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THE JURY VERDICT FAVORED HELEN PALSGRAF[1]: A CRITIQUE OF THE RESTATEMENT (THIRD) PEH AND FORESEEABILITY—"WHAT DOES IT ALL MEAN?"[2]

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1. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99 (N.Y. 1928).

2. The subtitle of this article is borrowed from THOMAS NAGEL, WHAT DOES IT ALL MEAN?: A VERY SHORT INTRODUCTION TO PHILOSOPHY (Oxford Univ. Press 1987).

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I. INTRODUCTION

The concept of *foreseeability* crafts negligence law. As stated by Professor Owen, "[f]oreseeability is the dark matter of tort."[3] "Like celestial dark matter, foreseeability swirls throughout the law of tort, permeating, connecting, and providing moral strength to the elements of negligence."[4] Traditionally, foreseeability of harm was an essential prerequisite in establishing whether a duty is owed, which is a question generally reserved for the court. And foreseeabilty also is intertwined throughout proximate cause; this decision is typically within the province of the jury. The Rhode Island Supreme Court, remarking on the concept of foreseeability, stated:

> The confusion may stem, at least in part, from the fact that the "foreseeability" concept plays a variety of roles in tort doctrine generally; in some contexts it is a question of fact for the jury, whereas in other contexts it is part of the calculus to which a court looks in defining the boundaries of "duty."[5]

The *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (*Restatement (Third) PEH*) attempts to avoid the confusion surrounding foreseeability through amputation.[6] It only retains

50 CONSUMER FIN. L. Q. REP. 397 (1996); Products Liability Law in the Nineties: Will Federal or State Law Control?, 49 CONSUMER FIN. L. Q. REP. 327 (1995); *Drug Manufacturers' Recommendations and the Common Knowledge Rule to Establish Medical Malpractice*, 63 Neb. L. Rev. 859 (1984). Professor MacDougall served as Faculty Editor for The Holloway Issue of the Oklahoma City University Law Review Honoring Judge William J. Holloway, Jr. (1923–2014), United States Court of Appeals for the Tenth Circuit 1968–2014, 40 Okla. City U. L. Rev. 1 (2015) (including Editorial note, pgs. 217–18); and Editor in Chief, NEGLIGENCE: POLICY, ELEMENTS, AND EVIDENCE: THE ROLE OF FORESEEABILITY IN THE LAW OF FIFTY STATES (2018) (author, Introduction and chapters D.C., Mass., R.I., S. Dak. & Vt.). A portion of this article is the Introduction to THE ROLE OF FORESEEABILITY IN THE LAW OF FIFTY STATES, *id.*, and is reproduced within this article with permission.

3. David G. Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1277, 1277 (2009).

4. *Id*. at 1306.

5. Banks v. Bowen's Landing Corp., 522 A.2d 1222, 1226 (R.I. 1987) (quoting Ballard v. Uribe, 41 Cal. 3d 564, 572 n.6 (Cal. 1986)).

6. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (AM. LAW INST. 2010). *See generally* W. Jonathan Cardi, *Purging Foreseeability: The New*

the concept of foreseeability in the breach of duty element of a negligence cause of action.[7] Therefore, provisions of the *Restatement (Third) PEH* attempt to eliminate foreseeability as a relevant consideration in establishing a duty of care and in the area of proximate cause.[8] Indeed, the *Restatement (Third) PEH* attempts to delete the term *proximate cause* and the *substantial-factor* test used for cause in fact altogether.[9] However, the concepts of foreseeability and proximate cause

Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts, 58 VAND. L. REV. 739 (2005); Owen, *supra* note 3; Mike Steenson, *Minnesota Negligence Law and the Restatement (Third) of Torts: Liability for Physical and Emotional Harms*, 37 WM. MITCHELL L. REV. 1055 (2011); Tory A. Weigand, *Duty, Causation and Palsgraf: Massachusetts and the Restatement (Third) of Torts*, 96 MASS. L. REV. 55 (2015); Benjamin C. Zipursky, *Foreseeability in Breach, Duty and Proximate Cause*, 44 WAKE FOREST L. REV. 1247 (2009); Thomas B. Read & Kevin M. Reynolds, *The Restatement (Third), Duty, Breach of Duty and "Scope of Liability*," 14, No. 3 Iowa Def. Couns. Assoc., Def. Update 1 (2012).

7. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (AM. LAW INST. 2010). It provides as follows:

> 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.

Id. "The Reporters are eager to maintain the role [of foreseeability] in breach, albeit reshaped by the Hand formula." Zipursky, *supra* note 6, at 1275. "As to breach, foreseeability needs to be taken more seriously apart from its role in the Hand formula." *Id.*

8. Weigand, *supra* note 6, at 56.

> 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 workhorse, foreseeability is otherwise relegated to the issue of breach and the work of fact finders.

Id.

9. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 (AM. LAW INST. 2010). It embraces the "but for" causation test. Section 26 provides the following: "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 § 27." *Id.* Section

still predominate throughout the country, and the power of *stare decisis* is clearly behind both doctrines in the vast majority of states throughout the country. Most states' current law is contrary to select provisions of the *Restatement (Third) PEH*.[10] This Article will explore select provisions of the new Restatement (particularly in the scope of liability [proximate cause] and duty arenas) and provide a forecast of the potential impact of those controversial provisions based on traditional tort doctrine.

II. *THE RESTATEMENT (THIRD) PEH* AND SCOPE OF LIABILITY (PROXIMATE CAUSE)

The main purpose of any Restatement is to restate, not create, the law.[11] However, in the tort arena, the Restatement, at times, had a

27 imposes liability for duplicative causation. Despite recognition, the substantial-factor test "originated in the *Restatement of Torts* . . . and was replicated in the *Restatement (Second) of Torts*," and the *Restatement (Third) PEH* opines that the "substantial factor test has not, however, withstood the test of time, as it has proved confusing and been misused." *Id.* § 26 cmt. j. According to the *Restatement (Third) PEH*, "the substantial-factor rubric tends to obscure, rather than to assist," explain, and clarify causation deliberations. *Id.* The substantial-factor test is well established in case law throughout the country, and it is unclear if courts will be eager to displace precedence. "Elimination of [the] substantial factor usage would be a significant change" and is "currently ingrained in . . . causative law and jury presentation." Weigand, *supra* note 6, at 79. Further, "legitimate criticism of section 27 is its omission of the requirement that a defendant's conduct alone be sufficient and substantial, and that any standard less than but-for represents a decision to impose liability without causation." *Id.* at 79. However, the use of the substantial-factor test is common. *See, e.g.*, Sharp v. Fairbanks N. Star Borough, 569 P.2d 178, 181 (Alaska 1977).

10. Zipursky, *supra* note 6, at 1275. "In today's courts, foreseeability plays a role in breach, duty, and proximate cause." *Id.*

11. MICHAEL D. GREEN & WILLIAM C. POWERS, JR., THE RESTATEMENT THIRD OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (2013) *in* A CONCISE RESTATEMENT OF TORTS 7–8 (AM. LAW INST. 3d ed. 2013). Arguably, this is a myopic view. The American Law Institute believes that the Restatements have a broader purpose.

> *Restatements* are not simply a "restatement" of what courts have done. In many cases they attempt to synthesize decisions that seem disparate or confused. Sometimes, they attempt to rationalize a doctrine that has developed by accretion over time. Sometimes they are prescriptive rather than descriptive, providing rules that the Institute believes are an improvement.

Id. At times, the Restatements can be "an attempt to lead courts to a more appropriate

tendency to depart from its mission and attempt to change or create the law. This occasional quest to change the law is perhaps a longing to recreate the success of the *Restatement (Second) of Torts* section 402A.[12] Section 402A is the holy grail of products-liability law and was instrumental in creating strict products liability in almost every state.[13] Obviously, it is easier to shape and create law where precedent and *stare decisis* do not hinder the adoption of new doctrinal law. But typically, each jurisdiction has a well-defined body of substantive law on the issues of duty, proximate cause, and foreseeability.[14] However, coincidentally, proximate cause is the area of tort law that the *Restatement (Second) of Torts* and the *Restatement (Third) PEH* have targeted for change.

Granted, the concept of proximate cause is amorphous. "The term *proximate cause* is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established. The word *proximate* is a legacy of Lord Chancellor Bacon, who in his time committed other sins."[15] Arguably, it is a misguided term because proximate cause "is neither about proximity nor . . . causation."[16] The *Restatement (Second) of Torts* section 430 attempted to clarify the doctrine of proximate cause by changing the doctrine's name to *legal cause*.[17] However, the term *legal cause* was

rule of law." *Id.* at 8.

12. RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).

13. *Id.*

14. Dew v. Crown Derrick Erectors, Inc., 208 S.W.3d 448, 452 n.4 (Tex. 2006). When urged to adopt the scope-of-liability principles of the *Restatement (Third) PEH*, the Texas Supreme Court stated, "While we applaud any effort to bring greater clarity to this difficult area of the law, we must decline the invitation to abandon decades of case law." *Id.* Further, the Court of Appeals of Kansas observed

> [t]he Third Restatement view may one day gain acceptance, but even its authors concede that they have staked out a basis of analysis that is different than the one actually employed by the courts today (or for the past 100 years for that matter). The Restatement reporters recognized that they have proposed a scope-of-risk analysis rather than the standard foreseeability test applied . . . [in most states] for proximate cause.

Hale v. Brown, 167 P.3d 362, 365 (Kan. Ct. App. 2007).

15. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 273 (5th ed. 1984) (emphasis added) (internal quotations omitted).

16. GREEN & POWERS, *supra* note 11, 7–8.

17. RESTATEMENT (SECOND) OF TORTS § 430 (AM. LAW INST. 1965).

omitted from the *Restatement (Third) PEH* because "despite 75 years of Torts Restatement commitment to legal cause, its acceptance in the vocabulary of tort law is quite limited."[18] Therefore, the preexisting state law prevailed, and the terminology of proximate causation persevered.

The *Restatement (Third) PEH* acknowledges the term "*proximate cause* has been in widespread use in judicial opinions, treatises, casebooks, and scholarship."[19] Despite this fact, the *Restatement (Third) PEH* does not employ the term "because it is an especially poor one to describe the idea to which it is connected."[20] Instead, the concept of proximate cause is known as *scope of liability*.[21] It is hard to argue that *scope of liability* properly describes the concept of proximate cause. However, proximate cause is firmly entrenched in the language of lawyers and courts, so ridding the term from case law and substituting it for *scope of liability* will prove a formidable task. The gift of precognition would likely reveal that the continued use of the term *proximate cause* in the vocabulary of tort law and that the *Restatement (Third) PEH's* attempt to clarify through terminology will meet the same fate as the *Restatement (Second)'s*.

The *Restatement (Third) PEH* adopts a test for scope of liability (proximate cause): "An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."[22] According to the *Restatement (Third) PEH*,[23] "[c]ourts have increasingly moved toward adopting a foreseeability test . . . . Currently, virtually all jurisdictions employ a foreseeability (or risk) standard for some range of scope-of-liability issues . . . ."[24] Moreover, the *Restatement (Third) PEH* opines that "[t]he risk standard . . . is preferable to a foreseeability standard."[25] The *Restatement (Third) PEH* admits the risk and

18. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM ch. 6, Special Note on Proximate Cause (AM. LAW INST. 2010).

19. *Id.* (emphasis added) (internal quotations omitted).

20. *Id.*

21. *Id.*

22. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (AM. LAW INST. 2010). The risk test has its origins in *Overseas Tankship Ltd. v. Morts Dock & Eng'g Co. Ltd.*, [1961] AC 388 (UK).

23. See generally Owen, *supra* note 3; Steenson, *supra* note 6; Weigand, *supra* note 6; Zipursky, *supra* note 6; and Read & Reynolds, *supra* note 6, for the *risk test* and the *scope of liability* under the *Restatement (Third) PEH*.

24. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. e (AM. LAW INST. 2010).

25. *Id.*

foreseeability tests are functionally equivalent and both "exclude liability for harms that were sufficiently unforeseeable at the time of the actor's tortious conduct."[26] However, according to the *Restatement (Third) PEH*, the risk standard is "preferable because it provides greater clarity, facilitates clearer analysis in a given case, and better reveals the reason for its existence."[27] "A foreseeability test for negligence cases risk[s] being misunderstood because of uncertainty about what must be foreseen, by whom, and at what time."[28] While that may be true, applying the risk test could prove to be equally unclear and difficult to understand. The scope-of-risk test should

> consider all of the range of harms risked by the defendant's conduct that the jury *could* find as the basis for determining that conduct tortious. Then, the court can compare the plaintiff's harm with the range of harms risked by the defendant to determine whether a reasonable jury might find the former among the latter.[29]

Clarity will, at times, be equally difficult under the risk test.[30] Listing potential risks of harm that *could* arise from tortious behavior will likely vary significantly upon the insight, imagination, and foresight of the author of the list. Uncertainty could haunt the risk test as easily as a test that considers foreseeability. Quite frankly, regardless of terminology or the test utilized, proximate cause is simply a murky, albeit fascinating, area of the law. The scope of liability will still give room to argue for the imposition of liability under almost any given set of facts under the risk theory. As previously noted, most jurisdictions utilize the concept of foreseeability in proximate cause.[31] The risk theory is a very useful tool

26. *Id.* § 29 cmt. j.
27. *Id.*
28. *Id.*
29. *Id*. § 29 cmt. d (emphasis in original).
30. Weigand, *supra* note 6, at 79. "[T]here 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." *Id.* (emphasis added) (internal quotations omitted).
31. Only a very few courts have adopted the risk test of the *Restatement (Third) PEH*, such as Iowa in *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009), and two federal courts that utilized the test without discussion. Drumgold v. Callahan, 707 F.3d 28, 49 (1st Cir. 2013); Howard & Assoc., P.C. v. Cassity, No. 4:09CV01252 ERW, 2014 WL 7408884 (E.D. Mo. Dec. 31, 2014). Kansas and Texas have specifically rejected the risk

in proximate cause analysis; however, it is unlikely to replace the current jurisprudence that is entrenched throughout the various states.[32]

The *Restatement (Third) PEH* recommends not giving jury instructions that require tortious behavior to "cause the harm in a 'natural and continuous sequence'" or "the causal sequence 'be unbroken by any efficient intervening cause,' [because such language] do[es] not reflect the risk standard adopted in this Section."[33] This language is very common in current jury instructions, definitions of proximate cause, and appellate decisions.[34] When confronted with a proximate-cause or scope-of-liability issue, appellate courts, attorneys, and jury instructions will likely continue using those phrases.[35]

III. ILLUSTRATIONS OF THE RISK TEST VERSUS FORESEEABILITY—WHAT'S IN A NAME?

The *Restatement (Third) PEH* opines that the risk standard is "preferable to a foreseeability standard."[36] The *Restatement (Third) PEH* admits the risk test and the foreseeability test are functionally equivalent and both "exclude liability for harms that were sufficiently unforeseeable at the time of the actor's tortious conduct."[37] However, according to the *Restatement (Third) PEH*, the risk standard is "preferable because it provides greater clarity, facilitates clearer analysis in a given case, and

test from the *Restatement (Third) PEH*. Hale v. Brown, 167 P.3d 362, 365 (Kan. Ct. App. 2007); Dew v. Crown Derrick Erectors, Inc., 208 S.W.3d 448, 452 n.4 (Tex. 2006).

32. *See generally* Steenson, *supra* note 6. Professor Steenson observes that four states have adopted the *Restatement (Third) PEH* and "purged foreseeability" from either the duty or proximate cause analysis. *Id.* at 1062. Those states are Arizona, Iowa, Nebraska, and Wisconsin. Gipson v. Kasey, 150 P.3d 228, 231 (Ariz. 2007) (duty); Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009) (duty and scope of liability); A.W. v. Lancaster Cty. Sch. Dist., 784 N.W.2d 907 (Neb. 2010) (duty); Behrendt v. Gulf Underwriters Ins. Co., 768 N.W.2d 568 (Wis. 2009) (duty). Tennessee "specifically decided that foreseeability is pivotal in the resolution of duty issues without directly considering section 7." Steenson, *supra* note 6, at 1062 (citing Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 362–63 (Tenn. 2008)). Delaware rejects the *Restatement (Third) PEH*. *Id.* at 1063 (citing Riedel v. ICI Ams. Inc., 968 A.2d 17, 20–21 (Del. 2009)).

33. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. g (AM. LAW INST. 2010).

34. *See, e.g.*, Hale v. Brown, 167 P.3d 362, 362–63 (Kan. Ct. App. 2007).

35. *Id.*

36. § 29 cmt. e.

37. *Id.* § 29 cmt. j.

better reveals the reason for its existence."[38]

Analytical difficulty with the application of foreseeability is illustrated in the case of *Yun v. Ford Motor Co*.[39] In *Yun*, the spare tire and part of the support bracket holding the spare tire broke loose from a Ford van while the van was moving down the Garden State Parkway (Parkway).[40] The van's driver was able to safely drive the van onto the berm.[41] Mr. Chang Yun ran across the Parkway to retrieve the spare and errant parts.[42] Defendant Linderman struck Mr. Yun as he was coming back across the Parkway.[43] The car slid and hit Mr. Yun a second time.[44] Mr. Yun died seven months later as a result of injuries sustained on the Parkway.[45] Several defendants were sued under the theory of the spare-tire bracket being defective.[46] Because proximate cause was lacking, the trial judge granted summary judgment in favor of the defendants.[47]

The New Jersey Appellate Division affirmed.[48] Although the court acknowledged issues of proximate cause are normally for jury resolution, the court stated proximate cause may be a matter of law "where the manner or type of harm caused to the plaintiff is unexpected" or the results are "highly extraordinary."[49] The Appellate Division thought the results were unexpected or highly extraordinary because Mr. Yun's "highly extraordinary and dangerous actions in crossing the Parkway twice with complete disregard for his own personal safety clearly constitute[d] a superseding and intervening cause of his own injuries."[50] The "allegedly defective spare tire bracket had 'spent its force.'"[51]

38. *Id.*
39. 647 A.2d 841 (N.J. Super. Ct. App. Div. 1994), *rev'd*, 669 A.2d 1378, 1379 (N.J. 1996).
40. *Id.* at 844.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 843–44.
47. *Id.* at 844.
48. *Id.* at 849.
49. *Id.* at 848.
50. *Id.* at 847.
51. *Id.* (citing Peck v. Ford Motor Co., 603 F.2d 1240, 1244–45 (7th Cir. 1979)). Quite frankly, one must ponder the overall merits of this case. The rear-tire mounting bracket was damaged in a prior accident. *Id.* at 844. Chang and Yun, who serviced the van, told the owner the bracket had been "bent down" and advised the owner not to have it repaired because "it was going to be repaired by the dealer and handled through the

Application of foreseeability to these facts led to the opposite conclusion by the dissent. Judge Baime, in his dissenting opinion, believed that a jury could decide it was reasonably foreseeable and that someone might try to retrieve the tire and, in doing so, be injured.[52]

Illustrating that learned jurists can vary significantly in interpreting proximate cause and foreseeability, the New Jersey Supreme Court reversed in a one-line decision: "The judgment is reversed, substantially for the reasons expressed in the dissenting portion of Judge Baime's opinion in the Appellate Division."[53] Not surprisingly, a dissent accompanied the Supreme Court's decision describing Mr. Yun's

insurance company of the other driver who was involved in that motor vehicle accident." *Id.* The owner continued to drive the van "with knowledge of the defect." *Id.* at 849. These facts appear to be uncontroverted. Therefore, the defendants' behavior in either modifying the van by adding the rear-mounting, spare-tire bracket or in servicing the van simply was not the cause in fact of the tire breaking loose, requiring retrieval by the decedent. The cause was the prior accident. Failure to establish cause in fact might have provided a more persuasive rationale. Arguably, the better lawsuit, if not barred by the statute of limitations, might be brought by the Yun estate against the driver of the car who caused the bent bracket in the prior car accident.

52. *Id.* at 851 (Baime, J., concurring and dissenting opinion). Justice Baime had the following fascinating remarks regarding the value of the decision-making capacity of the jury:

> While I recognize the power and duty of a trial judge to bar the jury from considering the question of proximate cause where the consequences of a negligent act are so extraordinary that as a matter of law they cannot be considered 'natural,' that authority should be exercised sparingly. We judges are strange creatures. It is not that we are less brave than others, but rather by reason of our training, if not our nature, we tend to the conservative. For most of us, prudence and caution are the watchwords. We are rarely rewarded for taking risks. But the rest of the population does not always act the way we do. What may appear strange to judges might seem rather ordinary to others. It thus generally makes sense to have lay people, not judges, make decisions on the question of proximate cause, grounded as that concept is in considerations of foreseeability and fairness. And in that context, a jury might well find it rather ordinary for a person to venture on to the highway on a clear night when there is little traffic in order to retrieve a spare tire that has become dislodged from his vehicle.

Id. The majority and dissenting opinions could not even reach agreement on the description of the weather. While the dissent used the phrase "clear night [with] little traffic," the description in the majority opinion is that Mr. Yun "ran across two lanes of the dark, rain-slicked Parkway." *Id.* The two descriptions convey opposing portraits of the night in question.

53. Yun v. Ford Motor Co., 669 A.2d 1378, 1379 (N.J. 1996).

behavior as "suicidal"[54] and "unlawful."[55] And Mr. Yun's behavior was not "objectively reasonable to expect."[56] As a result, the dissent concluded there should be no liability as a matter of law because the "defective spare tire assembly was not the proximate cause of plaintiff's injuries."[57]

The *Yun* case provides a good example of solid legal minds grappling with the application of foreseeability and proximate cause. However, it is unclear if the risk test of the *Restatement (Third) PEH* would really clarify the analysis. The scope-of-risk test should

> consider all of the range of harms risked by the defendant's conduct that the jury *could* find as the basis for determining that conduct tortious. Then, the court can compare the plaintiff's harm with the range of harms risked by the defendant to determine whether a reasonable jury might find the former among the latter.[58]

Does the scope of the risk include Mr. Yun's behavior? The same dilemma persists. Stated generally, the risk created by a defective spare-wheel bracket might be that someone could be injured attempting to retrieve the tire if the bracket breaks. More specifically, extremely risky (suicidal) attempts to retrieve the tire would perhaps not be within the risks created by the defective bracket. The same debate would likely occur in the New Jersey Supreme Court and Appellate Division regarding the resolution of the *Yun* case. The risk test does not arguably add or clarify the debate.[59] Whether analysis proceeds under the rubric of *scope of risk* or proximate cause and foreseeability, the schism among the judges of the New Jersey Supreme Court and Appellate Division would likely persist accompanied by the intelligible conclusion that

54. *Id.* at 1380 (Garibaldi, J., dissenting opinion).

55. *Id.* at 1380–81. Two statutes provided that it was unlawful for a pedestrian to cross the Parkway. *Id.*

56. *Id.* at 1381.

57. *Id.*

58. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. d (AM. LAW INST. 2010) (emphasis in original).

59. *Id.* § 34. The provision on intervening cause does not provide enlightenment because the test used is an extension of the risk test. "When a force of nature or an independent act is also a factual cause of harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." *Id.*

reasonable minds could vary and that the case is one for the jury.

The case of *Thompson v. Kaczinski*[60] is one of the few cases specifically adopting the *Restatement (Third) PEH's* scope-of-risk test and provides another example that most cases should be decided by the jury under either the risk test or the rubric of foreseeability.[61] In *Kaczinski*, Herbert Kaczinski and Michelle Lockwood resided next to a gravel road.[62] In the summer of 2006, they disassembled a trampoline on their property.[63] Their intent was to dispose of the parts.[64] The parts were not secured and were left in the yard approximately thirty-eight feet from the road.[65] After a severe storm, a gust of wind blew the top of the trampoline onto the road.[66] Reverend Charles Thompson lost control of his car when he swerved to avoid the trampoline and drove into a ditch.[67] His car rolled several times, and Reverend Thompson was injured as a result.[68] The trial judge granted summary judgement in favor of the defendants.[69] After adopting the risk standard from the *Restatement (Third) PEH*,[70] the Supreme Court of Iowa reversed.[71] The court stated the following:

> We conclude the question of whether a serious injury to a motorist was within the range of harms risked by disassembling the trampoline and leaving it untethered for a few weeks on the yard[72] less than forty feet from the road is not so clear in this case as to justify the district court's resolution . . . as a matter of law at the summary judgment stage. A reasonable fact finder could determine Kaczinski and Lockwood should have known high winds occasionally occur in Iowa in September and

60. 774 N.W.2d 831, 831 (Iowa 2009).
61. *Id.* at 835, 839.
62. *Id.* at 831.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 831–32.
68. *Id.* at 832.
69. *Id.*
70. *Id.* at 839.
71. *Id.* at 840.
72. *Id.* at 839. I believe everyone can agree the scope of risks would include tripping over the parts, potentially endangering someone walking in the yard.

> a strong gust of wind could displace the unsecured trampoline parts the short distance from the yard to the roadway and endanger motorists.[73]

The conclusion would likely remain the same under the foreseeability approach. Reasonable minds would disagree over the answer to the question of whether it is foreseeable that unsecured parts of a trampoline could endanger motorists if the top of the trampoline was blown into the road. However, clarity is lost under either approach when Justice Cady's concurring opinion is examined. Justice Cady contended a judge might very well appropriately grant summary judgment if the facts showed the trampoline was flat on the ground because the "incident was not within the risks of leaving a trampoline in the yard."[74] Only if the facts showed the trampoline was positioned in such a way that the "wind could enter under the trampoline tarp and lift the trampoline" could the range of risks support liability.[75] Because the critical issue of whether the trampoline tarp was lying flat or not was disputed, Justice Cady agreed the granting of summary judgment was not appropriate.[76] Arguably, however, the same result would be reached under a foreseeability analysis. Disassembly of a trampoline only causes a foreseeable risk to motorists if the top can be picked up by the wind.

Many examples can be found where the same conclusion would result whether a traditional proximate-cause approach or scope-of-risk test is utilized.[77] For example, natural and probable consequences do not include suffering a heart attack following observation of brownish water coming from the bathroom faucet.[78] The installation of a water softener caused the water to turn brown; the plaintiff used the brownish water to make the coffee before he saw it coming from the faucet.[79] A heart attack is not a foreseeable consequence of negligence in the installation of a

73. *Id.*
74. *Id.* at 840 (Cady, J., concurring).
75. *Id.*
76. *Id.*
77. For example, attempting to shoot a bull could foreseeably endanger bystanders. *See generally* Geyer v. City of Logansport, 346 N.E.2d 634 (Ind. Ct. App. 1976), *overruled by* 370 N.E.2d 333 (1977). Under the *Restatement (Third) PEH*, one risk of discharging a weapon could be injury to bystanders. With either test, specific details, such as the fact the bullet ricocheted off one of the bull's horns, would not be particularly significant.
78. Caputzal v. Lindsay Co., 222 A.2d 513, 516–17 (N.J. 1966).
79. *Id.* at 514.

water softener.[80] The scope of risk from negligent installation of a water softener might include hard water or maybe absence of water but probably not a heart attack. Under either approach, the same result is likely.

Similarly, it was not foreseeable that faulty repairs of an upstairs toilet by a homeowner would cause the toilet to overflow, react with the electrical system, and create an electrical current that severely shocked the neighbor when he touched the outside faucet to water flowers for the homeowner.[81] The court said "the defendant could not have reasonably foreseen the harm that befell" the neighbor.[82] Under the scope-of-risk approach, negligent repair of an upstairs toilet could cause many risks; however, electrocution of a neighbor when he or she touches the outside faucet is not one of them.

Clarity would not necessarily improve under the *Restatement (Third) PEH* approach. Applying the *Restatement (Second)*, the court in *Jensen v. Schooley's Mountain Inn, Inc.*[83] held the defendant's tavern was not liable as a matter of law for the death of a customer, despite the fact the tavern continued to serve alcohol to the visibly intoxicated patron.[84]

> It cannot be disputed that Jensen's climbing to the top of the tree, falling and rendering himself unconscious and then drowning in the river is, at the very least, an extraordinary occurrence. Such a sequence of events cannot reasonably be expected to follow from serving alcohol to one who is visibly intoxicated and, in our view, does not provide a fair, just [sic] or common sense [sic] basis to visit liability upon defendant. . . . However, legal responsibility for the consequences of an act cannot be imposed without limit. The events here transgress the judicial line beyond which liability should not be extended as a matter of fairness or policy.[85]

Also, under the *Restatement (Third) PEH*, a court could conclude a

80. *Id.* at 516–17.
81. *See* Hebert v. Enos, 806 N.E.2d 452, 456 (Mass. App. Ct. 2004).
82. *Id.* at 457.
83. 522 A.2d 1043 (N.J. Super. Ct. App. Div. 1987).
84. *Id.* at 1044–1045.
85. *Id.*

customer falling out of a tree, rolling into a river, and drowning is not within the scope of risks created by the act of negligently selling alcohol to a visibly intoxicated patron. Accordingly, a court could grant summary judgment in favor of the tavern. The result is clear, or is it? Perhaps the result under either approach depends on the level of generality employed in describing the issue. Providing alcohol to a visibly intoxicated person could foreseeably cause death, even death by drowning (a car accident could result in the car going into a body of water or the intoxicated person going for a swim). If death is foreseeable, the specific details should not matter. Likewise, selling alcohol to a visibly intoxicated person creates the risk of death, arguably drowning and even falling. Under either approach, there is an argument the court erred and should have allowed this case to go to the jury instead of deciding the issue as a matter of law.

Clarity is not improved by the *Restatement (Third) PEH*; therefore, predicting and comparing case results will, unfortunately, remain nebulous. Since stability and predictability are core values in the legal system, they provide strong countermeasures to change in the rule of law. If case results remain unchanged and clarity is not drastically improved, overturning established law on the doctrines of proximate cause and foreseeability for scope of liability and the incorporation of the risk test will be unlikely—especially when there is a danger of misapplication or difficulty when utilizing any new law. Further, the risk test could have a tendency to broaden liability because one should consider "all of the range of harms risked by the defendant's conduct that the jury *could* find as the basis for determining that conduct tortious"[86] to be within the scope of liability if the defendant's behavior created one of the enumerated risks.

For example, the court in *Goodwin v. Yeakle's Sports Bar & Grill, Inc*.[87] held "a shooting inside a neighborhood bar is not foreseeable as a matter of law."[88] Assuming negligent behavior on the part of the tavern,

86. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. d (AM. LAW INST. 2010) (emphasis in original).

87. 62 N.E.2d 384 (Ind. 2016). The court also implicitly rejected the approach of the *Restatement (Third) PEH*. The court held foreseeability is a component of duty and "acknowledged" this approach was "not universally embraced," citing Section 7 for the opposing viewpoint. *Id.* at 389 & n.4.

88. *Id.* at 394. Goodwin, Randolph, and Washington were socializing. Carter was seated at a nearby table with his wife and mistakenly thought he heard Washington "make a derogatory remark about Carter's wife. This angered Carter who produced a

the court acknowledged that "bars can often set the stage for rowdy behavior."[89] Negligent behavior on behalf of a bar will likely consist of serving alcohol to a visibly intoxicated patron or a failure to use reasonable care to protect patrons. But "all of the range of harms risked" should be included.[90] Accordingly, risks would include drunk driving by the patron causing injury to a third party, rowdy behavior injuring a fellow patron, or intentional or criminal behavior aimed at another customer or employee. So instead of the decision being made as a matter of law, as in *Goodwin*, arguably the case would at least go to the jury under the *Restatement (Third) PEH's* approach.

Expansion of liability through the consideration of all risks potentially springing from negligent behavior can also be illustrated by the case of *Ocampo v. Famco, LLC*.[91] In *Ocampo*, the landlord negligently failed to repair the lock on the second-floor window of the plaintiff's apartment.[92] There was also no screen on the window.[93] The sixteen-year-old plaintiff fell from the window while evidently sleepwalking.[94] Although the landlord knew of the disrepair of the window, the landlord did not know the plaintiff suffered from sleepwalking.[95] The court held "the risk created by defendants' non-repair of the window lock was not reasonably foreseeable" as a matter of law.[96] Arguably, application of the *Restatement (Third) PEH* would allow the case to go to the jury. In prior cases, liability was imposed for the foreseeable dangers of a criminal attack and for failure to properly repair a screen that allowed an infant to fall from the window.[97] If risks of negligent failure to repair window latches include criminals coming in and children falling out the window, all risks could be stretched to

handgun and fired at Washington. He struck Washington and accidently struck Goodwin and Randolph as well. All three shooting victims survived; and Carter later pleaded guilty to three counts of battery with a deadly weapon." *Id.* at 385–86.

89. *Id.* at 393.
90. § 29 cmt. d.
91. No. L-1417-08, 2010 WL 3932797 (N.J. Super. Ct. App. Div. Oct. 5, 2010).
92. *Id.* at *1.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at *4.
97. *Id.* at *3 (first citing Trentacost v. Brussel, 412 A.2d 436 (N.J. 1980) (duty to protect against foreseeable criminal attacks); and then Anderson v. Sammy Redd & Assocs., 650 A.2d 376 (N.J. Super. Ct. App. Div. 1994), *cert. denied*, 655 A.2d 444 (N.J. 1995) (infant fell out of negligently repaired window screen)).

include older adolescents falling out for whatever reason. Even if a court would not buy the argument, it might dangerously follow the lead of the *Restatement (Third) PEH* and send the case to the jury. The threat of jury submission could result in increased pressure to settle more cases or to settle the cases for a larger sum—a good or bad result depending on your point of view.

The problem of potentially expanding liability is compounded by the treatment of intervening causes in the *Restatement (Third) PEH*. The traditional approach dealing with intervening causes is found in the case of *Stahlecker v. Ford Motor Company*.[98] In *Stahlecker*, Amy Stahlecker was driving a Ford Explorer when the Firestone radial tire failed.[99] Amy was stranded in a remote area.[100] "Richard Cook encountered Amy alone and stranded as a direct result of the tire failure and . . . he assaulted and murdered her."[101] Her parents sued Ford and Firestone.[102] Demurrers were sustained and later affirmed based on the rationale that the murderous behavior was an independent force, an efficient intervening cause, severing the causal connection.[103] The court cited Section 448 of the *Restatement (Second) of Torts*, which provides as follows:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.[104]

98. 667 N.W.2d 244 (Neb. 2003). *See also* Sharp v. Fairbanks N. Star Borough, 569 P.2d 178, 183 (Alaska 1977) (citing RESTATEMENT (SECOND) OF TORTS § 442 (AM. LAW INST. 1965) (Factors used to "determine whether an intervening force is superseding cause.")).

99. *Stahlecker*, 667 N.W.2d at 249.

100. *Id.*

101. *Id.* (internal quotations omitted).

102. *Id.*

103. *Id.* at 258–59.

104. *Id.* at 255 (quoting RESTATEMENT (SECOND) OF TORTS § 448 (AM. LAW INST. 1965)).

It is safe to say the court made the correct decision. Although it is an unimaginable, tragic case, Ford and Firestone, even if they injected a defective tire into the stream of commerce, should not be responsible for the murder of the user left stranded by the failed tire. However, the result under the *Restatement (Third) PEH* would travel a different path. The provision on intervening causes duplicates the risk theory. Section 34 provides that "[w]hen a force of nature or an independent act is also a factual cause of harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."[105] In contrast with the *Restatement (Second)*, the *Restatement (Third) PEH* contains no specific provision addressing the intervention of criminal behavior.[106] In *Stahlecker*, the harm, assault, and murder resulted from the risk (tire failure) that made Ford and Firestone's behavior tortious. It was conceded that Amy would not have been raped and murdered "but for" the failure of the tire.[107] The list of risks created by a defective tire would include a car accident or the occupants stranded while waiting for a tow or repair of the vehicle. Once a car is disabled, it requires no great use of imagination to include the danger of criminal attack within the risks caused by stranding a motorist through tortious misbehavior. The fear of being stranded could be lost time or lost sleep. However, the danger that leaps to the minds of most is that the incapacity will be seized upon by an opportunistic criminal. Perhaps some courts will be persuaded by the approach of the *Restatement (Third) PEH*. However, most courts would probably adhere to specific precedents regarding the intervention of an intentional or criminal actor.

Stare decisis will provide a powerful force against adoption of the *Restatement (Third) PEH*. Predictability of results and stability are strong motivators. If the risk test and the foreseeability test are functionally

105. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 34 (AM. LAW INST. 2010).

106. *Id.* § 34 cmt. e. Criminal intervention is relegated to comment status. The *Restatement (Second)* contained numerous provisions that acted as guideposts for reoccurring cases dealing with intervening causes. Those guideposts are removed from the *Restatement (Third) PEH*. The provisions in the area of intervening cause are scarce. In addition to Section 34, there are only three other sections that discuss it: Section 35, "Enhanced Harm Due to Efforts to Render Medical or Other Aid"; Section 36, "Trivial Contributions to Multiple Sufficient Causes"; and Section 33, "Scope of Liability for Intentional and Reckless Tortfeasors." *Id.* §§ 33, 35–36.

107. *Stahlecker*, 667 N.W.2d at 254.

equivalent and both tests "exclude liability for harms that were sufficiently unforeseeable at the time of the actor's tortious conduct,"[108] there is certainly not a strong impetus for change. Although the *Restatement (Third) PEH* opines the risk standard is "preferable because it provides greater clarity,"[109] clarity will arguably not be improved. The application of the risk test could easily have a tendency to broaden liability, or at least allow more cases to reach the jury, because an issue regarding "scope of liability is a question of fact for the factfinder."[110] Clearly, a plaintiff's verdict is not guaranteed. Although Justice Cardozo, writing for the majority of the court, overturned the verdict, the jury's decision was in favor of the plaintiff, Helen Palsgraf, in the most famous duty/proximate-cause case in tort law.[111] The potential for a plaintiff's victory provides powerful motivation. The greater potential for plaintiff's success creates more inclination on the part of the defendant to settle. Although the risk test will likely provide a useful tool for resolution of proximate-cause cases, traditional doctrine will remain intact. Foreseeability is too firmly entrenched to "go gentl[y] into that good night."[112]

108. § 29 cmt. j.
109. *Id.*
110. *Id.* § 7 cmt. a.
111. *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).
112. Dylan Thomas, *Do Not Go Gentle into That Good Night*, *in* THE POEMS OF DYLAN THOMAS 239, 239 (Daniel Jones eds., 1947).

> Do not go gentle into that good night,
> Old age should burn and rave at close of day;
> Rage, rage against the dying of the light.
>
> Though wise men at their end know dark is right,
> Because their words had forked no lightning they
> Do not go gentle into that good night.
>
> Good men, the last wave by, crying how bright
> Their frail deeds might have danced in a green bay,
> Rage, rage against the dying of the light.
>
> Wild men who caught and sang the sun in flight,
> And learn, too late, they grieve it on its way,
> Do not go gentle into that good night.
>
> Grave men, near death, who see with blinding sight
> Blind eyes could blaze like meteors and be gay,

IV. DUTY AND *THE RESTATEMENT (THIRD) PEH*

Arguably, the most dramatic proposal of the *Restatement (Third) PEH* is its position on duty and foreseeability, or to be precise, the declaration that foreseeability should be ignored in ascertaining if a duty of care is owed.[113] The *Restatement (Third) PEH* observes that "[d]espite widespread use of foreseeability in no-duty determinations, this Restatement disapproves that practice and limits no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder."[114] The *Restatement (Third) PEH* attempts to draw a bright line between questions of law for the court and questions of fact for the jury.[115] According to the *Restatement (Third) PEH,* there is an important difference between scope of liability (proximate cause) and duty because the "no-duty rules are matters of law decided by the courts, while the defendant's scope of liability is a question of fact for the factfinder."[116] Because foreseeability, as admitted by the *Restatement (Third) PEH*, is a valid, if not critical, factor throughout the country in duty analysis, eliminating foreseeability from the duty analysis is a bold approach.

> If Judge Cardozo's *Palsgraf* opinion really was, as the Second Restatement's Reporter once said, a "bombshell

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> Rage, rage against the dying of the light.
>
> Any you, my father, there on the sad height,
> Curse, bless, me now with your fierce tears, I pray.
> Do not go gentle into that good night.
> Rage, rage against the dying of the light.

Id.

113. *See* Cardi, *supra* note 6; W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671 (2008); Alani Golanski, *A New Look at Duty in Tort Law: Rehabilitating Foreseeability and Related Themes*, 75 ALB. L. REV. 227 (2012); John H. Marks, *The Limit to Premises Liability for Harms Caused by "Known or Obvious" Dangers: Will it Trip and Fall Over the Duty-Breach Framework Emerging in the Restatement (Third) of Torts?*, 38 TEX. TECH L. REV. 1 (2005); Steenson, *supra* note 6; Aaron D. Twerski, *The Cleaver, the Violin, and the Scalpel: Duty and the Restatement (Third) of Torts*, 60 HASTINGS L. J. 1 (2009); Read & Reynolds, *supra* note 6.

114. § 7 cmt. j.

115. *Id.* § 7 cmt. a.

116. *Id.*

> burst" that "stated the issue of foreseeability in terms of duty," then today's ALI could be described as having . . . launched a retaliatory bombshell that states, in so many words, "not in our Third Restatement."[117]

The *Restatement (Third) PEH* assumes a duty is owed in the vast majority of cases.[118] As stated in Section 7(a), "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."[119] Foreseeability of a risk of harm is critical in determining if the actor was negligent; however, the *Restatement (Third) PEH's* position is antithetical and provides that determinations of duty should be made without the use of foreseeability.[120] In most cases, there is a presumption of a duty if the actor created a risk of harm. Because a duty does exist in the vast majority of cases, a presumption of duty is not an extraordinary concept. For example, the driver of a car owes a duty toward others on the road in most car accidents. Indeed, the academic study of the law of duty concentrates on those cases where there could be a problem with the duty issue, such as in no-duty-to-rescue,[121] special-relationship,[122] protection-against-third-party-actions,[123] under-taking,[124] or entrants-upon-land cases.[125] However, there is criticism that the *Restatement (Third) PEH's* approach will "open the floodgates of plaintiffs' suits"[126] with its presumption of a duty in all cases where

117. Marks, *supra* note 113, at 70.

118. This approach is very similar to Justice Andrews's opinion in *Palsgraf* where he concluded a duty was owed to the world at large to refrain from negligent conduct. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

119. § 7(a).

120. *Id.* § 7 cmt. j.

121. *See generally* Estate of Cilley v. Lane, 2009 ME 133, ¶ 9, 985 A.2d 481, 484–85; Yania v. Bigan, 155 A.2d 344, 346 (Pa. 1959).

122. *See generally* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 336 (Cal. 1976); Iseberg v. Gross, 879 N.E.2d 278, 284–85 (Ill. 2007).

123. *See generally* Ward v. Inishmaan Assocs. Ltd. P'ship, 931 A.2d 1236, 1236 (N.H. 2007); Posecai v. Wal-Mart Stores, Inc., 99-1222 (La. 11/30/99); 752 So. 2d 764, 764.

124. *See generally* Spengler v. ADT Sec. Serv., Inc., 505 F.3d 457, 457 (6th Cir. 2007); Wahulick v. Mraz, 751 N.E.2d 2, 2 (Ill. App. Ct. 2001); Florence v. Goldberg, 375 N.E.2d 764, 764 (N.Y. 1978).

125. *See generally* Rowland v. Christian, 443 P.2d 562, 562 (Cal. 1968); Gladon v. Greater Cleveland Reg'l Transit Auth., 662 N.E.2d 291, 291 (Ohio 1996).

126. Steenson, *supra* note 6, at 1085 (quoting Supplemental Answering Brief of Defendant – Below, Appellee ICI Americas Inc. at 2, Riedel v. ICI Americas Inc., 968 A.2d 17 (Del. 2009) (No. 156), 2008 WL 50698608, at *2).

someone creates a risk of harm. Further, "there . . . is no sound reason to abandon the duty analysis, . . . which requires that some legally significant relationship exist between the parties for a duty of care to flow between them, in favor of the Third Restatement's novel, untested and impractical approach."[127]

Some members of the defense bar have expressed concerns regarding what could be considered an expansive view of duty.

> The Restatement 3rd PEH § 7 eliminates "foreseeability" of harm as one of the factors in the duty analysis. Rather, "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." Although this simplifies the duty analysis, it arguably establishes the existence of a duty in a wider variety of circumstances and situations, and this should be a concern to defendants. It no longer matters whether the physical harm to a particular person or class of people is foreseeable. Simply put, if the actor's conduct creates a risk of physical harm, the actor *must* exercise reasonable care.[128]

In other words, the presumption of duty could be perceived as "creating duties in areas of the law where the court previously found no duty."[129]

The most controversial provision regarding duty is eliminating foreseeability from consideration when deciding whether one owes a duty. Section 7(b) provides as follows: "In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular [category] of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification."[130] Under this approach, a no-duty determination can only be made to a *category of cases*,[131] and a no-duty

127. *Id.*

128. Read & Reynolds, *supra* note 6, at 3 (footnote omitted) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(a) (AM. LAW INST. 2010)).

129. Steenson, *supra* note 6, at 1085 (citing Riedel, 968 A.2d at 20).

130. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) (AM. LAW INST. 2010).

131. *See generally* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928). This approach would mean there would be a duty owed to Helen Palsgraf or to the

determination in an individual case is prohibited.[132] "A no-duty ruling represents a determination, a purely legal question, that no liability should be imposed on actors in a category of cases."[133] Because duty is presumed if a risk of harm is created, "[a] defendant has the procedural obligation to raise the issue of whether a no-duty rule" would be applicable and whether the case falls within a category of cases wherein the court has concluded, or will conclude, it is appropriate for a no-duty rule.[134]

In a "purely legal question," the court concludes, based on articulated policies, if there is no duty in a category of cases.[135] "These reasons of policy and principle do not depend on the foreseeability of harm based on the specific facts of a case. They should be articulated directly without obscuring references to foreseeability."[136] The *Restatement (Third) PEH* articulates principles or policies courts should use when deciding whether a duty is owed in a category of cases. The considerations include "[c]onflicts with social norms,"[137] conflicts with other areas of the law,[138] "[r]elational limitations,"[139] "[i]nstitutional competence and administrative difficulties,"[140] and "[d]eference to

unforeseeable plaintiff. Justice Cardozo concluded, based on the facts of the *Palsgraf* case, no duty was owed to Mrs. Palsgraf. *Id*. at 101. This approach was endorsed by the *Restatement (Second)*. *See* RESTATEMENT (SECOND) OF TORTS § 281(b) (AM. LAW INST. 1965). It would be disallowed under the *Restatement (Third) PEH*. *See* § 29 cmt. n.

132. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) cmt. a (AM. LAW INST. 2010).

> 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 [category] of cases.

Id.

133. *Id.* § 7 cmt. j.
134. *Id.* § 7 cmt. b.
135. *Id*. § 7 cmt. j.
136. *Id.*
137. *Id.* § 7 cmt. c (italics omitted).
138. *Id.* § 7 cmt. d.
139. *Id.* § 7 cmt. e (italics omitted).
140. *Id.* § 7 cmt. f (italics omitted).

discretionary decisions of another branch of government."[141] Contrary to most states' duty determinations, foreseeability is not among the factors considered. As the *Restatement (Third) PEH* states:

> 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 practice and limits no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder.[142]

The counter argument is that application of various factors could be manipulated or obscure explanations just as easily as the concept of foreseeability. Clarity could remain elusive, and transparency stay an unrealized dream.

Currently, foreseeability is a key factor for most courts in duty cases. For example, a court deciding whether a shopkeeper has a duty to protect customers from criminal acts typically hinges on the court, at least, considering the foreseeability of a criminal act under the circumstances. The *Restatement (Third) PEH* would ask if the case fell within a category of cases in which no duty was owed—failing to examine the particular facts of the case. If policy and principle did not justify a no-duty rule for a category of cases, then a duty is presumed if there was a risk of harm.

Alternately, consider a case where a driver negligently causes a noisy automobile collision.[143] The noise frightens a horse in a nearby field, causing the horse to stampede and run five miles.[144] Then the runaway horse strikes its owner, knocks her unconscious, and throws her twenty

141. *Id.* § 7 cmt. g (italics omitted).
142. *Id.* § 7 cmt. j.
143. Billman v. Indianapolis, Cincinnati & Lafayette R.R. Co., 76 Ind. 166, 167 (Ind. 1881).
144. *Id.*

feet into a pond.[145] Alas, the owner drowns.[146] Most courts would examine foreseeability in ascertaining whether the driver of the car owed a duty to the owner of the horse. The *Restatement (Third) PEH* would presume there was a duty. Examining if there is a duty in an individual case is prohibited. Only if the facts of the case fit into a "category of cases" where there is no-duty due to policy and principle could a court conclude there was no duty.[147]

Although the *Restatement (Third) PEH* would not decide this case under duty, it would be appropriate to consider scope of liability, which would be a question of fact for the jury. The driver would be liable if the risk was included within the risks created by his behavior. The immediate response might be drowning, but this response is not within the risks created by a car accident. However, many have drowned following a car accident when the car is plunged into a body of water. Indeed, the precise details of an accident or manner of occurrence is not considered significant. Death by drowning or collision is still death. Thus, both are a risk that fall within the cluster of risks created by negligently causing a car accident. Again, results could still be equally arguable or obscure under the *Restatement (Third) PEH.* Instead of a court deciding the case as a matter of law by concluding there was no duty under the facts of the individual case, the controversy could be submitted to the jury. Although one could herald the value of the jury resolving controversies, the trade-off is arguably judicial efficiency and allowing suspect cases to proceed to the jury (or increased settlements of perhaps less than meritorious cases).

V. A SAMPLER OF DUTY CASES

The *Restatement (Third) PEH's* positions that there is a *de facto*

145. *Id.*

146. *See id*. Reading through runaway-horse cases is delightful and will reveal the author's imagination is not that far-fetched. *See* Elam v. City of Mt. Sterling, 117 S.W. 250 (Ky. Ct. App. 1909); Smethurst v. Proprietors Indep. Cong. Church, 19 N.E. 387 (Mass. 1889); Forney v. Geldmacher, 75 Mo. 113 (Mo. 1881); Sowles v. Moore, 26 A. 629 (Vt. 1893); Patterson v. City of Austin, 39 S.W. 977 (Tex. Civ. App. 1897).

147. § 7 cmts. c, d, e, f, & g. This case really does not conflict with social norms or other areas of the law. There would not appear to be a relationship limitation, nor would it interfere with another branch of government. This scenario would not appear to call into play institutional competence or administrative difficulties. The policies and principles outlined in the *Restatement (Third) PEH* would not appear to justify a no-duty rule to a category of cases.

presumption a duty of care is owed in all cases,[148] that there is an express disapproval of the resolution of cases based on the rationale there is no duty owed in an individual case,[149] and that there is no foreseeability in duty determinations[150] are all such dramatic changes to the current duty doctrine that duty morphs into a distant relative. Under the *Restatement (Third) PEH*, the conclusion that no duty is owed is one for the court to draw with the restriction that the case has to belong to an identifiable group of cases based upon articulated policy reasons. Even more earth-shaking is the shifting of the burden to the defendant in duty cases. Historically, the plaintiff had to prove the defendant owed the plaintiff a duty to use reasonable care. Under the *Restatement (Third) PEH*, "[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."[151]

A. Category of Cases

The no-duty-to-rescue cases and the no-duty-owed-to-a-trespasser cases are, arguably, the easiest examples of categories of cases where no duty is owed. "[S]ocial norms about responsibility"[152] and "[r]elational limitations"[153] could justify precluding liability in these categories of cases. The *Restatement (Third) PEH* mentions social-host-liability,[154]

148. *Id.* § 7 cmt. a.

149. *Id.* § 7 cmts. a & j.

150. *Id.* § 7 cmts. a & j. "Reliance on foreseeability in finding that no duty exists can also lead courts astray from the real issue that require confrontation." *Id.* § 7 Reporters' Note cmt. j. The Reporters' Note references the case of *Chavez v. Desert Eagle Distributing Co.* to illustrate that use of foreseeability in the analysis of the duty concept can result in murky reasoning. 151 P.3d 79, 79 (N.M. Ct. App. 2006). In *Chavez*, an Indian casino legally served alcohol continuously for twenty-four hours. *Id.* The court struggled with the issue of the liability of the wholesaler of alcohol. If the retailer could not be liable, it would seem odd to impose liability on the wholesaler for a lawful sale of alcohol to the retailer. *Id.* at 86–87. Although it is foreseeable some alcohol will be misused, that was not sufficient to impose liability. *Id.* at 84. An arguably more straightforward approach might be to state that a wholesaler of alcohol does not owe a duty to a customer of a retail seller if personal injury results from over-consumption of alcohol. A category of cases where no duty is owed is created by "[r]elational limitations." § 7 cmt. e (italics omitted).

151. *Id.* § 7 cmt. b.

152. *Id.* § 7 cmt. c (italics omitted).

153. *Id.* § 7 cmt. e (italics omitted).

154. *Id.* § 7 cmt. c ("[C]ommercial establishments that serve alcoholic beverages have

economic-loss,[155] firefighter,[156] and failure-of-the-police-to-provide-protection cases[157] as examples of categories of cases that might very well merit no-duty rules based on articulated policy reasons. Another category fitting within the framework of the *Restatement (Third) PEH* are those cases where the defendant owes the plaintiff no duty based on relational limitations. For example, one could conclude under the *Restatement (Third) PEH* that an employer owes no duty to the wife of an employee to avoid the wife's exposure to take-home asbestos (the danger of asbestos exposure from asbestos taken home on clothing) because there was no relationship between the employer and spouse.[158]

In limited cases, the fact duty exists unless the case falls within an articulated category of cases might allow liability where the facts scream for liability, but describing why a duty was owed and avoiding an expansion of liability might be difficult. The 1847 case of *Vandenburgh v. Truax*[159] provides an example. In that case, the plaintiff owned a store.[160] While the plaintiff's stable boy was on his way to the store, an altercation arose between the defendant and the boy.[161] The stable boy

a duty to use reasonable care to avoid injury to others who might be injured by an intoxicated customer, but . . . social hosts do not have a similar duty to those who might be injured by their guests.").

155. *Id.* § 7 cmt. d ("Conflicts with another domain of law" is one policy reason given for concluding that no duty is owed to the category of cases dealing with economic loss, whereas liability for purely economic harm in commercial cases often raises issues better addressed by contract law or by the tort of misrepresentation.) (italics omitted).

156. *Id.* § 7 cmt. e. "Relational limitations" can limit liability to a class of persons "in a certain relationship." *Id.* (italics omitted). "[A] home owner who negligently starts a fire might be liable to an adjacent landowner but not to a firefighter. Thus, an actor may have a duty of reasonable care to some persons but not to others." *Id.*

157. *Id.* § 7 cmt. g ("[D]eference to discretionary decisions of another branch of government" justifies the no-duty rule where "police have no duty of reasonable care in deciding how to allocate police protection throughout a city.").

158. *See, e.g.*, Riedel v. ICI Americas Inc., 968 A.2d 17, 18 (Del. 2009); Simpkins v. CSX Transp., Inc., 2012 IL 110662, ¶ 1, 963 N.E.2d 1088, 1088. Although both cases could be resolved under the *Restatement (Third) PEH*, they were decided using traditional analysis. *Simpkins* states that the "first factor we look to in determining whether a duty of care existed . . . is whether the risk of harm to the plaintiff was reasonably foreseeable." *Simpkins*, 2012 IL 110662, ¶ 24, 963 N.E.2d at 1098. *Riedel* specifically rejected the approach of the *Restatement (Third) PEH* in favor of the *Restatement (Second) of Torts* section 4. *Riedel*, 968 A.2d at 21. However, the point is that both cases *could* fit within the framework of the *Restatement (Third) PEH* section 7.

159. 4 Denio 465, 465 (N.Y. Sup. Ct. 1847).

160. Ryan v. New York C. R. Co., 35 N.Y. 210, 214 (1866).

161. *Id.*

was able to escape and run inside the plaintiff's store, but the defendant chased after the boy with a pickaxe.[162] The boy then ran behind the counter to avoid being struck by the pickaxe.[163] However, the boy "knocked out the faucet from a cask of wine, and a portion of the liquor was spilled and lost."[164] For that injury, the plaintiff brought suit, and the court, treating the case as a negligence cause of action, upheld liability for the lost alcohol.[165]

If a similar case were to be decided today, a court might have semantic difficulties describing in a sufficiently narrow manner why the defendant owed the shopkeeper a duty of care to avoid sweeping liability. I suppose a court could state an actor owes a duty to anyone who could be injured if the actor chases a third party (and the third party is likely to be careless) resulting in injury to others or their property because the third party's actions were prompted by fear.[166] Stating there is a duty to use reasonable care in pursuit of another is perhaps awkward and could result in interesting interpretations and obscure holdings. The *Restatement (Third) PEH* avoids this issue because its fall-back position is that a duty of care is owed.[167] The *Restatement (Third) PEH's* approach may avoid stepping onto slippery slopes and murky analysis in some cases.

However, the more likely result of applying the *Restatement (Third) PEH* is the potential for subtly broadening liability by allowing more cases to be decided by the jury. Clearly, some cases would be decided the same. An example is the case of *D. Houston, Inc. v. Love*,[168] wherein an exotic dancer was injured in a one-car accident after performing at Treasures and consuming twelve alcoholic beverages with customers.[169] The court explained the imposition of a common-law duty, separate from liability under the dram-shop statute, by concluding "that if an employer requires its independent contractor while working to consume alcohol in sufficient amounts to become intoxicated, it owes her a duty to take

162. *Id.*
163. *Id.* at 214–15.
164. *Id.* at 215.
165. *Id.*
166. The court stressed that the precipitating factor was fear caused by the defendant's chase with the pickaxe in hand. *Id.* at 467.
167. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 (AM. LAW INST. 2010).
168. 92 S.W.3d 450 (Tex. 2002).
169. *Id.* at 452.

reasonable care to prevent her from driving when she leaves work."[170] Under the *Restatement (Third) PEH*, the result on the issue of duty would be the same because a duty is owed unless the case is one of an articulated category of cases where no duty is owed.[171] Thus, in the vast majority of cases, there would be a duty owed under either a pre- or post-*Restatement (Third) PEH* approach.

However, there are many examples where courts have concluded no duty existed in the individual case, a practice disavowed by the *Restatement (Third) PEH*. In *Bird v. W.C.W.*,[172] the court held a mental-health professional "owed no professional duty to the father to not negligently misdiagnose the condition of the child,"[173] so the mental health professional could not be liable for damages caused to the father.[174] The rationale of the court follows:

> A claimant's right to sue a mental health professional must be considered in light of countervailing concerns, including the social utility of eradicating sexual abuse. Evaluating children to determine whether sexual abuse has occurred is essential to that goal. . . . Young children's difficulty in communicating sexual abuse heightens the need for experienced mental health professionals to evaluate the child. Because they are dealing with such a sensitive situation, mental health professionals should be allowed to exercise their professional judgment in diagnosing sexual abuse of a child without the judicial imposition of a countervailing duty to third parties.[175]

A drug-testing company had "no duty to disclose to [the potential employer] or [prospective employee] any information about the effect of eating poppy seeds on a positive drug test result" in *Smithkline Beecham Corp. v. Doe*.[176] Although a false-positive test result caused by the consumption of poppy seeds is a foreseeable risk, the court declined to

170. *Id.*
171. § 7.
172. 868 S.W.2d 767, 768 (Tex. 1994).
173. *Id.* at 770.
174. *Id.* at 768, 772.
175. *Id.* at 769.
176. 903 S.W.2d 347, 354 (Tex. 1995).

impose a duty based on policy reasons. First, the duty to disclose the possible causes of false positives could not be "readily defined" because "all possible causes of positive results other than using drugs"[177] would be included, such as the use of an "over-the-counter inhaler, or from inhaling second-hand marijuana smoke."[178] Secondly,

> the fact that there are reasons to be concerned about the uses, potential misuses or abuses of drug test results does not justify imposing additional and unprecedented duties upon a laboratory with the sole function of analyzing a sample and returning a report, particularly when such report is factually accurate.[179]

Another example is *Nabors Drilling, U.S.A., Inc. v. Escoto*.[180] Mr. Ambriz worked a twelve-hour shift at Nabors and crossed the center line of a farm-to-market road and collided with another vehicle.[181] Five people were killed in the accident.[182] In the resulting litigation, the theory of relief against Nabors was that Nabors owed a duty to protect motorists from an employee's work-related fatigue.[183] Although the court acknowledged traffic accidents are a risk of excessive fatigue,[184] the court declined to impose a duty on employers to prevent fatigued employees from leaving the work site because of the "far-reaching and onerous" nature of such a potential duty.[185] The court gave many rationales to support its rejection of this duty: 1) "there is no quantitative physical measure of fatigue that could be used to determine whether an employee is impaired";[186] 2) employers would be unable to "consistently judge when employees have gone beyond tired and become impaired";[187] 3) work-place conditions impact employees differently;[188] 4) the elimination of factors contributing to fatigue at work would be difficult

177. *Id.* at 353.
178. *Id.* at 354.
179. *Id.*
180. 288 S.W.3d 401 (Tex. 2009).
181. *Id.* at 404.
182. *Id.*
183. *Id.* at 403–04.
184. *Id.* at 410.
185. *Id.* at 412.
186. *Id.* at 410.
187. *Id.*
188. *Id.*

due to the lack of consistent factors;[189] and finally, 5) off-duty factors, "such as an employee's commute length, lifestyle, sleep cycle during weeks off, sleep disorders, and medications can affect worker fatigue."[190] Given the onerous and unworkable nature of this burden, the court perceived "little social or economic utility" would result by creating a duty.[191]

Lastly, in *Gushlaw v. Milner*,[192] the court held a defendant who drove an intoxicated friend to his car and knew the intoxicated friend was going to drive in an impaired condition owed no duty to third parties killed in a car accident caused by the intoxicated friend.[193] The policy reasons for declining to impose a duty in the case were that

> the question of whether such a duty should be imposed upon the public—a duty that could arguably be considered as a "designated-driver" duty—is one that is appropriate for legislative research and community debate. Given the palpable issues in defining the scope and extent of such a duty, . . . [the court] exercise[d] judicial restraint and decline[d] to impose such a duty on this occasion.[194]

189. *Id.* at 411.

190. *Id.*

191. *Id.*

192. 42 A.3d 1247 (R.I. 2012). Another case is *Bard v. Jahnke*, wherein a carpenter sued the owner of a farm for injuries caused by a breeding bull allowed to roam the farm unrestrained. 848 N.E. 2d 464, 464 (N.Y. 2006). The court held there was no duty to protect the carpenter from injuries caused by the breeding bull because the farmer was not on notice of the vicious propensities of the breeding bull. *Id.* at 466, 468 (citing Collier v. Zambito, 807 N.E.2d 255, 255 (N.Y. 2004)). The court did apply a no-duty rule; however, the case could be construed to fall within the parameters of the exceptions to the *Restatement (Third) PEH's* section 7, which provides that ordinarily an actor has a duty to use reasonable care. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(a) (AM. LAW INST. 2010). Owners-and-occupiers-of-land cases might often fall within the category of exceptional cases where no duty is owed. *Id.* § 7 cmt. e. One interesting point is that the New York court considered the breeding bull a domesticated animal and the no-duty to confine sprang from that classification. *Bard*, 848 N.E.2d at 466. The author's experience with breeding bulls suggests Oklahomans might perceive breeding bulls in a different light than seen by the majority of the judges on the New York Court of Appeals. In other words, the breeding bull would be considered dangerous by nature and there would be a duty to protect lawful entrants upon the land from the breeding bull.

193. *Gushlaw*, 42 A.3d at 1245, 1248–49, 1264.

194. *Id.* at 1264.

Bird, *Smithkline*, *Nabors Drilling*, and *Gushlaw* all share common attributes. All observe that foreseeability is a factor in determining duty cases,[195] foreseeability alone will not create a duty,[196] and strong policy reasons support not imposing a duty.[197] Accordingly, all resolve the controversy by deciding no duty is owed under the facts of the individual cases.[198] Under the *Restatement (Third) PEH's* approach, there are two alternatives for the resolution of this sampling of cases. First, the courts could still conclude there was no duty owed for cases brought under Section 7(b)[199] and declare the cases "exceptional" and "articulate[] countervailing principle or policy [that] warrant[] denying or limiting liability in a particular [category] of cases."[200]

The imposition of a duty in *Smithkline* would "[c]onflict[] with another domain of law"[201] because the imposition of a duty by the laboratory on a potential employee would interfere with the contractual duty owed by the laboratory toward the employer regarding the analysis of the blood. In *Nabors Drilling*, if the court created a duty to monitor fatigue levels of employees, there would be "administrative difficulties"[202] because there would be "difficulty gathering evidence or drawing doctrinal lines necessary to adjudicate certain categories of cases."[203] And holding in *Bird* that a mental-health professional owed a duty to the father to correctly diagnosis child abuse would conflict with the duty to protect children from such abuse; therefore, such a duty would inappropriately conflict with "another domain of law"—i.e., child protection laws.[204] Finally, expansion of dram-shop liability in *Gushlaw*

195. *Id*. at 1256; *Nabors Drilling*, 288 S.W.3d at 405; *Smithkline*, 903 S.W.2d at 353; *Bird*, 868 S.W.2d at 769.

196. *Gushlaw*, 42 A.3d at 1256–57, 1261; *Nabors Drilling*, 288 S.W.3d at 408–09 (actor's ability to control was a key factor in determining duty); *Smithkline*, 903 S.W.2d at 353; *Bird*, 868 S.W.2d at 769

197. *Gushlaw*, 42 A.3d at 1264; *Nabors Drilling*, 288 S.W.3d at 410–12; *Smithkline*, 903 S.W.2d at 353–54; *Bird*, 868 S.W.2d at 769.

198. *Gushlaw*, 42 A.3d at 1264; *Nabors Drilling*, 288 S.W.3d at 413; *Smithkline*, 903 S.W.2d at 354; *Bird*, 868 S.W.2d at 770.

199. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) (AM. LAW INST. 2010).

200. *Id.*

201. *Id.* § 7 cmt. d (italics omitted).

202. *Id.* § 7 cmt. f (italics omitted).

203. *Id.*

204. *See id.* § 7 cmt. d (italics omitted).

to include a designated-driver duty would conflict with the legislative control of liquor liability. The no-duty holding would arguably be an appropriate "[d]eference to discretionary decisions of another branch of government."[205]

On the surface, this first approach in deciding the sampling of cases might seem sound from an analytical standpoint. However, the danger exists in most cases where a court would want to conclude there is no duty, the court could consider the case *exceptional*. A court could create a category of cases supported by policy reasons, and thus squeeze them into an exception. The *Restatement (Third) PEH's* general framework that a duty is generally owed in all cases could disappear through cleverly crafted exceptions.[206] The exceptions would then swallow the rule. This approach would thwart the overriding goal of the *Restatement (Third) PEH* that "[w]hen liability depends on factors specific to an individual case, the appropriate rubric is scope of liability,"[207] and the case should be submitted to the jury to "protect the traditional function of the jury as factfinder."[208]

The second approach is to follow the *Restatement (Third) PEH's* general rule and conclude a duty is owed because "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."[209] Accordingly, the jury would have to resolve the case. The jury could easily conclude liability should be imposed in this sampling. Arguably, it is this potential for liability that, in part, nudged the respective courts toward a no-duty approach. If a duty is owed in *Nabors Drilling*, fatigue-related automobile accidents are within the risks created by the requirement that employees work twelve-hour shifts for an entire week.[210] If a duty is owed in *Bird* to the father accused by a mental-health-care professional of sexually abusing his child, damage to the father is likely if he is erroneously prosecuted.[211] Within the cluster of risks from negligent misdiagnosis of the child is the risk of damage to the parents. Clearly, in *Gushlaw* the risks to others on the roads is anticipated if the designated driver allows an intoxicated friend

205. *Id.* § 7 cmt. g (italics omitted).
206. *Id.* § 7(a).
207. *Id.* § 7 cmt. a.
208. *Id.* § 7 cmt. j.
209. *Id.* § 7(a).
210. Nabors Drilling, U.S.A. Inc. v. Escoto, 288 S.W.3d 403, 404 (Tex. 2009).
211. Bird v. W.C.W., 868 S.W.2d 768, 769 (Tex. 1994).

to get behind the wheel of a car.[212] Lastly, in *Smithkline* a report submitted by a laboratory that an applicant for a job failed a drug test when the failure was due to consumption of poppy seeds could easily result in a jury verdict for the applicant if the laboratory owed a duty to warn of the danger of false positives from poppy seeds.[213]

The stumbling block for the plaintiff to resolve these cases appears to be duty. Once this barrier to recovery is removed, the jury could easily decide for the various plaintiffs because each case appears meritorious. By removing the no-duty tool from the court's hands, the jury would receive more cases. The more cases submitted to the jury, the more likely the injured plaintiff will receive a verdict in its favor. Remember, the jury in *Palsgraf* found in favor of Helen Palsgraf.[214] Other examples of questionable jury verdicts exist. A jury verdict in favor of the plaintiff for $750,000 was affirmed when a tavern served an intoxicated wheelchair-bound patron alcohol, and the wheelchair-bound patron deliberately drove his vehicle into the tavern causing serious injuries to the plaintiff.[215] The fear of unwarranted plaintiffs' verdicts is not totally unwarranted.

The *Restatement (Third) PEH's* default position (a duty is owed in all but an exceptional category of cases) will have the not-so-subtle impact of broadening potential liability. Even if cases were decided for the defendant at trial, transactional costs could increase because more cases would require a jury trial, which would increase the cost of litigation.

212. Gushlaw v. Milner, 42 A.3d 1247, 1248 (R.I. 2012).
213. Smithkline Beecham Corp. v. Doe, 903 S.W.2d at 353–54 (Tex. 1995).
214. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928).
215. Cusenbary v. Mortensen, 1999 MT 221, ¶ 1, 987 P.2d 351, 353. The court stated:

> The consequences of serving alcohol to a person who is visibly intoxicated are reasonably foreseeable precisely because of the causal relationship between serving alcohol and drunken conduct. Wells' drunken conduct was not freakish, bizarre, or unpredictable as Mortensen asserts. Rather, drunken conduct is the expected, predictable, and therefore reasonably foreseeable outcome of serving alcohol to a person who is already intoxicated.

Id. ¶ 30, 987 P.2d at 356. "[T]he intervening cause in the present case (Wells' drunken driving) is the reasonably foreseeable result of the original negligence complained of (Mortensen's serving of alcohol to Wells who was already intoxicated)." *Id.* ¶ 31, 987 P.2d at 356.

Further, a case that has the potential to go to the jury, with the corresponding potential for a plaintiff-friendly verdict, has more value from a settlement standpoint. Although incentives to settle might be good, the result of a mandate to go to the jury because a duty is owed might cause a resulting increase in the amount and number of settlements. This is either an intended or an unintended consequence of the *Restatement (Third) PEH*, but a consequence nonetheless.

B. No Duty on a Case-by-Case Basis

The *Restatement (Third) PEH* disapproves of a judicial holding that no duty is owed under the facts of an individual case. However, courts will likely continue to resort to this familiar approach in some cases where the court wants to assure, as a matter of law, no liability will be found. Under the *Restatement (Third) PEH*, a duty is owed,[216] and the case would be submitted to the jury if the risk of harm was within those "risks that made the actor's conduct tortious."[217] The jury would be the final arbitrator.[218] Because "[d]uty is a question of law for the court . . . while scope of liability, although very much an evaluative matter, is treated as a question of fact for the factfinder,"[219] a court's resort to a no-duty approach in a particular case would allow the court to avoid the potential of a plaintiff's verdict in select cases and rule for the defendant as a matter of law. Three illustrations of cases where a court might decide there is no duty in a given case without crafting a category of cases exception will be discussed.

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216. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(a) (AM. LAW INST. 2010).

217. *Id.* § 29.

218. The *Restatement (Third) PEH* section 29 distinguishes the function of the judge and jury as follows:

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

Id. § 29 cmt. q.

219. *Id.* § 29 cmt. f.

First, there are categories of cases where the law evolved to impose a duty of care. For example, the illegal sale or provision of alcohol to a visibly intoxicated person or to a minor creates a duty to third persons who are injured by the intoxicant. Dram-shop liability is well established.[220] However, courts are occasionally confronted with cases that stretch the boundaries of liability too far and conclude no duty is owed. For example, the seller of alcohol to a minor owed no duty to those injured when a third person deliberately poured 190-proof Everclear, or grain alcohol, over an open flame in *Selwyn v. Ward*.[221] The court in *Goodwin* provides another example. The court held "that although bars can often set the stage for rowdy behavior, we do not believe that bar owners routinely contemplate that one bar patron might suddenly shoot another."[222] Accordingly, the court declined to "impose a blanket duty on proprietors to afford protection to their patrons."[223] There was no duty because "a shooting inside a neighborhood bar is not foreseeable as a matter of law."[224]

Secondly, restriction of duty on a case-by-case basis is expedient and an appealing judicial tool. The case of *Kaczinski* is celebrated because it is one of the few cases to adopt the scope-of-risk test from the *Restatement (Third) PEH*.[225] As the reader will recall, the landowners disassembled a trampoline and left parts in their yard.[226] High wind gusts

220. Other examples of cases where the law has evolved to create duties include cases dealing with criminal attacks on business premises. *See* Posecai v. Wal-Mart Stores, Inc., 99-1222 (La. 11/30/99); 752 So.2d 762, 768–69. There are also cases for the failure to report abuse. *See* Landeros v. Flood, 551 P.2d 389, 395 (Cal. 1976); Becker v. Mayo Found., 737 N.W.2d 200, 208–10, 212–13 (Minn. 2007). Cases also deal with a therapist's failure to warn potential victims of the danger from a client. *See* Tarasoff v. Regents of Univ. of Calif., 551 P.2d 334, 340 (Cal. 1976). Finally, there are some cases that deal with the failure to remove keys from ignitions. *See* Ney v. Yellow Cab Co., 117 N.E.2d 74, 80 (Ill. 1954). This list is not exclusive. However, if the facts become too attenuated or far-fetched, a court could easily hold no duty was owed in the case at hand to avoid submission of the case to the jury.

221. Selwyn v. Ward, 879 A.2d 882, 888 (R.I. 2005). The court stated duty was to be determined on a case-by-case basis, considering both public policy and foreseeability. *Id.* at 887. Dram-shop liability "reflect[s] a public policy against underage drinking and not incendiary behavior." *Id.* at 888.

222. Goodwin v. Yeakle's Sports Bar & Grill, Inc., 62 N.E.3d 384, 393–94 (Ind. 2016).

223. *Id.* at 394.

224. *Id.*

225. Thompson v. Kaczinski, 774 N.W.2d 829, 839 (Iowa 2009).

226. *Id.* at 831.

blew the top of the trampoline into the road.[227] Thompson lost control of his vehicle and was injured when he swerved into a ditch to avoid the trampoline.[228] The court found a reasonable jury could conclude a risk caused by leaving an unsecured, disassembled trampoline in a yard is that the top of the trampoline could become a road hazard following high winds.[229] However, the concurring judge made the following observations:

> [T]he majority holds that the defendants had a common-law duty to reasonably secure outdoor personal property from being displaced by the wind. While I agree with the holding, I believe it should be narrowly construed to the facts of this case. A narrow construction is necessary because there may be a point when public-policy considerations would intervene to narrow the duty to exclude some items of personal property placed or kept by homeowners and others outside a home, such as patio and deck furniture and curbside waste disposal and recycling containers.[230]

Common sense applauds that observation. There will always be cases that demand resolution to narrow the scope of duty in individual cases, admittedly a result the *Restatement (Third) PEH* attempts to avoid.

Finally, another example comes from the case of *Banks v. Bowen's Landing Corp.*[231] The Landing was an outdoor bar area that abutted a float and ramp on Newport Harbor.[232] Banks was intoxicated and dove off the ramp into the shallow waters of Newport Harbor and suffered a broken back.[233] In the resulting cause of action to recover for Banks's injuries, the trial court entered judgment for the defendants because there was no duty to warn of the depth of the water or erect barriers.[234] The Supreme Court of Rhode Island affirmed, holding no duty was owed.[235]

227. *Id.*
228. *Id.* at 831–32.
229. *Id.* at 839.
230. *Id.* at 840 (Cady, J., concurring).
231. 522 A.2d 1222 (R.I. 1987).
232. *Id.* at 1223.
233. *Id.* at 1224.
234. *Id.*
235. *Id.* at 1227.

The court acknowledged that "[n]o clear-cut rule exists to determine whether a duty is in fact present in a particular case."[236] The court did not believe Banks jumping into the harbor was foreseeable, nor did the court believe that a warning would dissuade an intoxicated person from diving.[237] Further, diving into shallow water is a danger within the common knowledge of mankind.[238] However, the real reason the court found no duty under the facts of this case is one steeped in policy:

> We find it difficult to envision the complete extent of the burden we would impose upon water-front-property owners were we to conclude that they owe a duty to warn against and prevent people's diving off their property into shallow waters. Such a duty, if imposed, might require the construction of unsightly and burdensome barriers along the shore and restrict access to beaches, docks, and other recreational spots along the water. We agree with the second trial justice, who eloquently concluded that "[b]arricades might well seriously diminish the utility of [our state's] docks, wharfs and floats which are designed to permit and enhance rather than retard passage between land and water."[239]

Unique considerations of state policy might dictate the need for flexibility and the retention of deciding the issue of duty in individual cases.

Despite the *Restatement (Third) PEH's* approach, courts could easily resort to a conclusion that no duty is owed in cases dealing with an unforeseeable plaintiff. In the celebrated *Palsgraf* case, employees of the Long Island Railroad negligently helped two men board a moving train.[240] One man carried an unmarked package that was accidently

236. *Id.* at 1225.

237. *Id.* Other courts could easily conclude reasonable minds may differ on whether it was foreseeable an intoxicated patron would dive into the harbor. A drunk diving into water strikes the author as conduct a tavern should anticipate if the bar is located outside next to a body of water.

238. *Id.*

239. *Id.* at 1225–26.

240. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99 (N.Y. 1928).

dislodged and fell upon the tracks.[241] The unmarked package contained fireworks and exploded on the tracks.[242] The facts state the explosion caused a penny- weighing machine to topple over and strike Mrs. Palsgraf who was standing many feet away on the platform.[243] Judge Cardozo held no duty was owed to Mrs. Palsgraf because injury to Mrs. Palsgraf was not foreseeable under the facts of the case.[244] "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."[245] The foreseeable risk was toward the men boarding the train, not to Mrs. Palsgraf.[246]

The *Restatement (Third) PEH* specifically rejects this approach. It states, regarding unforeseeable plaintiffs, "[n]o express limitation in this Section places harm to unforeseeable plaintiffs outside the scope of an actor's liability. . . . Ordinarily, the risk standard contained in this Section will, without requiring any separate reference to the foreseeability of the plaintiff, preclude liability for harm to such plaintiffs."[247] *Palsgraf* could have been decided based on the rationale that an explosion causing heavy objects to fall was not the "result from the risks that made the actor's conduct tortious";[248] negligently helping men board a train includes many risks of personal harm but not an explosion from the contents of an unmarked package.

However, there is nothing to suggest all cases having an unforeseeable plaintiff will also have an unforeseeable risk. In other words, the risk might be one the actor using reasonable care should have avoided, but injury to the plaintiff was not anticipated. One such example is the case of *Radigan v. W. J. Halloran Construction Co.*[249] Halloran

241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* ("The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all.").
247. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. n. (AM. LAW INST. 2010). Thus, the *Restatement (Third) PEH* rejects the *Restatement (Second)*, which had adopted a provision to address the unforeseeable plaintiff. RESTATEMENT (SECOND) OF TORTS § 281(b) (AM. LAW INST. 1965).
248. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (AM. LAW INST. 2010).
249. 196 A.2d 160 (R.I. 1963).

Construction was using a crane to construct a bridge when the steel bucket of the crane contacted an uninsulated power line.[250] The power line carried 110,000 to 115,000 volts.[251] The electrical current traveled "underground along an unused electrical conduit, where it burned a hole in a 12-inch gas main causing a gas leak. The leaking gas penetrated to the third floor of the fire station where it caused an explosion, resulting in the death of plaintiff's decedent."[252] Citing *Palsgraf* for support, the Rhode Island Supreme Court concluded no duty was owed because the plaintiff was not foreseeable.[253]

> In the case at bar nothing is alleged that would lead the operator of the crane to foresee that the electricity escaping from the power line would follow the course it did and by the co-operation of other factors underground and unknown to the operator would enter the fire station, commingle with escaping gas and emerge in the room where the decedent was working, and cause an explosion. In other words, the allegations of the declaration do not reasonably apprise defendant of any duty which it owed to the decedent.[254]

The *Restatement (Third) PEH's* approach would differ. A duty would be owed under the *Restatement (Third) PEH*.[255] Further, harms from negligently causing an uncontrolled electrical current of 110,000 to 115,000 volts could easily include explosion from leaking gas and be within the "risks that made the actor's conduct tortious."[256] The case would be one for the jury to resolve. Clearly, the *Restatement (Third) PEH* would consider the latter approach the better analytical approach. The more appropriate question is which approach would be utilized by most courts: the *Restatement (Third) PEH's* or Cardozo's view in *Palsgraf* where no duty is owed. The author suspects many would retain the no-duty approach in cases dealing with the unforeseeable plaintiff.

250. *Id.* at 161.
251. *Id.*
252. *Id.*
253. *Id.* at 163.
254. *Id.*
255. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(a) cmt. n (AM. LAW INST. 2010).
256. *Id.* § 29.

C. Judicial Reception

Hopefully, this sampling of cases will illustrate that many courts will refrain from the adoption of the *Restatement (Third) PEH's* duty approach. One of the few courts to address the issue whether to adopt the *Restatement (Third) PEH* was the Delaware Supreme Court in *Riedel v. ICI Americas Inc.*[257] The court made the following observations:

> At this time, we decline to adopt any sections of the *Restatement (Third) of Torts*. The drafters of the *Restatement (Third) of Torts* redefined the concept of duty in a way that is inconsistent with this court's precedents and traditions. The *Restatement (Third) of Torts* creates duties in areas where we have previously found no common law duty and have deferred to the legislature to decide whether or not to create a duty.
>
> . . . .
>
> Whether the expansive approach for creating duties found in the *Restatement (Third) of Torts* is viewed as a step forward or backward in assisting courts to apply the common law of negligence, it is simply too wide a leap for this Court to take. Therefore, at the present time we continue to follow the *Restatement (Second) of Torts*.[258]

The Delaware Supreme Court is likely prognosticating the approach of most courts on this issue for a variety of reasons. The resolution of cases on an individual basis based on a lack of duty owed is well entrenched in our case law. Judicial familiarity with the approach will support its continued use. As a tool, it allows judicial efficiency in screening and deciding cases as a matter of law to avoid a full trial and submission of the case to the jury. Even if normally there is a duty in certain types of cases, the facts could be sufficiently unique where a court would find it appropriate to decide the case as a matter of law and declare there is no duty under the facts. The same result could occur when sufficiently strong state policies demand a similar approach. Many courts would continue applying the no-duty rule toward unforeseeable plaintiffs. Furthermore, the traditional approach could avoid the potential

257. 968 A.2d 17, 20 (Del. 2009).
258. *Id.* at 20–21 (emphasis added).

of broadening liability. Or the potential artful misuse of the *Restatement (Third) PEH's* exception, that it is appropriate to conclude there is no duty "[i]n exceptional cases[] when an articulated countervailing principle or policy warrants denying or limiting liability in a particular [category] of cases,"[259] could result. The judiciary is very capable of justifying results by creating categories of cases based on articulated policy reasons. Time-honored principles of *stare decisis* also mandate retention of the current law on duty.

VI. CONCLUSION

The scholarly debate regarding duty, the proper role of foreseeability, and the *Restatement (Third) PEH's* proposal will likely continue.[260] The judicial reaction to the *Restatement (Third) PEH's* approach has been lukewarm.[261] It is safe to say when courts were faced with the question of whether to adopt the *Restatement (Third) PEH's* approach, most courts rejected it rather than accepted it when specifically confronted with the issue.[262]

Courts are likely to cling to duty determinations in individual cases where appropriate, and they will be hard to persuade and accept the idea that a duty is owed in all but exceptional cases that fall within a clearly articulated category of cases.[263] The *Restatement (Third) PEH* attempts to purge the concept of foreseeability from tort law. However, simply said, "foreseeability plays a role in the analysis of duty."[264] "Duty to foresee is often the most salient policy issue constituent within the larger

259. § 7(b).

260. *See* Cardi, *supra* note 6; Cardi & Green, *supra* note 113; Golanski, *supra* note 113; Marks, *supra* note 113; Steenson, *supra* note 6; Twerski, *supra* note 113; Read & Reynolds, *supra* note 6.

261. *See, e.g.*, Gipson v. Kasey, 150 P.3d 228, 231 (Ariz. 2007); Thompson v. Kaczinski, 774 N.W.2d 829, 829 (Iowa 2009); Latzel v. Bartek, 846 N.W.2d 153, 162 (Neb. 2014).

262. *See, e.g.*, Wilson v. Moore Freightservice, Inc., Civ. No. 4:14-CV-00771, 2015 WL 1345261, at *5 (Fed. D. Ct. M.D. Pa. March 25, 2015); Cannizzaro v. Marinyak, 57 A.3d 830, 837 (Conn. App. Ct. 2012); Goodwin v. Yeakle's Sports Bar & Grill, Inc., 62 N.E.3d 384, 390 (Ind. 2016); Cullum v. McCool, 432 S.W.3d 829, 829 (Tenn. 2013); Tesar v. Anderson, 2010 WI App 116, ¶ 11, 789 N.W.2d 351, 357 n.13. In *Cullum*, the concurring judge urged the use of the *Restatement (Third) PEH*. *Cullum*, 432 S.W.3d at 839 (Holder, J., concurring & dissenting). The Wisconsin Court of Appeals asked the question, "Why mess with success?" *Tesar*, ¶ 11, 789 N.W.2d at 358 n.13.

263. § 7.

264. *Goodwin*, 62 N.E.3d at 390.

duty determination."[265] Foreseeability "clarifies duty's parameters and helps send to the jury those cases in which enforcing an obligation to foresee is deemed normatively desirable."[266]

Foreseeability is also consistently used in proximate-cause cases. Cleansing foreseeability from the language of proximate cause will be a difficult undertaking. Familiarity breeds endurance of ideas.[267] Eradicating the term *proximate cause* in favor of *scope of liability* will likely confront the same fate as the *Restatement (Second) of Tort's* attempted extermination in favor of the term *legal liability*.[268] Respect for precedent, *stare decisis*, and familiarity will likely be winning arguments. "[T]he role of foreseeability gives courts appropriate gatekeeping responsibilities consistent with the traditions and policy of negligence law, and . . . it is a familiar system to judges and lawyers who understand it and know how to apply it."[269]

The presage of the judicial reaction to the risk test of scope of liability is limited or varied acceptance. Embodiment of the risk test as the sole criteria for scope of liability or proximate cause will be a hard sale to the courts.[270] The forecast is minimal whole-scale acceptance in a few courts. However, the risk test will probably be embedded as a useful tool in more courts who will incorporate the risk test into existing doctrine. In other words, the risk test and other theories of proximate cause will coexist.

Even if the *Restatement (Third) PEH* does not develop an

265. Golanski, *supra* note 113, at 278.

266. *Id.* ("Foreseeability in duty is a resilient hybrid factor tending to meld duty A (whether the protected group should be deemed closely enough situated to warrant defendant's consideration) and duty B (whether the defendant should be vigilant or investigate) concerns.").

267. SUN TZU, THE ART OF WAR 9 (2018 ed.) (Written 500 B.C. First translated from Chinese by Lionel Giles, M.A., 1910). The enemy you know is better than the unknown one.

> If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.

Id.

268. RESTATEMENT (SECOND) OF TORTS § 430 (AM. LAW INST. 1965).

269. Steenson, *supra* note 6, at 1058.

270. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (AM. LAW INST. 2010).

enthusiastic throng, its most lasting contribution to the development of tort law may be "inviting courts to evaluate their own negligence law to determine whether it is structured in a clear way that judges and lawyers can understand and apply with consistency and that achieves proper balance in the judge-jury relationship."[271]

Courts will continue to be confronted with arguments to endorse the position of the *Restatement (Third) PEH* and adopt scope of liability instead of proximate cause,[272] apply the risk test[273] rather than foreseeability to resolve proximate-cause issues, abandon the substantial-factor test in favor of "but for" causation,[274] adopt the presumption of duty,[275] and only apply no-duty rules to a category of cases based on solid principles[276] that do not include foreseeability as a factor. Hopefully, this Article illustrates the continued importance of the concept of duty and foreseeability, its use in the law of the vast majority of jurisdictions, and the position of the *Restatement (Third) PEH* being the arguable outlier. "A capacity to change is indispensable. Equally indispensable is the capacity to hold fast to that which is good."[277]

271. Steenson, *supra* note 6, at 1133.

272. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM ch. 6, Special Note on Proximate Cause (AM. LAW INST. 2010).

273. *Id.* § 29.

274. *Id.* § 26 cmt. j.

275. *Id.* § 7(a).

276. *Id.* § 7(b).

277. LEONARD ROY FRANK, RANDOM HOUSE QUOTATIONARY 92 (2001) (quoting John Foster Dulles (1888–1959)).