TORT APPENDECTOMY: A HISTORICAL APPROACH TO REMOVING THE VESTIGIAL RELATIONSHIP REQUIREMENT FOR DUTY

*Bryce W. Talbot**

The duty element of a negligence action under many states' case law has seen a variety of interpretations and constructions. Perhaps the most common, and puzzling, of these is that a duty must arise based on some relationship between the plaintiff and defendant. This Article employs a novel historical analysis to argue that the reliance on relationships is a vestige of the old-English writ system that should not be retained. Further analysis confirms that the duty concept in the United States started as a general duty from all to all. But then activists, scholars, and judges began implementing a more limited, narrow duty (more similar to proximate cause) for policy reasons they believed in. Since then, courts have struggled to define and implement duty as an element of tort law. Following this analysis, this Article then presents novel case study research on how courts have variously tried to define duty, and how a historically-accurate definition of duty would lead to more consistent and proper results, resolving confusion among the lower courts and preserving the proper role of the jury in factual determinations.

INTRODUCTION

With the world-wide arrival of the novel coronavirus in 2020, scholars, pundits, and government officials from small-town mayors to world leaders have grappled with how to respond to a pandemic where every individual's negligent actions can create havoc for strangers on a global scale. As cases increased, along with strains on health systems and growing fatality lists, government responses varied. New Zealand implemented strict regulations that seemingly paid off.[1] Several West African countries, experienced from the Ebola epidemic, were among the first to take protective steps.[2] Sweden notably took a hands-off approach for many months, entrusting its citizens to be conscientious and prudent in their

* Bryce Talbot is a graduate of the University of Arizona College of Law. Bryce would like to thank his wife, Alex, and his family for their support.

1. Paul Dyer, *Policy and Institutional Responses to COVID-19: New Zealand*, BROOKINGS (Jan. 24, 2021), https://www.brookings.edu/research/policy-and-institutional-responses-to-covid-19-new-zealand/.

2. Marguerite Massinga Loembé et al., *COVID-19 in Africa: The Spread and Response,* 26 NATURE MED. 999, 999-1000 (June 11, 2020), https://www.nature.com/articles/s41591-020-0961-x.

interactions with others.[3] Different states and even different counties in the United States implemented different approaches ranging from no regulations, to pro forma restrictions with no real bite, to quarantines enforced by prison time.[4]

The disagreements even boiled over onto front lawns and into coffee shops. Viral videos show these arguments and the litany of constitutional and statutory provisions, real and imagined, being peddled and skewed to back up the speaker's beliefs. Companies have had to consider the liability that might come with their policies concerning masks, services, and whether to even be open.[5] Lawsuits began pouring in regarding the alleged mismanagement of cruise lines, hotels, nursing homes, and airlines.[6]

Undoubtedly, one thing this pandemic has highlighted is how the irresponsibility of others, including complete strangers, can have a harmful, even deadly, impact on individuals and whole populations. It raises important questions of how we define our duty of care to others in society and to what extent we will allow liability to compensate those who are harmed.

Tort law seeks to answer many of these questions, and negligence principles offer the solution to many harms that arise while living in a collective society. The duty of care, as the first guidepost of negligence, leads the charge in addressing these problems. But what is the duty of care and how does it define our responsibilities to refrain from harming others?

Some state courts have stated that individuals owe a duty of care to only certain other people.[7] This is often limited to instances where the plaintiff and the defendant have a pre-existing "special relationship."[8] Such relationships often exist between family members, employers and employees, or where one undertakes an action for the benefit of another.[9]

But what about if someone with an infectious disease carelessly exposes others at a wedding, for example, to the likely risk of harm? That person might be liable to their own family members, but not to the others in the same room with whom they have no "special relationship." The tortfeasor is made immune to the damages he transmits.

In contrast, some have argued that a duty of care lies whenever a tortfeasor's actions create a risk of harm to others.[10] In other words, if you are doing something that could harm others, be careful while you do it. This definition does not rely on

---

3. Nele Brusselaers et al., *Evaluation of Science Advice During the COVID-19 Pandemic in Sweden*, 9 HUMANITIES & SOC. SCI. COMMC'NS. 1, 1 (Mar. 22, 2022), https://www.nature.com/articles/s41599-022-01097-5#citeas.

4. *See, e.g.,* Paulin Cachero, *Yes, You Can Face Criminal Charges, be Fined, and Even Jailed for Breaking a Coronavirus Quarantine*, INSIDER (Mar. 12, 2022, 12:27PM), https://www.insider.com/breaking-coronavirus-quarantine-in-us-jail-charges-fines-2020-3.

5. Christopher J. Boggs, *Legal Liability and Requiring COVID Masks,* INS. J. (June 24, 2020), https://www.insurancejournal.com/blogs/big-i-insights/2020/06/24/573346.htm.

6. *Coronavirus Lawsuits / COVID-19 Lawsuits*, RIDDLE & BRANTLEY, https://justicecounts.com/ coronavirus-lawsuits-covid-19-lawsuits/ (last visited Nov. 1, 2022).

7. *See infra* Part IV.A.

8. *Id.*

9. *Id.*

10. *See infra* Part III.

the identity of the person who is put in harm's way. Indeed, the Restatement (Third) of Torts defines tort duty in this way, and courts throughout the country have been faced with the question of adopting this broader definition.[11]

By employing a novel historical analysis of English common law and early U.S. thought, this Article contends that requiring relationships in order to impose a duty is a vestige from the old-English writ system and that the historically correct definition of duty is broad like the Third-Restatement definition. It was only in the last century that duty began to be used as a vehicle to limit liability for questionable policy reasons.[12] Neither the vestige from the writ system nor the twentieth century policies provide a good foundation for requiring relationships to impose duties. Courts should not be reluctant to return to and adopt the proper definition of duty, like that contained in the Third Restatement.

Indeed, while much has been said about various perceived virtues or mistakes in the Third-Restatement definition of duty from a *contemporary policy* perspective,[13] this Article seeks to understand the *historical* role of special relationships in the tort duty of care and duty's proper definition. This Article then argues that the Third-Restatement definition of duty correctly encompasses the historically accurate scope of duty and therefore provides a firmer foundation for tort law. Finally, the Article examines two case studies, the treatment of duty in Arizona and in Utah, and offers considerations for state courts in making well-grounded and consistent duty decisions. More particularly, this Article will proceed as follows.

Part I of this Article will examine what role relationships played in the historical common law development of negligence actions. Specific attention will be paid to the development of actions for trespass and trespass on the case, and how relationships between parties in these early writs translated to later developments in negligence actions. Of course, the centuries-long history of the common law cannot be laid down with great detail in these pages. However, in scrutinizing and building on the work of historical scholars, this analysis will hypothesize one possible understanding of the arc of common law development and argue that the collective intelligence of centuries of jurists should be understood to impose liability for misfeasance that causes physical harms, and not just the dereliction of a pre-existing duty of someone within a relationship.

Part II will discuss the early treatment of duty and relationship in American negligence law and the purposeful conversion in the twentieth century of duty into a vehicle to limit liability.

Part III presents the Restatement (Third) of Torts definition of duty and its relationship to the historically accurate duty.

Lastly, Part IV will present and analyze the case law of Arizona and Utah as case studies illustrating two different implementations of duty and how the historically accurate duty leads to better results. Most importantly, this case study

---

11. RESTATEMENT (THIRD) OF TORTS § 7.

12. *See infra* Part II.

13. *See generally*, John C. P. Goldberg & Benjamin C. Zipursky, *The* Restatement (Third) *and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001) (discussing the Third-Restatement definition of duty).

research provides courts around the country with valuable evidence and analysis in considering the scope of negligence liability and a return to historical wisdom: specifically, liability that is not limited to relationships, and therefore respects the fact finder's position in our system and creates clear court rulings with more predictable results.

I. HISTORICAL ORIGIN OF RELATIONSHIPS IN THE DUTY CONCEPT

A. Duty in the Writ System

The writ system was solidified in England by William the Conqueror and it prescribed the ways a person could seek redress from a court.[14] Traditionally, there was the king's court and other lower courts, and each handled different matters.[15] Important to this Note's consideration is the writ of trespass.[16] The writ of trespass was a claim that could be brought in the king's court and had to involve a breach of the king's peace, or *contra pacem regis*.[17] Thus, these claims were more about breaching the community peace and not about disagreements between individuals in a legal relationship.[18] While the writ of trespass would include actions like what we now consider battery, it would not include your disagreement with your neighbor, for example, about the number of eggs that he promised to bring you.[19]

In order to deal with disagreements between people that were not based on harm from direct force, but on broken promises or harms caused indirectly, local courts applied what became known as the writ of trespass on the case, or "case" as it has now become known.[20] Eventually, people wanted to bring case writs into the king's court to get better remedies, so injured parties would frame the same situation as a writ of trespass.[21] For example, instead of claiming that a farrier did a bad job (i.e., was negligent) in putting a shoe on a horse which infected and killed the horse, the claimant would simply claim that the defendant had killed his horse by force, against the king's peace, thereby satisfying the writ of trespass.[22] The particular facts of the case would then be presented once in the jury phase.[23]

By the fourteenth century, however, hiding case actions in the writ of trespass became less necessary.[24] Customary liability of the innkeeper, for example, could not sensibly have been charged as a breach of the king's peace.[25] But in 1368, an

---

14. *See* DAVID C. DOUGLAS, WILLIAM THE CONQUEROR: THE NORMAN IMPACT UPON ENGLAND 293 (1964); S. F. C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 22 (2d ed. 1981).

15. MILSOM, *supra* note 14, at 52.

16. *Id.* at 287.

17. *Id.* at 289-91. *See also* Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L. Q. 49, 58-59 (1991).

18. *See* MILSOM, *supra* note 14, at 289-90.

19. *See id; see also* Kelley, *supra* note 17, at 57-61.

20. MILSOM, *supra* note 14, at 283.

21. *See id.* at 289-90; s*ee also* Kelley, *supra* note 17, at 57-58.

22. MILSOM, *supra* note 14, at 290.

23. *Id.* at 299.

24. *Id.* at 290-91.

25. *Id.* at 290-91, 345.

action for carelessness was brought on the king's behalf and alleged contempt of the king.[26] Claims based on carelessness in relationships (case) were now heard with claims between strangers (trespass), and attempting to keep a practical separation between the two was unworkable.[27] More specifically, "[w]hat was unworkable was the proposition that the forms corresponded to distinct kinds of fact and were mutually exclusive."[28] Soon, an allegation that the conduct was *contra pacem regis* was no longer needed for jurisdiction and, for example, "the writ against the careless driver [(a stranger)] could have become as truthful as the writ against the careless smith [(someone within a relationship)]. Only conservatism and the advantage of *capias* [warrants] kept the old form in use, and divided the law of torts into two."[29] Thus, the distinction between harms arising between strangers versus harms within a relationship "were first separated by jurisdiction and kept apart, as has been seen, by a mishap over process. … And this artificiality was perpetuated, because there was no change in the form of the writ when the king's peace ceased to be necessary for jurisdiction."[30]

By the end of seventeenth century, negligence was beginning to be seen as the basis for an action in itself, "based on the defendant's failure to take reasonable care," and that "a man shall be answerable for all mischief proceeding from his neglect or his actions."[31] In practicality, it became so that when

> a man was civilly liable for inadvertent harm to his fellow-creatures.… [There was not] any formal and conscious postulation of a precedent duty on the defendant's part to take care. *Such duty was repeatedly taken for granted*….[32]

Indeed, as negligence became separated from other areas of law, "'duty' was not made the subject of critical discussion by counsel or by the bench."[33] Indeed, "[i]f duty was sought for at all, it was found in some simple explanation like 'custom of the realm,' or 'trust or confidence placed in the defendant,' or it was referred to an otiose maxim like '*Sic utere tuo ut alienum non laedas*,'"[34] or "use your [own] property in such a way as not to injure another's."[35] A duty of reasonable care did not require a special relationship.

---

26. *Id.* at 292.
27. *Id.* at 397.
28. *Id*.
29. *Id.* at 398.
30. *Id.* at 393-94.
31. James C. Plunkett, *The Historical Foundations of the Duty of Care*, 41 MONASH U. L. REV. 716, 718 (2015).
32. Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 48 (1934) (emphasis added).
33. *Id.* at 49.
34. *Id.*
35. Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1004 (2004)

B. Misfeasance and Nonfeasance

Along with these new discussions among scholars came the consideration of on what principle negligence was based.[36] Holmes argued that the basis of liability for tortious conduct was always predicated on fault.[37] Other scholars claimed it had never been well defined and had always simply been a question of whether the circumstances warranted the victim being compensated.[38]

By the mid-1800s, a majority of courts found liability based on the principle of fault.[39] Fault is an idea that contemplates morals.[40] To be at fault is to have transgressed some societal standard as opposed to only caring whether a prescribed duty was met.[41] Fault, therefore, is of a different nature than nonfeasance. The most obvious manifestation of this is that true nonfeasance does not care *how* the omission happened—it is only concerned with whether something happened, which is now considered strict liability.[42] Fault, on the other hand, does not simply look objectively at what happened but rather contemplates the actor and whether his or her actions were right or wrong—for example, the question of reasonable care.[43] "[If] the conduct of the defendant was free from blame, he will not be liable."[44] For instance, in the 1850 case *Brown v. Kendall*, the Supreme Court of Massachusetts held that liability in a personal injury case had to be based on whether the defendant had used ordinary care and prudence as judged by society and not simply on whether a proscribed duty had been neglected, regardless of the reason.[45]

Chief Justice Shaw in *Brown v. Kendall* suggested that the ordinary care standard would be applicable whenever an injury occurred while someone was doing something that was generally lawful to do.[46] One noted scholar, G. Edward White, argues that to Chief Justice Shaw negligence not only applied to neglect of specific duties within a relationship but "was the touchstone… of a general theory of civil obligation, under which persons owed other persons a universal but confined duty to take care not to cause injury to another."[47] Negligence as its own independent principle, therefore, relied on fault and a societal-moral standard of right and wrong, and not solely on omission of a proscribed duty.[48]

---

36. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 16 (Oxford Univ. Press Expanded ed. 2003) (1980).

37. *Id.* at 13.

38. *Id.* at 14.

39. *Id.* at 15-16.

40. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 539 (1972).

41. *See id.*; WHITE, *supra* note 36, at 13.

42. *See* Fowler V. Harper & Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 886-87 (1934); Fletcher, *supra* note 40, at 539.

43. *See* Fletcher, *supra* note 40, at 539.

44. Brown v. Kendall, 60 Mass. (6 Cush.) 292, 296 (1850).

45. *Id.* at 293.

46. *Id.* at 297.

47. WHITE, *supra* note 36, at 16.

48. *See id.* at 15-16.

Other scholars, like Morton Horwitz, have likewise recognized an important "shift in emphasis" during the nineteenth century from an "implied contract theory of nonfeasance to a tort conception of misfeasance."[49] In addition to emerging from a new emphasis on fault as opposed to omission of a preexisting duty, liability based on a wide and general standard of care came about in a practical sense from the need to deal with "stranger cases"—accidents that involved non-contracting strangers with no preexisting relationship.[50]

II. TORT LAW IN AMERICA

By the early 1800s, the writ system was falling apart in the courts of the United States and scholars looked for general theories and principles of law to organize a system without writs.[51] As late as 1871, even Justice Oliver Wendell Holmes declared that "Torts is not a proper subject for a law book."[52] Soon, however, the tone changed and scholars began looking to define torts as its own segment of law.[53] Justice Holmes, now a supporter of the idea, began by analyzing the related writs that might fall under the heading of tort, and categorized them into absolute liability, intentional torts, and negligence.[54] Edward White argues that Holmes' identification of negligence as an independent theory was significant because it "systematized an embryonic expansion in American case law of the meaning of negligence from that of neglect of a specific, predetermined duty to that of violation of a more general duty potentially owed to all the world."[55]

This was embodied in Justice Holmes' statement that tort law is made up of a duty owed "of all the world to all the world."[56] The modern negligence principle in America had therefore grown "from the omission of a preexisting, specific duty owed to a limited class of persons to the violation of a generalized standard of care owed to all."[57]

A. Duty Transformed into a Vehicle for Limiting Liability

Along with the emergence of negligence as a standalone subject, and the recognition of a generalized duty of care, came the need to consider the limits of liability.[58] *Legal* or *proximate* cause was first used to limit liability but as seen

49. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 95 (1977).

50. *Id.*; WHITE, *supra* note 36, at 16.

51. WHITE, *supra* note 36, at 8-12.

52. Oliver W. Holmes, *Book Notices*, 5 AM. L. REV. 337, 341 (1870).

53. Oliver W. Holmes, *The Theory of Torts*, 7 AM. L. REV. 652, 659-60 [hereinafter *Theory of Torts*]. This article has no named author, but it is widely attributed to Holmes. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 reporters' note (AM. L. INST. 2010).

54. *Id.*

55. WHITE, *supra* note 36, at 13.

56. *Theory of Torts*, *supra* note 53, at 660.

57. WHITE, *supra* note 36, at 18.

58. *Id.* at 93.

below, by the mid-1900s some scholars were advocating for the use of duty as a vehicle for liability limitations.[59]

The practical question was: who could, theoretically, be held liable for an injury? The simple answer: the person who caused the injury. However, scholars recognized that causation could have an almost indefinite number of intermediate steps—policy required that there be some limit to liability.[60] However, there was some debate about how to fit these considerations into the overall structure of the emerging negligence doctrine.[61] By the late nineteenth century, the prevailing way to do this was by using the language of *legal* or *proximate* causation, asking whether the injury was too marginal or remote from the careless act.[62] Not only did there need to be a factual link between the defendant's acts and the injury, but courts began to hold that even when there was a factual causation, some injuries were "nonetheless too marginal to give rise to liability."[63] Debate about the exact formulation of proximate cause continued into the twentieth century, but almost all viewpoints were motivated by "fairness" between the parties.[64]

For the most part, using proximate cause as the vehicle for limiting the scope of liability was not challenged until the late 1920s when Professor Leon Green made an argument against it.[65] Building on the prior work of a few scholars, Green argued that using proximate cause to limit liability was foolish.[66] He called proximate cause "a bogey, the sort of thing found only in children's story books—a sort of child's mind creation."[67] Instead of focusing on a "vague conception" of fairness with proximate cause, Green suggested the question to be answered is more rightly who should bear the burden of payment for the injuries.[68]

To Green, these overall questions of limiting liability for policy reasons "were in fact related to a determination of the scope of a given defendant's *duty* to a given plaintiff."[69] As such, the question would be for the judge, "whom we like to think able to comprehend the purposes of rules and to take into account the interests of a whole society, to define the scope of protection afforded?"[70] The questions should not, as Green put it, be left to the "whimsical incapacities of laymen."[71] Green's theory, therefore, was nothing less than an "abandonment" of the general duty of care[72] and of the jury's proper role as the fact finder.[73] Instead, Green argued that duty should be used to limit the scope of liability and that duty

59. *See id.*
60. *See id.*
61. *See id.* at 93-102.
62. *Id.* at 93.
63. *Id.*
64. *Id.* at 93-94.
65. *Id.* at 94.
66. *See id.* at 94-95.
67. LEON GREEN, RATIONALE OF PROXIMATE CAUSE v (1927).
68. *See id.* at 196.
69. WHITE, *supra* note 36, at 94 (emphasis added).
70. GREEN, *supra* note 67, at 198.
71. *Id.* at 199.
72. WHITE, *supra* note 36, at 94.
73. *Id.* at 95.

would be based on a relationship between the plaintiff and defendant.[74] There could only be a duty to protect that plaintiff if the risk to that plaintiff was foreseeable.[75] The reaction from scholars to this split from conventional negligence theory was mixed.[76]

B. Palsgraf v. Long Island Railroad Company

The debate between proximate cause and Green's new duty conception came to fruition in the now famous case *Palsgraf v. Long Island R.R. Co.*[77] In that case, two railroad employees were helping a man board a soon-departing train.[78] In the process, the two employees dislodged a package containing fireworks from the man's arms, and it fell to the platform.[79] The fireworks exploded which caused a piece of equipment to fall on and injure Palsgraf, who was standing many feet away.[80] Palsgraf sued the railroad for the injuries based on the negligence of its employees.[81]

The unique and unfortunate series of events that led to Mrs. Palsgraf's injury made this case prime ground for considering the scope of liability: were the employees really liable for a nondescript package, that happened to contain fireworks, causing injury to a woman standing far away from the incident?[82] As White explains, if the railroad was not liable, it would have to be based either on proximate cause or something similar to Green's new duty concept.[83]

Chief Judge Cardozo's first line of discussion points to which of the two analysis he applied: "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."[84] He continued, "[i]f no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless… with reference to her, did not take to itself the quality of a tort because it happened to be a wrong… with reference to some one [sic] else."[85] To Judge Cardozo, the reason the railroad was not liable to Mrs. Palsgraf was not because the proximate causation was too marginal.[86] It was because the act had not been negligent with reference *to her*—there was no relationship.[87] Had the equipment

74. *Id.* at 107.
75. William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 4 (1953).
76. WHITE, *supra* note 36, at 96.
77. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928).
78. *Id.* at 99.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. WHITE, *supra* note 36, at 97-99.
84. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99 (N.Y. 1928).
85. *Id.*
86. *See id.*
87. *See id.*

hit the same man from whom the package had been dislodged, it is arguable that there would have been liability according to Cardozo's reasoning.[88]

This analysis, using duty instead of causation to limit the scope of liability, was a "reorientation of negligence theory."[89] This is even more reinforced by Judge Andrews' dissent that recognized the departure from the traditional view of duty and hoped to reemphasize that "[d]ue care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B or C alone."[90]

C. The Confusion Continues

The confusion of what role proximate cause played continued.[91] By 1941, William Prosser had concluded that proximate cause "cannot be reduced to absolute rules.… 'It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent.'"[92] Duty and proximate cause continued to coexist as ways of putting policy limitations into negligence cases.[93] For example, the Restatement (Second) of Torts talks about duty in terms of "persons within a given area of danger" and a "class of persons" but also uses proximate cause to limit liability to the class of victims to whom a reasonable man would say the danger was caused.[94]

In summary, the long history of tort law does not support a duty limited by relationships. While there was some separation between stranger and relationship cases centuries ago because of the writ system, even that distinction quickly became vestigial as all the cases were brought together. By the time of early American tort law, duty was firmly established as including strangers. But activism in the twentieth century began using duty to limit liability in a way unsupported by centuries of common law development. A return to the historically accurate definition of duty, like that found in the Third Restatement, is proper.

III. THE THIRD RESTATEMENT DEFINITION OF DUTY REFLECTS THE HISTORICALLY ACCURATE BROAD DUTY

The Restatement (Third) of Torts § 7 seeks to shore up the walls of negligence doctrine and define the role of duty and proximate cause.[95] In doing this, it considers the existing concepts of both duty and proximate cause and puts them both in their rightful spheres.[96] The Restatement (Third) formulation of duty reaffirms that: (1) there is a broad and mostly general duty of care owed to others

88. *See id.*

89. WHITE, *supra* note 36, at 98.

90. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 102 (N.Y. 1928).

91. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 319 (1941).

92. *Id.* at 319-20 (quoting THOMAS A. STREET, FOUNDATIONS OF LEGAL LIABILITY 110 (1906)).

93. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 281 (stating elements of a cause of action for negligence), 431 (stating elements of legal cause) (1965).

94. RESTATEMENT (SECOND) OF TORTS §§ 281 cmt. c, 431 (1965).

95. *See* RESTATEMENT (THIRD) OF TORTS PHYS. & EMOT. HARM § 7 cmt. a (AM. L. INST. 2010).

96. *See id.* §§ 7 cmt. a, 29 cmt. f.

when a risk of physical harm is created by an actor; and, (2) duty can act as a vehicle for judicially-imposed policy limitation on liability so long as that limitation is well-articulated and for an entire class of cases.[97]

Specifically, the Third Restatement provides that,

> [a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.… In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.[98]

Unlike the Restatement (Third) definition, a more narrow definition based on relationships is not historically accurate nor a staple of the common law of negligence in America.[99] It is quite the opposite. As seen, in the United States, the original theory was a general duty of care from all to all.[100] Things get complicated when policy considerations militate against imposing liability.[101] Proximate cause has always been used to limit liability on the facts of the case, allowing the scope of liability determination to be made by the jury in most cases.[102] Duty limitations became another way to limit liability based on policy, but the confusion surrounding the historical foundations of duty and its wide use by the judiciary have led to unpredictable results and inconsistent rulings.[103]

The broad, and more defined duty of care in the Restatement (Third) returns duty to its proper definition before it was used as a vehicle for policy limitations that were popular at the time.

IV. STATE COURTS' VARYING APPROACHES TO DUTY AND THE APPLICATION OF THE HISTORICALLY ACCURATE DUTY: ARIZONA AND UTAH AS CASE STUDIES

Because the distinction between stranger and relationship cases is an artificial vestige with no policy basis, case law that has sought to hold on to a duty limited to relationships ends up with inconsistent holdings. This may often be the case because courts encounter facts where fairness and common sense dictate some level of liability, but no technical relationship exists.

This article does not present the Restatement (Third) definition of duty as a better and *new* step forward in Tort law that states should consider adopting. Indeed, many courts, for a variety of reasons, including political, are reluctant to engage in perceived revisions to law even if it is something entirely within their jurisdiction and authority, like common law tort claims.

---

97. *See id.* § 7.
98. *Id.*
99. *See supra* Section I.A.
100. *See supra* Section I.B.
101. *See supra* Section II.A.
102. DAN B. DOBBS ET AL., HORNBOOK ON TORTS § 9.6, at 199 (2d ed. 2016).
103. *See supra* Section II.A.

Rather, this Article argues that the Restatement (Third) definition *more accurately* captures the *proper*, *historical* definition of duty, and that adopting this definition is not a revision or "sea change" in tort law but a return to and reaffirmation of duty's proper place. Due to its more proper basis and historical refinement, true duty, like defined in the Restatement (Third), leads to more consistent ruling and less confusion of the rules of the court and jury.

To show this, we will consider two case studies. First, in Arizona, the state courts have tried to hang on to a limited view of duty. This section considers Arizona cases, their inconsistent rulings and struggles to justify this view, and how the historically accurate, Third Restatement definition of duty would lead to better results. Second, Utah's approach will be considered. These cases have adopted a more holistic, historically accurate view of duty, and present a firmer and more predictable basis for tort liability.

These case studies illustrate how different courts around the country have considered the definition of duty to varying degrees. Additionally, this research provides courts with evidence and a basis to evaluate their own case law, consider inconsistent results, and frame a return to a more proper definition of duty.

A. Arizona Seeks to Limit Duty to Special Relationships

Arizona case law has struggled with defining duty and how to implement it. Various cases have described duty differently, applied it differently, and made different statements about what the standard in Arizona is and why it should or should not be changed. This case study reviews Arizona cases relating to when duty arises, whether there should be an omnipresent duty, whether historical case law supports a broader duty, and how policy consideration should be made.

1. When Does Duty Arise?

Arizona cases often echo a view of duty based on preexisting or quasi-contractual relationships as was the case during the emergence of the negligence doctrine in England hundreds of years ago.[104] For example, in *Quiroz v. ALCOA Inc.*, where a negligence action was brought by an asbestos worker's son against the employer, the appellate court held that "[a] duty of care may arise from a special relationship [between the plaintiff and defendant] based on contract, family relations, or conduct undertaken by the defendant, or may be based on categorical relationships."[105] This formulation is very common in recent Arizona negligence cases and also often includes that public policy only found in statute may give rise to a duty as well.[106] Although the formulation as stated by the courts does not

104. *See supra* Section I.A.

105. Quiroz v. Alcoa Inc., 382 P.3d 75, 78 (Ariz. Ct. App. 2016), *cert. granted*, 2017 Ariz. LEXIS 30 (Feb. 14, 2017), *vacated* 416 P.3d 824 (Ariz. 2018).

106. *See* Guerra v. State, 348 P.3d 423, 425 (Ariz. 2015) ("'Duties of care may arise from special relationships'… and from public policy considerations" (quoting Gipson v. Kasey,150 P.3d 228, 232 (Ariz. (2007))). *See also* Stanley v. McCarver, 92 P.3d 849, 850-52 (Ariz. 2004); Acri v. State, 394 P.3d 660, 663 (Ariz. Ct. App. 2017); Noriega v. Town of Miami, 407 P.3d 92, 95 (Ct. App. 2017);

explicitly limit duty to only these situations, the way the courts go about the duty analysis has often had the same effect in recent years: the *Quiroz* court's analysis, for example, found no relationship between the parties that gave rise to a duty and rejected a public policy argument.[107] After finding no duty from this express list, the court rejected arguments that would open "new channels of liability."[108] In *Barkhurst v. Kingsmen of Route 66, Inc.*, an Arizona appellate court likewise held that there was no relationship and so found no duty.[109] Another case, *Hogue v. City of Phoenix*, limited duty to special relationships and public policy, and held that "[b]ecause a duty of care arose neither from the existence of a special relationship nor from public policy, the [negligence] claims fail."[110]

Duty restricted in this way has recently become so imbued in our tort system that when the Arizona Supreme Court heard oral arguments in *Quiroz v. ALCOA, Inc.*, Justice Bolick explained that "if you look at the structure of our cases we have typically insisted either on a special relationship or deriving a public policy rationale from statutory law [in order to find a duty]."[111] Likewise, many of the questions directed at the appellant during oral arguments were concerned that the Restatement (Third) would create a general duty of care and therefore a "sea change" in Arizona tort law.[112] The court in *Quiroz* relied on *Delci v. Gutierrez Trucking Co.*, which suggests that adopting the Restatement (Third) definition of duty would "substantially change Arizona's longstanding conceptual approach to negligence law by effectively eliminating duty as one of the required elements of a negligence action."[113]

The support the *Delci* court gives for this statement is illustrative of the harkening back to old English duty that causes courts to worry of a sea change.[114] In the first instance, the court cites Justice Hurwitz's concurrence in the Arizona Supreme Court case *Gipson v. Kasey*.[115] There, Justice Hurwitz correctly explains that the Restatement (Third) approach views duty as the norm but departs from it in certain instances.[116] Second, the *Delci* court cites the equally correct statement that "[w]e do not understand the law [of Arizona] to be that one owes a duty of reasonable care at all times to all people under all circumstances."[117] The suggestion seems to be that the two statements are incongruent and therefore

---

Hogue v. City of Phoenix, 378 P.3d 720, 723 (Ariz. Ct. App. 2016), *cert. denied*, 2017 Ariz. LEXIS 17 (Jan. 10, 2017).

107. *Quiroz*, 382 P.3d at 81.

108. *Id.*

109. Barkhurst v. Kingsmen of Route 66, Inc., 232 P.3d 753, 758 (Ariz. Ct. App. 2014).

110. *Hogue*, 378 P.3d at 723.

111. Oral Argument at 15:00, Quiroz v. ALCOA, Inc., 416 P.3d 824 (Ariz. 2018) (No. CV-16-0248-PR), https://supremestateaz.granicus.com/player/clip/2138?view_id=11&redirect=true&h=3fb06461dfb2ab0d2ba0d8360b62ae0f (last visited Nov. 2, 2022).

112. *Id.* at 6:30, 8:50.

113. Delci v. Gutierrez Trucking Co., 275 P.3d 632, 637 (Ariz. Ct. App. 2012).

114. *See supra* Section I.A.

115. *Delci*, 275 P.3d at 637 (citing Gipson v. Kasey, 150 P.3d 228, 234 (Ariz. 2007) (Hurwitz, J., concurring)).

116. *Gipson*, 150 P.3d at 234.

117. *Delci*, 275 P.3d at 637 (citing Wertheim v. Pima Cnty., 122 P.3d 1, 5 (Ariz. Ct. App. 2005)).

adoption the Restatement (Third) definition would be a sea change.[118] This suggestion, however, misunderstands both the Restatement (Third) definition of duty and the long standing conceptual approach.

2. The Restatement (Third) Does Not Impose an Omnipresent Duty

The Restatement (Third) definition of duty does not impose a duty "at all times to all people under all circumstances."[119] Instead it states,

> (a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm. (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.[120]

Thus, there are two requirements for there to be a duty—a prerequisite and a limitation: the actor's conduct must create a risk of physical harm; and even then, there may be no duty because of an articulated policy concern.[121]

The first of these, that the actor must create a risk of physical harm, is a reiteration of the general distinction in tort law between misfeasance and nonfeasance.[122] Misfeasance is the improper performance of an act, while nonfeasance is the failure to act.[123] Said in the confines of duty, the distinction is that, "as a matter of general legal theory, it is said that D[efendant] has a negative duty to refrain from hurting P[laintiff], but has no affirmative duty to help P[laintiff] in her time of need or peril."[124] Arizona cases have likewise recognized this distinction.[125]

One such case is instructive: *Cobb v. Salt River Valley Water Users' Ass'n*.[126] In *Cobb,* the Arizona Supreme Court found that a company that had negligently created a slick condition on a public sidewalk outside its building owed a duty to the passer-by plaintiff who slipped and injured herself.[127] The Court held that had the problem with the sidewalk arisen from a natural cause, the company would have had no duty to exercise reasonable care in relation to the sidewalk.[128] Such a

---

118. *See id.*

119. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM §7 (AM. L. INST. 2010).

120. *Id.*

121. *See id.*

122. *See* Brian D. Bender, *Torts: The Failings of the Misfeasance/Nonfeasance Distinction and the Special Relationship Requirement in the Criminal Acts of Third Persons—State v. Back*, 37 WM. MITCHELL L. REV. 390, 396 (2010).

123. Fowler V. Harper & Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 887 (1934).

124. RICHARD A. EPSTEIN, TORTS 285 (1999).

125. *See, e.g.*, Cobb v. Salt River Valley Water Users' Ass'n, 114 P.2d 904, 905 (Ariz. 1941); *Grimm v. Arizona Bd. of Pardons & Paroles*, 564 P.2d 1227, 1234 (Ariz. 1977).

126. *See Cobb*, 114 P.2d 904.

127. *Id.* at 905.

128. *Id.*

duty would be for nonfeasance which the Court declined to impose.[129] However, the company had created the risk of a physical injury by making the sidewalk slick—the improper performance of an act.[130] A reading of the opinion in this case does not reveal any special relationship between the two parties—the sidewalk was public land, the plaintiff was just passing by the company, and the company had not undertaken to fix the sidewalk.[131] A quick peruse of tort cases in Arizona will show that a relationship between parties is important when considering affirmative duties.[132] However, in instances of risk-creation, or misfeasance, like here, the court held that the company owed a duty to the public "to do no affirmative act that will create a dangerous condition," without the need to find a relationship.[133] The Restatement (Third) § 7 duty is limited to these situations where someone has positively acted and created a risk of physical harm.[134]

The Restatement (Third) further allows a limit on this duty if a public policy consideration is articulated for a class of cases.[135] This is consistent with the post Leon Green move away from a true general duty of care by allowing duty to serve as a vehicle for judicially-imposed policy limitation of liability.[136] The Restatement (Third) simply prescribes a clearer and sounder way of doing this, as will be discussed below.[137]

3. There is Support for the Restatement (Third) Definition in Arizona Case Law

Part of the resistance to the Restatement's (Third) definition of duty arises from a misunderstanding of not only what the section says, but also the scope of duty in Arizona case law.[138] To argue that Arizona common law on duty is *limited* to public policy and special relationships (including contractual and undertakings), one must overlook several Arizona Supreme Court cases which note a duty on every person to "avoid creating situations which pose an unreasonable risk of harm to others."[139]

---

129. *See id.*

130. *See id.* at 907.

131. *See Id.* at 905.

132. *See, e.g.*, Cummings v. Henninger, 236 P. 701, 702 (Ariz. 1925) (considering a slip and fall case that occurs on the defendant's property); Diaz v. Phoenix Lubrication Serv., Inc., 230 P.3d 721-22 (Ariz. Ct. App. 2010) (examining liability where the defendant undertook to perform a service); Monroe v. Basis Sch., Inc., 318 P.3d 871, 873-74 (Ariz. Ct. App. 2014) (considering where a school-student relationship can lead to an affirmative duty to act).

133. Cobb v. Salt River Valley Water Users' Ass'n, 114 P.2d 904, 905 (Ariz. 1941).

134. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (AM. L. INST. 2010).

135. *Id.*

136. *See supra* Section I.C.

137. *See supra* Section II.B.

138. *See* Delci v. Gutierrez Trucking Co., 275 P.3d 632, 637 (Ariz. Ct. App. 2012).

139. *E.g.*, Nunez v. Pro. Transit Mgmt. of Tucson, Inc., 271 P.3d 1104, 1108 (Ariz. 2012); Gipson v. Kasey, 150 P.3d 228, 233 n.4 (Ariz. 2007); Ontiveros v. Borak, 667 P.2d 200, 209 (Ariz. 1983).

This is not to say that there is not disagreement on the issue of duty.[140] A few courts have noted the tension surrounding some of the courts' statements regarding there being a general duty of care.[141] For example, *Markowitz v. Arizona Parks Board* recognized that Arizona case law had "failed to clarify [the Court's] views of the duty problem."[142] This case is cited by several cases in discussing duty as a matter of relationship.[143] The facts of *Markowitz*, however, involve the failure to act, which is nonfeasance, and not the creation of the risk of physical harm, which is misfeasance, and the way that the Restatement (Third) talks about having a general duty.[144] If the common distinction between misfeasance and nonfeasance is recognized, *Markowitz* is distinguishable from other cases that would use the Restatement (Third) § 7 definition of duty.

Moreover, Arizona courts in other cases before and after *Markowitz* have found there to be a duty when no special relationship existed between the parties.[145] In 2007, the *Gipson* Court noted that the scope of negligence has been extended beyond the idea of relationship-based duty.[146]

In some instances, Arizona courts have come to view duty as a general duty of care subject to policy considerations.[147] For example, the Arizona Supreme Court in *Ontiveros v. Borak*, quoting Professor Prosser, held that under Arizona's common law of negligence, duty is "an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[148] Other Arizona cases have continued to reference this formulation.[149] Importantly, the *Ontiveros* Court also echoed the first part of Professor Prosser's quote, namely that "'duty' is not sacrosanct in itself."[150] In essence, duty does not exist as a principle in and of itself that must be based on something; it is purely a vehicle for policy considerations. This recognizes the true historical underpinnings of duty in the United States.[151]

A more recent Arizona Supreme Court case, *Gipson v. Kasey*, recognized in a footnote that, while relationship-based duty came about from "actions on the case" in the writ system between people who already had a relationship, the common law necessarily developed to recognize a more general duty of reasonable

---

140. *See Gipson*, 150 P.3d at 230-31.

141. *E.g.*, *id.* at 233 n.4 (noting that "tension may exist between language" of differing Arizona court cases); Sanders v. Alger, 394 P.3d 1083, 1085-86 (Ariz. 2017).

142. Markowitz v. Arizona Parks Bd., 706 P.2d 364, 368 (Ariz. 1985).

143. *See, e.g.*, Carrow Co. v. Lusby, 804 P.2d 747, 753 (Ariz. 1990).

144. *See Markowitz*, 706 P.2d at 366-68.

145. *See Carrow Co.*, 804 P.2d at 752-53. *See also* Stanley v. McCarver, 92 P.3d 849, 851-52 (2004) (noting that "courts have imposed duties for the protection of persons with whom no preexisting 'relationship' existed"); Lombardo v. Albu, 14 P.3d 288, 291 (2000) (finding that an agent was obliged to disclose information to a third party on the basis of their client's fiduciary duty to said third party); Gipson v. Kasey, 150 P.3d 228, 235 (2007) (Hurwitz, J., concurring).

146. *Gipson*, 150 P.3d at 232.

147. *See* Ontiveros v. Borak, 667 P.2d 200, 208 (1983); *see also Gipson*, 150 P.3d at 232.

148. *Ontiveros*, 667 P.2d at 208 (quoting PROSSER, *supra* note 91, at 324).

149. *See e.g.*, Geurra v. State, 348 P.3d 423 (2015).

150. *Ontiveros*, 667 P.2d at 208 (quoting PROSSER, *supra* note 91, at 324).

151. *See* PROSSER, *supra* note 91, at 84.

care.[152] The next footnote of *Gipson* went on to cite *Ontiveros*, recognizing that the Supreme Court had already noted that "every person is under a duty to avoid creating situations which pose an unreasonable risk of harm to others."[153] The Court noted the similarity between this holding and the Restatement (Third) definition but, because it found duty based on statute, declined to decide whether duty would arise under this broader definition.[154]

The "tension" that exists between cases on the issue of negligence duty in Arizona courts can hardly allow for a clear consensus of what Arizona common law currently is.[155] Adoption of the § 7 definition of duty does not seem to be a sea change in Arizona law when the statements of some Supreme Court cases are very similar to that definition.[156] Adoption would ease the tension by clarifying the approach to take in these cases without having to rely on cases that admitted confusion.[157]

4. How Policy Considerations are Made: The Third Restatement Definition Compared to Arizona Law

The Restatement (Third) definition applies a default duty when an actor creates a risk of physical injury.[158] A judge may still find no duty as a matter of law "in exceptional cases" when "an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases …."[159] Additionally, the comments to this section also seek to fix the problem of courts "tak[ing] the question of negligence away from the jury" when the court believes no reasonable mind could differ on the matter, but then "inaptly express[ing] this result in terms of duty."[160] The comment directs that these instances "should not be misunderstood as cases involving exemption from or modification of the ordinary duty of reasonable care."[161]

An appropriate policy consideration under the Restatement (Third) definition of duty therefore involves three important considerations for the court: (1) Distinguishing between a no-duty holding (which is in the court's province) and finding no negligence as a matter of law with an understanding that such a ruling invades the jury's province and takes the important question away from them;[162]

---

152. Gipson v. Kasey, 150 P.3d 228, 232 n.3 (2007).

153. *Id.* at 233 n.4.

154. *Id.*

155. *See id.*

156. *See id.* at 232.

157. *See* Markowitz v. Ariz. Parks Bd., 706 P.2d 364, 368 (1985).

158. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010), cmt. o. "An actor's conduct creates a risk when the actor's conduct or course of conduct results in greater risk to another than the other would have faced absent the conduct. Conduct may create risk by exposing another to natural hazards, as, for example, when a pilot of an airplane flies the plane into an area of thunderstorms. Conduct may also create risk by exposing another to the improper conduct of third parties."

159. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010).

160. *Id.* at cmt i.

161. *Id.*

162. *Id.*

(2) the countervailing principle or policy must be articulated;[163] and (3) the no-duty holding must apply to a class of cases and not just to the particulars of the case at hand.[164] In comparison to current laws from states like Arizona, the historically-accurate definition in the Restatement (Third) results in a proper recognition of the jury's role and well-articulated no-duty rules that lead to predictable results.

i. Recognizing the Jury's Role and Distinguishing between No-Duty and No-Negligence Holdings

The right of trial by jury is imposed by the Arizona Constitution.[165] This echoes the same guarantee that has been part of the fabric of rights in the United States since the adoption of the Bill of Rights.[166] In civil cases, the jury is the fact-finding body.[167] It "weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts."[168] The Arizona Supreme Court has stated in *Nichols v. City of Phoenix* that the "very essence" of this constitutionally required body is to come to a conclusion and that that "conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored."[169] Unless a certain high burden is met, "[n]o court is justified in substituting its conclusions for those of the twelve jurors."[170] In negligence law, breach is a question of fact for the jury to consider even when taking into account how reasonable the situation is.

> The longstanding American practice has been to treat the negligence question as one that is assigned to the jury; to this extent, the question is treated as one that is equivalent to a question of fact. Accordingly, so long as reasonable minds can differ in evaluating whether the actor's conduct lacks reasonable care, the responsibility for making this evaluation rests with the jury.[171]

---

163. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010).

164. *Id.*

165. ARIZ. CONST. ART. II. SECTION 23 ("The right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law.").

166. *See* U.S. CONT. AMEND. 7 ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

167. Nichols v. City of Phoenix, 202 P.2d 201, 210 (1949).

168. *Id.*

169. *Id.*

170. Apache Ry. Co. v. Shumway, 158 P.2d 142, 150 (1945), overruled in part on other grounds by Gen. Petroleum Corp. v. Barker, 269 P.2d 729 (1954).

171. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 8 (2010), cmt. b.

Yet, renowned torts scholar Dan Dobbs identified invading the jury province as one of the "widespread criticism[s]" of using vague factors in duty determinations by the court.[172]

> The factors used by the judges [when determining duty by factors] are mainly the very same factors that determine the negligence question. Yet when the question is phrased as a question of duty, the judge, not the jury, may become the decision maker, evaluating risks created by the defendant, costs of avoiding them, and, other such quintessential jury issues as foreseeability. Some courts recognize that they must not invade the jury's province, yet without explanation continue to determine the existence or non-existence of a duty by using factors the jury would consider on the breach issue.[173]

This, along with other means of working around the jury's role, makes "a shambles of the whole trial process."[174]

When presented with a no-duty defense, a judge should first distinguish the two avenues of ruling as a matter of law: holding that there is no duty, or alternatively, holding that there is no negligence as a matter of law.[175] The Restatement (Third) definition serves to make this distinction clear; a no-duty holding can only happen with "an articulated countervailing principle or policy" for a "particular class of cases."[176] Other lists of factors that have previously been used,[177] which often involve factual considerations of the specifics of the case and the reasonableness of the situation, will not be considered under the title of duty.[178] If a judge wants there to be no liability based on the facts of the case without an exceptional and articulated no-duty reason, the judge is forced to recognize that such a determination would be taking the negligence question away from the jury.[179] Instead of considering vague theories of why duty does not affirmatively arise based on the particular facts, the judge determines whether reasonable minds could differ on the finding of negligence.[180] If not, the court must hold according to ruling on negligence as a matter of law and not on duty.[181]

Additional issues arise when the question of duty depends on preliminary questions of fact.[182] Case law in Arizona is clear: "whether a duty exists is a legal question to be decided by the court."[183] "However, when the existence of a duty depends on preliminary questions that must be determined by a fact finder, the

---

172. DAN B. DOBBS, PAUL T. HAYDEN AND ELLEN M. BUBLICK, THE LAW OF TORTS § 255 (2d ed.).
173. *Id.*
174. *Id.*
175. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010), cmt. i.
176. *See id.* at § 7.
177. *See id.* at § 7, cmt. i.
178. *See id.*
179. *See id.*
180. *See id.*
181. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010), cmt. i; *see id.*
182. Diggs v. Arizona Cardiologists, Ltd., 8 P.3d 386, 388 (Ariz. Ct. App. 2000) ("[T]he existence of a duty may depend on preliminary questions that must be determined by a fact finder.").
183. Gipson v. Kasey, 150 P.3d 228, 235 (Ariz. 2007).

court may not rule as a matter of law and should not enter summary judgment."[184] If the court relies on the old description of the duty determination which cares about factors and relationships, the duty determination is intermingled with the facts of the case, and the court may end up making these preliminary factual determinations in the process of deciding duty.[185] The Restatement (Third) does away with fact-specific duty determinations and specifically outlines that if reasonable minds can differ as to facts relating to the other elements of a negligence claim, the facts must be determined by the jury.[186]

ii. The Countervailing Principle or Policy for a No-Duty Determination Must be Articulated

In constructing a clearer definition of duty, the commenters to the Restatement (Third) explain that the new definition should be adopted to "facilitate more transparent explanations of the reasons for a no-duty ruling."[187] This reasoning and desire has been echoed by states adopting the Restatement (Third) definition.[188] In his concurrence in *Gipson v. Kasey*, Arizona Supreme Court Justice Hurwitz, joined by two of his colleagues, argued for the benefits of the Restatement (Third) definition of duty.[189] In commenting on the weight of a no-duty decision, Justice Hurwitz emphasized that a judicial no-duty finding for the defendant means that there is no liability at all even if the defendant's actions were unreasonable and the cause of the plaintiff's injuries.[190] "Such a result should obtain," he claimed, "only when there is a good reason for doing so, and courts finding no duty as a matter of law should be required clearly to identify that reason."[191]

Justice Hurwitz further argued that the Restatement (Third) definition "would simplify our analytical task in future cases and remove some understandable confusion among the bar and lower courts on the duty issue."[192] The Arizona Supreme Court has even recognized that Arizona "case law has created 'some confusion and lack of clarity'" in regards to what determines duty.[193] Parties are,

184. Perez v. Thrush, No. 1 CA-CV 12-0316, 2013 WL 773042, at *2 (Ariz. Ct. App. Feb. 28, 2013). *See* Estate of Maudsley v. Meta Servs., Inc., 258 P.3d 248, 255 (Ariz. Ct. App. 2011) (deciding whether a relationship that may give rise to a duty actually exists may be a factual question for a fact finder to decide before court can analyze duty); State v. Juengel, 489 P.2d 869, 873 (Ariz. Ct. App. 1971) (holding that a child plaintiff's status "as trespasser, licensee or invitee was contested and properly treated as a question of fact for the jury's determination"), overruled on other grounds in New Pueblo Constructors, Inc. v. State, 696 P.2d 185, 198-99 (Ariz. 1985).

185. *See* Boisson v. Arizona Bd. Of Regents, 343 P.3d 931, 933 (Ariz. Ct. App. 2015) (making a factual determination that a student trip was not school sanctioned and therefore no duty arose based on relationship); Sandoval v. City of Tempe, 2015 WL 3916994 at 4-5 (Ariz. Ct. App. 2015).

186. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 8 (AM. L. INST. 2010).

187. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. j (AM. L. INST. 2010).

188. A.W. v. Lancaster Cnty. Sch. Dist. 0001, 784 N.W.2d 907, 918 (Neb. 2010).

189. Gipson v. Kasey, 150 P.3d 228, 234-5 (Ariz. 2007) (en banc).

190. *Id.* at 235.

191. *Id.*

192. *Id.*

193. *Id.* at 231.

arguably, better served when they can better anticipate the law that will be applied to the facts before them.

Resolving this confusion and lack of clarity could lead to more efficient outcomes. The standard economic model of bargaining, which describes the process of deciding whether or not to pursue litigation to trial or instead settle a matter, requires, as an integral part of its formula, that the parties factor in their probability of being successful at trial.[194] Without a clear probability in the minds of the parties, an efficient decision cannot accurately be made.[195] Then, cases end up going to trial when they should have been settled and matters end up being settled that should have gone to trial, resulting in a net inefficient use of court costs and resources.[196] Better articulated and more transparent reasoning for no duty rules, attaching the reasoning to certain well-developed policy arguments, may give parties a better prediction of success at trial.[197]

A main focus of the Restatement (Third) definition is on articulated policy rationales to make sure that foreseeability is not used in the duty determination.[198] Using foreseeability to determine duty relies on specific facts of the case and interferes with the jury's role as fact finder.[199] Duty, a purely legal question, should be "explained and justified based on articulated policies or principles."[200] And "[t]hese 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."[201] The Arizona Supreme Court has already held that foreseeability should not be considered in duty determinations because "[t]he jury's fact-finding role could be undermined if courts assess [such factual inquires] in determining the existence of duty as a threshold legal issue."[202] Some Arizona cases have correctly focused on a policy consideration when finding no duty while others continue to use specific facts of the case.[203] Articulated policy

194. *See* Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L.J. 619, 630 (2006).

195. *See id.*

196. *See id.*

197. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. j (AM. L. INST. 2010). *See also* A.W. v. Lancaster Cnty. Sch. Dist. 0001, 784 N.W.2d 907, 916 (Neb. 2010) (explaining the mistakes that have been made in the Nebraska courts, sometimes allowing foreseeability to go to jury, other times assessing it under duty and thereby ruling on foreseeability as a matter of law, and then adopting the Restatement (Third) definition in order to correct these misunderstandings).

198. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. j (AM. L. INST. 2010).

199. *Id.*

200. *Id.*

201. *Id.*

202. Gipson v. Kasey, 150 P.3d 228, 231 (Ariz. 2007) (en banc).

203. *Cf.* Graham v. Valueoptions, 2010 WL 5054442 at *3 (Ariz. Ct. App. 2010). *But cf.* Hogue v. City of Phoenix, 378 P.3d 720, 723 (Ct. App. 2016) (relying on general non-fact-specific policy exclusions when finding no duty); Barkhurst v. Kingsmen of Route 66, 323 P.3d 753, 755-59 (Ariz. Ct. App. 2014); Sandoval v. City of Tempe, 2015 WL 3916994 at 4-5 (Ariz. Ct. App. 2015) (relying on specific facts for the case to find no duty based on policy).

and not fact specific reasons for no-duty determinations that are required by the Restatement (Third) sustain this objective.[204]

iii. A No-Duty Holding Must Apply to a Class of Cases

The Restatement (Third) definition requires that the articulated principle or policy reason for a no-duty determination apply in a particular class of cases.[205] So while specific case facts should generally not be taken into account when deciding whether duty exists, "when liability depends on factors applicable to categories of actors or patterns of conduct, the appropriate rubric is duty."[206] Likewise, "[n]o-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases."[207]

The Arizona Supreme Court has already held that "a conclusion that no duty exists is equivalent to a rule that, *for certain categories of cases*, defendants may not be held accountable for damages they carelessly cause."[208] This rule is also illustrated in *Markowitz v. Arizona Parks Bd.*, on which the *Gipson* Court relied.[209] *Markowitz* had to do with the actions of a park ranger and a visitor who was injured in the park. In explaining duty, the *Markowitz* court explained that

> [i]n the context of this case, the concept of duty is not a question of [specific facts]. The question is whether defendant was responsible to take any precaution for the safety of David or other invitees. Would the state have been liable even if the park ranger, knowing of the hazard, had sat on the rock, watched David get ready to dive and said nothing? Those who would answer that question in the negative find no duty. To those who would answer affirmatively … the question is was there a breach of the duty?[210]

This reinforces the rule that no-duty determinations cannot be based on the specific facts of the actions taken or situation as it stood.[211] By explaining that the correct question involves imagining extreme facts within the general confines of the class of case, the *Markowitz* court affirms that a no-duty rule must apply to the whole class of cases.[212] Even after *Markowitz* and *Gipson*, apparent confusion remains as cases continue to be dismissed for no duty based on specific facts of the cases that

---

204. *See supra* Section IV.A.1., adoption of the Restatement (Third) § 7 definition would not be a sea changed based on this foreseeability issue as well.

205. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (AM. L. INST. 2010).

206. *Id.* at cmt. a.

207. *Id.*

208. Gipson v. Kasey, 150 P.3d 228, 230 (Ariz. 2007) (en banc).

209. *See* Markowitz v. Arizona Parks Bd., 706 P.2d 364, 368 (Ariz. 1985); *Gipson*, 150 P.3d at 230.

210. *Markowitz*, 706 P.2d at 368.

211. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (AM. L. INST. 2010) cmt. a; *Gipson*, 150 P.3d at 230.

212. *Markowitz*, 706 P.2d at 368.

do not apply to the whole category.[213] The Restatement (Third) would serve to reinforce and clarify this already standing rule in Arizona.[214]

B. Duty Under Utah's Approach

Utah has taken a different approach. While relationships may still inform the court about certain duties, Utah does not require relationships for affirmative acts that create a risk of harm.

In *B.R. ex. rel. Jeffs v. West*, the Utah Supreme Court encountered the following facts: the defendant, West, was a nurse practitioner who prescribed certain medication to the plaintiffs' father.[215] Allegedly because of the certain combination of medication, plaintiffs' father shot and killed his wife, plaintiffs' mother.[216] The plaintiffs sued West for contributing to the murder, but the district court granted West's motion to dismiss, concluding that "West owed no duty of care to plaintiffs because 'no patient-health care provider relationship existed, at the time of the underlying events, between the plaintiffs… and the defendants.'"[217]

On appeal, the plaintiffs argued that a relationship is only required if an omission is alleged.[218] If the conduct alleged involves affirmative actions that create risks, no relationship is required for there to be a duty. The Court sided with the plaintiffs and helpfully explained why this distinction is important. It stated,

> "The long-recognized distinction between acts and omissions—or misfeasance and nonfeasance—makes a critical difference and is perhaps the most fundamental factor courts consider when evaluating duty. Acts of misfeasance, or "active misconduct working positive injury to others," typically carry a duty of care. Nonfeasance—"passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant"—by contrast, generally implicates a duty only in cases of special legal relationships.… A special legal relationship between the parties thus acts as a duty-enhancing, "plus" factor. Even in nonfeasance cases, where a bystander typically would owe no duty to prevent harm, a special legal relationship gives rise to such a duty.[219]

The Court then addressed a number of its previous precedents that came to the same conclusion and provided consistent and predictable rulings.

As an important note, this distinction between affirmative acts and omissions is not addressed in the Arizona cases that struggle with the definition of duty. Indeed, this may lead to many of the confusing and conflicting results in states, like Arizona, that attempt to require a relationship. Certainly, there are cases where someone is acting so brazenly risky to a stranger that courts attempt to impose

---

213. Acri v. State, 394 P.3d 660, 663 (Ariz. Ct. App. 2017); Barkhurst v. Kingsmen of Route 66, 323 P.3d 753, 755 (Ariz. Ct. App. 2014).

214. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. a (AM. L. INST. 2010).

215. B.R. v. West, 275 P.3d 228, 229-30 (Utah 2012).

216. *Id.* at 230.

217. *Id.* at 230 (alteration in original).

218. *Id.* at 230-31.

219. *Id.* at 231.

liability but on other grounds. For example, the Arizona Supreme Court would only impose liability on a person wildly swinging a golf club around strangers because there is a statute about assault and not because the conduct is dangerous as a matter of common law.[220] However, as this study of Utah's approach shows, noting the distinction between omissions and affirmative acts that create harm (and therefore a duty under the Restatement (Third)), helps to relieve this struggle and create consistent results.

C. Application to Other States

The principles discussed in these case studies illustrate how a return to the historically-accurate definition of duty contained in the Restatement (Third) is beneficial and a better foundation as a matter of policy. States across the country have struggled with how to define duty and then further struggled with how to implement that definition when faced with difficult fact patterns.

Specifically, from the illustrations in the case study of Arizona, courts may take a harder look at the bases for their rulings and ask when their definition of duty developed. Moreover, courts may ask whether the Restatement (Third) definition would really be a "sea change" they are reluctant to make or is it, in reality, a return to the proper definition of duty.

From Utah and Arizona, we see that the historically-accurate definition produces results that make more sense in fact patterns where there is no official relationship despite obvious bad acts. Furthermore, it is more judicially sound to leave questions relying on specific facts from the case to be decided by the jury, and not the court, in every instance.

In the end, these case studies should first give courts pause when they are reluctant to adopt the Restatement (Third) definition because they think it is a new change; however, in reality, it is a return to a more fundamental basis of tort law before duty was used as a vehicle to achieve a certain viewpoint. Second, courts should see the benefits that occur when duty is more firmly grounded in historical wisdom, including the correct role of the jury and more consistent and predictable results.

CONCLUSION

The return to a more accurate duty definition, like that contained in the Restatement (Third), would give clear guidelines to courts on how to determine duty. This definition would not be a sea change in tort law. It recognizes that a definition of duty that requires a relationship is a misunderstood vestige of the English writ system and that a narrow definition of duty in the United States arose as a policy limitation. It reaffirms what is found in many states' laws, including Arizona Supreme Court precedent, that duty is owed by every person "to avoid

220. *E.g.*, Quiroz et al. v. ALCOA Inc., 416 P.3d 824, 842-44 (Ariz. 2018).

creating situations which pose an unreasonable risk of harm to others;"[221] that the jury's role must be respected;[222] and that duty can be limited so long as articulated policy reasons are given for a class of cases.[223] The Restatement (Third) "is better understood as rearranging the basic questions that are posed by any negligence case and making sure that each question has been put in its proper place."[224] Such a clarification would reestablish tort duty with historical and precedential value and help to end the confusion and lack of clarity for the courts in many states.

221. *See* Nunez v. Pro. Transit Mgmt. of Tucson, Inc., 271 P.3d 1104, 1108 (Ariz. 2012); Gipson v. Kasey, 150 P.3d 228, 233 (Ariz. 2007) (en banc); Ontiveros v. Borak, 667 P.2d 200, 209 (Ariz. 1983).

222. *See supra* Section IV.A.4.

223. *See id.*

224. A.W. v. Lancaster Cnty. Sch. Dist. 0001, 784 N.W.2d 907, 918 (Neb. 2010).