern, the analyses are most likely here to stay. The duty and causation inquiries that underpin every tort case have significantly changed. There will be new jury instructions on causation for tort cases. This development has understandably attracted the attention of both the plaintiffs' and the defense bars. Any defense trial lawyer handling tort cases as a part of his or her practice should learn the new calculus and develop techniques to effectively present these concepts to courts and juries. FD

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must be filed under tight deadlines and maintain word or page limitations.

In some jurisdictions, the prevailing party can and should file an answer to a petition for further appellate review. In other jurisdictions—such as the federal courts of appeals—the prevailing party files an answer only if the court asks it to do so.

Hopefully it is obvious from this article's discussion of the necessary ingredients for a successful petition that neither the petition, nor the answer, if one is required or requested, should duplicate the briefs on appeal. You must carefully tailor both to focus on the standards for post-decision review and explain why a case does or does not meet the criteria for further appellate scrutiny.

It's Always a Long Shot

Even if you do everything right in crafting a petition for a panel rehearing or a rehearing en banc, have a strong dissent, and a well-developed conflict on a recurring issue of great importance to the court and the public, a petition for a panel rehearing or a rehearing en banc will still be a long shot. It remains a cold, hard fact that courts almost always deny petitions for panel rehearings and rehearings en banc. The long odds, reluctance of the judges, and strategic risks and delay associated with seeking a panel rehearing or a rehearing en banc should give you pause. But with luck, hard work, and skillful analysis and writing, you definitely can improve your chances. FD