WHO COULD HAVE SEEN THIS COMING? THE IMPACT OF DELEGATING FORESEEABILITY ANALYSIS TO THE FINDER OF FACT IN IOWA NEGLIGENCE ACTIONS

ABSTRACT

In November 2009, the Iowa Supreme Court decided Thompson v. Kaczinski *and reformulated the elements of negligence actions in Iowa to conform to the analysis presented in the Third Restatement of Torts: Liability for Physical and Emotional Harm. Two significant changes were made. First, the* Thompson *court changed the test used to determine whether a defendant had a duty to exercise reasonable care to prevent a harm suffered by the plaintiff, endorsed a generally applicable duty of reasonable care, and admonished Iowa courts to refrain from considering the foreseeability of that harm in determining whether a duty existed as a matter of law. Second, the* Thompson *court discarded both the substantial factor test for legal causation and the label "proximate cause" and adopted the scope of liability test proposed by the drafters of the Third Restatement, which requires the finder of fact to determine whether the harm that occurred was among the foreseeable risks of the defendant's conduct that would cause an observer to call it negligent or otherwise tortious. In doing so, the* Thompson *court expressed a strong preference for reserving any determinations of the foreseeability of harm for the ultimate finder of fact in Iowa negligence actions.*

The Thompson *decision has impacted Iowa negligence actions in a number of ways in the years since it was announced. In some areas,* Thompson *represents a sharp departure from Iowa courts' previously existing framework for adjudicating negligence claims; in other areas,* Thompson *provided room for reaffirmations of existing tort law. This Note explores some of the ways in which Iowa negligence actions have been affected by the* Thompson *decision and discusses ways in which Iowa lawyers can adapt their strategies, tactics, and arguments to gain an upper hand in Iowa negligence actions in a post-*Thompson *world.*

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I. INTRODUCTION: HOW MUCH CAN YOU FORESEE?

Imagine it is the year 2008, and you are a trial court judge in the state of Iowa; at the moment, you are presiding over a flurry of negligence cases. In each case, the defendant has moved for summary judgment, arguing that there was no breach of any applicable duty of care because the harm that befell the plaintiff was not within the realm of reasonably foreseeable harms that the defendant could have been duty-bound to take care to prevent.[1] For each of these cases you must rule on whether a duty of care existed in each of the following situations—to do so, under the applicable law, you must determine whether the kind of injury the plaintiff suffered was reasonably foreseeable.

(1) A man was killed while driving his speedboat near a local marina. He saw signs indicating that underwater dredging operations were taking place, but did not understand which areas he was being warned away from and mistakenly drove his boat into an area where dredging equipment was

1. Each motion for summary judgment references then-Chief Judge Benjamin Cardozo's maxim that "[t]he 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" that creates a duty of care. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100 (N.Y. 1928).

located. Other boaters saw this occur and attempted to warn him using common boating signals, but he did not see them. The boat's outboard motor struck the dredging equipment and was catapulted into the boat with the propellers still rotating at full speed, which caused gruesome and fatal injury. The man's family is suing for damages arising out of his wrongful death, alleging that the defendants, the owners and operators of the marina, caused his death by failing to post effective warnings that would have steered boaters away from the areas where dredging operations were taking place.[2]

(2) The plaintiff is a high school athlete. During an intense basketball game against a rival school, he received a crushing blow to the back of the head from an opposing player with a reputation for a short fuse and an explosive temper. The defendant is the rival school's basketball coach. The plaintiff argues the defendant is to blame for his injuries and should be liable for damages because any coach exercising reasonable care would never have allowed such a volatile player onto the court.[3]

(3) The plaintiff in this personal injury action was a patron at a dive bar owned and operated by the defendants. The plaintiff was drinking heavily and verbally harassing another patron. A waitress asked him to calm down, and when he refused, the bar manager asked the plaintiff to leave. As he was walking through the parking lot, he was assaulted by the man he had antagonized earlier. The plaintiff accuses the defendants of negligently exposing him to that assault by forcing him to leave the bar and failing to ensure he left the premises safely.[4]

(4) In this wrongful death action, the plaintiffs knew their 13-year-old daughter had an inappropriate sexual relationship with an adult. They called the defendant school bus company and requested that her school bus drop her off at a stop farther away from the adult's residence. When the daughter refused to comply and insisted she be let off at her old stop, the school bus driver allowed her to get off the bus. She then met up with the adult, who kidnapped and murdered her. The plaintiffs argue that the defendant negligently disregarded their clear instructions and allowed their daughter off the bus, leading to her death.[5]

2. Facts adapted from Estate of McFarlin v. Lakeside Marina, Inc., 979 F. Supp. 2d 891 (N.D. Iowa 2013).

3. Facts adapted from Brokaw v. Winfield–Mt. Union Cmty. Sch. Dist., 788 N.W.2d 386 (Iowa 2010).

4. Facts adapted from Hoyt v. Gutterz Bowl & Lounge, L.L.C., 829 N.W.2d 772 (Iowa 2013).

5. Facts adapted from Hill v. Damm, 804 N.W.2d 95 (Iowa Ct. App. 2011).

(5) The plaintiff is a truck driver who was delivering a shipment of heavy steel pipes to the defendant, who had requested delivery to two separate locations for use in construction. At the first delivery location, an employee of the defendant worked with the plaintiff to unfasten the cables that secured the steel pipes in the plaintiff's truck and then used a forklift to unload half of them. The defendant's employee left without helping the plaintiff to secure the remaining pipes and without stating that he had not refastened the cables. Moments later, while the plaintiff was preparing his truck for departure, one of the pipes rolled off the truck bed and crushed the plaintiff's legs. The plaintiff argues that the defendant's employee is to blame for his injuries because the employee was negligent both in failing to help refasten the cable and in failing to warn the plaintiff that the remaining pipes had not been re-secured.[6]

In these five cases, how do you rule on whether these harms were foreseeable enough to create a duty of reasonable care? Which motions for summary judgment do you grant, holding that the defendant had no duty of reasonable care in that particular situation, as a matter of law? Which motions for summary judgment do you deny, allowing the plaintiff to take the case to trial?

Unfortunately, because you are playing the part of an Iowa trial court judge in 2008, this game is not quite fair. The deck is stacked against you, and you will almost assuredly be reversed in one or more of these hypothetical cases—not because of some defect in your analysis but because the applicable law is about to change. The Iowa Supreme Court is about to render its decision in *Thompson v. Kaczinski*, abandoning the operative "fundamental rule of negligence law"[7] that would have allowed you to dispose of cases through summary judgment on the issue of the existence of a duty of care as a matter of law—"a duty of care must be premised on the foreseeability of harm to the injured person"[8]—and adopting the reformulated approach presented by the Third Restatement of Torts, which preserves these questions of foreseeability of harm for the finder of fact under the rubric of "scope of liability."[9] Consequently, if you had granted

6. Facts adapted from Smith v. HD Supply Water Works, Inc., No. 10-1459, 2011 WL 6655356 (Iowa Ct. App. Dec. 21, 2011).

7. *See* Thompson v. Kaczinski, 774 N.W.2d 829, 834 (Iowa 2009) (quoting Sankey v. Richenberger, 456 N.W.2d 206, 209–10 (Iowa 1990)) (internal quotation mark omitted).

8. *Id.* (citing *Sankey*, 456 N.W.2d at 209–10).

9. *See id.* at 839 (adopting "the risk standard as articulated in the Restatement

summary judgment for the defendant in any of the preceding cases, your order granting summary judgment would have been vacated; for better or for worse, all five cases are going to trial.

The purpose of this Note is not to endorse or criticize the course chosen by the Iowa Supreme Court in adopting this reformulation.[10] Rather, this Note's purpose is to present pragmatic advice for practicing attorneys to use in litigating negligence actions in Iowa and in states that have adopted similar analytical frameworks. First, this Note will examine the rationale of the Iowa Supreme Court's decision in *Thompson* and discuss its implications in terms of the judicial philosophies of Iowa judges.[11] Second, this Note will examine cases already impacted by this reformulation in the short period since its adoption, primarily focusing on negligence actions in Iowa.[12] Finally, this Note will conclude by discussing the new strategic considerations and tactical imperatives in play in negligence litigation in Iowa and in any other state where a similar reformulation has been adopted.[13]

II. THE BALLAD OF *THOMPSON V. KACZINSKI*

A. *Prelude: Factual and Procedural Background*

During the late summer of 2006, James Kaczinski and Michelle Lockwood began to disassemble a trampoline on their homestead in rural Madison County, Iowa.[14] The pair never completed the project, and they left the "partially disassembled trampoline" in their yard for "one to two

(Third)"); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 7, 29 & cmt. d (2010).

10. Some commentators enthusiastically applaud Iowa's endorsement of the Third Restatement's reformulation of the elements of negligence. *See, e.g.*, Michael D. Green, Symposium, *Flying Trampolines and Falling Bookcases: Understanding the Third Restatement of Torts (Spring 2010)*, 37 WM. MITCHELL L. REV. 1011, 1018 (2011) (praising the Iowa Supreme Court for its "courageous . . . willing[ness] to sacrifice and give up the security blanket of foreseeability"). Others sharply criticize judges who take unilateral action to redefine tort law and extend their criticism to the Third Restatement for encouraging the practice. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211, 1212 (2009) ("It is in our view inappropriate for a 'restatement' of the law to discard basic tort concepts rather than, for example, to acknowledge them and criticize them in commentary.").

11. *See infra* Part II.

12. *See infra* Part III.

13. *See infra* Part IV.

14. *Thompson*, 774 N.W.2d at 831.

weeks."[15] It remained there until an "overnight or early morning" thunderstorm accompanied by "winds which blew over trees and tree branches" moved the partially disassembled trampoline top "over thirty-eight feet" from its original location and onto a roadway.[16]

Later that morning, a pastor named Charles Thompson was driving between two rural parishes when he encountered the trampoline top in the roadway.[17] "Thompson swerved to avoid the trampoline" but then "lost control of his vehicle, [and] landed in an adjacent ditch"[18] after his vehicle had "rolled several times."[19] Thompson sustained injuries and sued Kaczinski and Lockwood for damages arising from the crash,[20] alleging that the pair had breached the common law duty of care "by negligently allowing the trampoline to obstruct the roadway."[21]

Kaczinski and Lockwood filed a motion for summary judgment on the issue of the existence of a duty of care; they claimed that, as a matter of law, they had no duty to protect travelers on adjacent roadways from any personal property or equipment that could blow onto the road during a windstorm.[22] In accordance with the accepted formula for determining whether a duty of care existed in a given situation, the trial court judge framed the issue as follows: "Viewing the facts of this case in the most favorable light for the plaintiffs, the issue[] becomes, does the placing of an untethered trampoline top in one's yard in the proximity of the roadway

15. Thompson v. Kaczinski, No. 08-0647, 2008 WL 5235512, at *1 (Iowa Ct. App. Dec. 17, 2008), *vacated*, 774 N.W.2d 829 (Iowa 2009).

16. *Id.*

17. *See Thompson*, 774 N.W.2d at 831.

18. *Thompson*, 2008 WL 5235512, at *1.

19. *Thompson*, 744 N.W.2d at 832.

20. *Thompson*, 2008 WL 5235512, at *1.

21. *Thompson*, 774 N.W.2d at 832. Thompson alleged a breach of this statutory duty of care: "[A] person 'shall not place, or cause to be placed, an obstruction within any highway right-of-way.'" *Id.* (quoting IOWA CODE § 318.3 (2007)). The trial court held that this statutory duty of care applied only to intentional placement of obstructions, and no duty arose under this statute; the Iowa Court of Appeals and Iowa Supreme Court each affirmed this analysis in turn. *See id.* at 832–34; *Thompson*, 2008 WL 5235512, at *2. This argument was summarily disposed of and will not be addressed further in this Note because "analysis of that issue really isn't germane to the discussion" of the case's significance. Justice Daryl Hecht, Symposium, *Flying Trampolines and Falling Bookcases: Understanding the Third Restatement of Torts (Spring 2010)*, 37 WM. MITCHELL L. REV. 1025, 1028 (2011).

22. *Thompson*, 2008 WL 5235512, at *1–2.

create a foreseeability or probability of harm to one traversing a nearby roadway?"[23] The judge concluded that the possibility "[t]hat a wind would remove the trampoline from the yard and place it in the roadway was simply not a foreseeable result of placing the trampoline in the defendants' yard" and granted summary judgment to Kaczinski and Lockwood on the duty element.[24]

Additionally, although Kaczinski and Lockwood did not raise the issue in their motion for summary judgment, the trial court ruled that Thompson had not established "a causal connection" between his injuries "and the acts and omissions of Kaczinski and Lockwood."[25] Because the court had already found that the trampoline's movement onto the roadway was not foreseeable, it also found that Thompson could not establish *legal* causation as a matter of law, even though Kaczinski and Lockwood's actions were clearly a factual cause of his injuries.[26]

The Iowa Court of Appeals affirmed the grant of summary judgment.[27] While acknowledging that, in some circumstances, a "common law duty to exercise reasonable care in keeping the roadway free of obstructions" exists,[28] the court stated that such a common law duty "only requires a person to guard against reasonably foreseeable harm."[29] Because Kaczinski and Lockwood "could not have foreseen the movement of the trampoline top from their yard onto the roadway," the court concluded that the trial court judge's ruling was correct in both respects: there was no duty of care to prevent this unforeseeable event from occurring, and Thompson could not show legal causation "as a matter of law."[30]

This set the stage for the Iowa Supreme Court to hear Thompson's appeal and issue an opinion that would transform the analysis of the elements of duty, breach, and causation in Iowa negligence actions to conform to the formulation set out in the Third Restatement of Torts.[31]

23. *Id.* at *1–2 (alteration in original) (quoting district court ruling granting summary judgment to Lockwood and Kaczinski).

24. *Id.*

25. *Thompson*, 774 N.W.2d at 836.

26. *See id.*

27. *Thompson*, 2008 WL 5235512, at *3.

28. *Id.* at *2 (citing Fritz v. Parkinson, 397 N.W.2d 714, 715 (Iowa 1986); Weber v. Madison, 251 N.W.2d 523, 527 (Iowa 1977)).

29. *Id.* (citing Kapphahn v. Martin Hotel Co., 298 N.W. 901, 906 (Iowa 1941)).

30. *Id.* at *3.

31. Throughout its opinion, the *Thompson* court cited to the proposed final draft

B. *First Movement: The Analysis of the Duty Element and the Demise of Foreseeability as a Relevant Factor in the Existence of a Duty of Care*

Before *Thompson* was decided, Iowa courts and judges were encouraged to use a "balancing process"[32] to resolve the question of whether a duty of care existed in a given situation as a matter of law.[33] Iowa courts were instructed to consider three factors in making that determination: "(1) the relationship between the parties, (2) reasonable foreseeability of harm to the person who is injured, and (3) public policy considerations."[34]

However, at the outset of its analysis in *Thompson*, the Iowa Supreme Court expressed both a strong distaste for the use of the second factor in the above analysis and a strong preference for a general duty of reasonable care as a principle of broad applicability in negligence actions.[35] The court stated that in the vast majority of contexts, "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."[36]

In proclaiming "the consideration of foreseeability is removed from the determination of duty" in Iowa negligence actions,[37] the Iowa Supreme Court reached the same conclusion as the drafters of the Third Restatement of Torts: "[d]espite widespread use of foreseeability in no-duty determinations,"[38] a court's authority to rule that a duty of reasonable care did not exist in a given factual scenario should be limited 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

of the Third Restatement of Torts: Liability for Physical and Emotional Harm, which had not yet been published "because the American Law Institute ha[d] expanded the project to include chapters on emotional harm and landowner liability." *Thompson*, 774 N.W.2d at 834 n.1. However, all of the sections cited by the *Thompson* opinion had already been "finally approved by both the American Law Institute's Council and its membership," so no substantive changes were made to those sections before they were published in 2010. *Id.*

32. *See id.* at 834 (citing Stotts v. Eveleth, 688 N.W.2d 803, 810 (Iowa 2004)).

33. *See id.* (quoting J.A.H. *ex rel.* R.M.H. v. Wadle & Assocs., P.C., 589 N.W.2d 256, 258 (Iowa 1999)).

34. *Id.* (quoting *Stotts*, 688 N.W.2d at 810) (internal quotation marks omitted).

35. *See id.* at 834–35.

36. *Id.* at 834 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7(a) (Proposed Final Draft No. 1, 2005)) (internal quotation marks omitted).

37. *Id.* at 835.

38. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. j (2010).

jury as factfinder."[39]

The clear advantage of this "general duty of reasonable care" approach is that it streamlines the legal analysis of whether a duty of care exists in any given factual scenario.[40] With this broad principle in their analytical toolbox, "courts 'need not concern themselves with the existence or content of this ordinary duty'" in evaluating each and every negligence action "but instead may proceed directly to the elements of liability" without analyzing duty "on a case-by-case basis" as a function of whether the specific harm that befell the plaintiff was foreseeable.[41] Following *Thompson*, analysis of the duty element can be handled summarily in most negligence actions that do not present "exceptional problems of policy or principle."[42]

39. *Thompson*, 774 N.W.2d at 835 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. J (Proposed Final Draft No. 1, 2005)) (internal quotation marks omitted). The Iowa Supreme Court explicitly stated that its intention was to fully adopt the Third Restatement reformulation of the general duty of reasonable care without alteration. *Id.* ("We find the drafters' clarification of the duty analysis in the Restatement (Third) compelling, and we now, therefore, adopt it."). Commentators who advocate widespread adoption of the Third Restatement's new formula for negligence actions were predictably exuberant. *See, e.g.*, Michael D. Green & Larry S. Stewart, *The New Restatement's Top 10 Tort Tools*, TRIAL, Apr. 2010, at 45–46 (proclaiming that this broad duty of reasonable care "completes the circle of evolution of legal theory" and applauding the *Thompson* court for "ensuring that juries, not judges, will decide the case based on the facts").

40. *Thompson*, 774 N.W.2d at 834 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. a (Proposed Final Draft No. 1, 2005)). The desire to streamline the analysis of the duty element is understandable, especially considering the way that vaguely defined concepts like foreseeability often give way to multifactored tests that confuse issues rather than clarify them. *See* W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf*: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1879–84 & n.26 (2011) (documenting 22 different tests used by various state courts for determining whether a duty exists, containing various combinations of 42 different factors).

41. *Thompson*, 774 N.W.2d at 834–35 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 6 cmt. f, 7 cmt. a (Proposed Final Draft No. 1, 2005)).

42. *See* Hoyt v. Gutterz Bowl & Lounge, LLC, 829 N.W.2d 772, 776 (Iowa 2013) (citing *Thompson*, 774 N.W.2d at 835). In some subsequent cases, courts have taken advantage of this streamlined analysis to reach conclusions about the applicable duty of care without a protracted context-dependent or fact-specific analysis. *See, e.g.*, Hall v. Jennie Edmundson Mem'l Hosp., 812 N.W.2d 681, 685–86 (Iowa 2012) (affirming summarily the conclusion of the district court "citing section 7 of the Restatement (Third) of Torts and *Thompson*" that "a hospital's duty to its patients stems from the general duty to exercise reasonable care that arises whenever an actor's conduct creates a risk of harm" and applying a general standard of "reasonable care under the circumstances" (internal quotation marks omitted)).

Implicit in the statement that no-duty determinations must be limited—specifically, in the statement that they must be limited to cases where "articulated policy or principle" applies to an entire category of plaintiffs, defendants, or claims—is an endorsement of the traditional role of the public policy exception.[43] The *Thompson* court noted that this broad, general duty of reasonable care would not entirely abolish the court's role in evaluating the wisdom of imposing a duty of reasonable care on specific actors, within specific relationships, or in specific contexts, because "[r]easons of policy and principle justifying a departure from the general duty to exercise reasonable care do not depend on the foreseeability of harm based on the specific facts of a case."[44]

This caveat is critical because it means that *Thompson* does not stand for the proposition that a trial court can never grant summary judgment for a defendant in a negligence action on the grounds that no duty of care existed. A court could still reach a no-duty ruling as a matter of public policy "when the court rules as a matter of law that no duty is owed by actors in a *category* of cases."[45] The *Thompson* court further cautioned that, in cases where a court finds that no duty of care existed as a matter of law, "the ruling 'should be explained and justified based on articulated policies or principles that justify exempting [such] actors from liability or modifying the ordinary duty of reasonable care.'"[46]

Where does this leave the issue of foreseeability of harm? Is it suddenly irrelevant that a particular harm that befell the plaintiff may have been unforeseeable? Although the foreseeability factor was excised from the analytical framework for determining whether a duty of care existed, foreseeability still retains relevance in analyzing other elements of

43. *See Thompson*, 774 N.W.2d at 835 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. j (Proposed Final Draft No. 1, 2005)) (internal quotation mark omitted).

44. *Id.* (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. j (Proposed Final Draft No. 1, 2005)).

45. *Id.* (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. j (Proposed Final Draft No. 1, 2005)) (emphasis added).

46. *Id.* (alteration in original) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. j (Proposed Final Draft No. 1, 2005)). The court briefly discussed whether the public policy exception applied in this case and noted that public policy considerations weighed against exempting similar cases from the general application of the duty of reasonable care, because of "the public's interest in ensuring roadways are safe and clear of dangerous obstructions for travelers." *Id.* (citing Weber v. Madison, 251 N.W.2d 523, 527 (Iowa 1977)).

negligence actions, including the determination of whether a breach of duty occurred[47] and the treatment of causation under the new "scope of liability" standard adopted in *Thompson*.[48]

C. *Second Movement: The Demise of Proximate Cause, the Advent of Scope of Liability, and the New Role of Foreseeability Within the Risk Standard*

Before *Thompson*, Iowa courts held that an actor's negligent conduct could be considered "a legal cause of harm" if two conditions were met: "(a) his conduct [was] a substantial factor in bringing about the harm, and (b) there [was] no rule of law relieving the actor from liability."[49] This familiar test for legal causation, often labeled proximate causation, was deceptively complex, because determining whether conduct was a "substantial factor" in bringing about a given harm required a consideration of "the 'proximity between the breach and the injury based largely on the concept of foreseeability,'"[50] as well as a determination of whether the breach had "such an effect in producing the harm" that would justify describing it as "substantial."[51]

The *Thompson* court noted that this formulation of proximate causation became a "source of significant uncertainty and confusion" for a variety of reasons.[52] One problem was that the formula "confus[ed] factual

47. "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." Hill v. Damm, 804 N.W.2d 95, 99 (Iowa Ct. App. 2011) (emphases added) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (2010)).

48. *See* Hecht, *supra* note 21, at 1030 ("Foreseeability, of course, remains a crucial element in the analysis of whether the general duty has been breached, and in the determination of whether the harm claimed by the plaintiff is within the scope of liability." (footnote omitted)).

49. *Thompson*, 774 N.W.2d at 836 (quoting RESTATEMENT (SECOND) OF TORTS § 431 (1965)) (internal quotation mark omitted).

50. *Id.* (quoting Estate of Long *ex rel.* Smith v. Broadlawns Med. Ctr., 656 N.W.2d 71, 83 (Iowa 2002)).

51. *See id.* (quoting Sumpter v. City of Moulton, 519 N.W.2d 427, 434 (Iowa Ct. App. 1994)).

52. *Id.* The *Thompson* court accepted a portion of the blame for this confusion for its own "less than consistent" application of the standard in resolving questions of legal causation in negligence actions, citing an earlier case in which the Iowa Supreme Court had extensively "chronicl[ed] inconsistencies in [its] approach to questions of proximate causation." *Id.* (citing Gerst v. Marshall, 549 N.W.2d 810, 816–17 (Iowa 1996)).

determinations . . . with policy judgments."[53] The old analytical framework for proximate cause merged the factual question of whether conduct was a "substantial factor in bringing about harm" with the policy question of whether a "rule of law preclud[es] liability" under the general heading of legal causation; this created a great deal of confusion because the substantial factor determination so closely mirrored the analysis used for the "factual cause" element.[54] In that sense, "the resulting confusion of factual and policy determinations" was an inevitability given the hybrid nature of that formulation of proximate causation—a muddled standard had produced a confusing and often inconsistent body of law.[55]

Perhaps more importantly, the proximate cause standard had created "considerable confusion for juries," especially when labeled "proximate cause," because the label "does not clearly express the idea it is meant to represent."[56] The *Thompson* court stated that juries had consistently failed to apply the appropriate standard in deciding whether an actor's conduct was a proximate cause of harm because "jurors understand 'proximate cause' as implying 'there is but one cause—the cause nearest in time or geography to

53. *Id.* at 836–37 (citing *Gerst*, 549 N.W.2d at 816).

54. *See id.* (citing *Gerst*, 549 N.W.2d at 815–16). Apparently, the substantial factor analysis, from its debut in the Second Restatement of Torts, was always intended to be used as a component of the factual causation analysis—specifically for use in situations where multiple independently sufficient factual causes exist—and was never meant to be included as a part of the legal causation analysis. *See id.* at 837 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. a (Proposed Final Draft No. 1, 2005)).

55. *See id.* at 837; *see also* Joseph Lavitt, *The Doctrine of Efficient Proximate Cause, the Katrina Disaster, Prosser's Folly, and the Third Restatement of Torts: Cracking the Conundrum*, 54 LOY. L. REV. 1, 40 (2008) ("The doctrine of 'proximate cause' has shown itself in practice as only a means to the end of arbitrariness and caprice.").

56. *Thompson*, 774 N.W.2d at 837 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. b (Proposed Final Draft No. 1, 2005)). Part of this problem might have been that the word "proximate" was so unfamiliar to jurors that they failed to parse out the words used to explain the standard. A study of jurors' ability to comprehend sample jury instructions found that 23 percent of those tested misheard the phrase "a proximate cause" as "approximate cause" or some other garbled phrase; further, even those jurors in the study who could repeat the proximate cause instruction verbatim had difficulty understanding and applying it. *See* Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1353 (1979); *see also* Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 84, 91–92 (1988) (finding, in one empirical study of 114 experienced jurors, that nearly 85 percent did not comprehend a model instruction on proximate cause).

the plaintiff's harm.'"[57] This had the effect of substantially lowering the standard that an intervening or superseding cause had to meet before it absolved a negligent actor of responsibility for any harm in the eyes of the jury tasked with determining proximate causation.[58]

After identifying these issues, the *Thompson* court found a more attractive alternative in the Third Restatement's scope of liability framework as a replacement for the convoluted proximate cause formulation that Iowa courts had been applying.[59] Under this new standard, the principle is that "[a]n actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious."[60] The *Thompson* court hoped this would produce results that conformed to "intuitive notions of fairness and proportionality" by providing an easily understandable bright-line rule, while still being "flexible enough to 'accommodate fairness concerns raised by the specific facts of a case.'"[61]

In some ways, this change was more stylistic than substantive. Limiting an actor's liability to "harms that result from the risks that made the actor's conduct tortious" is an unmistakable nod to the time-honored risk standard that inherently entails an analysis of the foreseeability of the type of harm that occurred; according to the *Thompson* court, this risk standard contained within the new scope of liability analysis performs the essential function of a legal causation test by "prevent[ing] the unjustified imposition of liability by 'confining liability's scope to the reasons for holding the actor liable in the first place.'"[62] The court also noted that the new standard would highlight

57. *Thompson*, 774 N.W.2d at 837 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. b (Proposed Final Draft No. 1, 2005)).

58. *See id.*; *see also* Asher v. OB–GYN Specialists, P.C., 846 N.W.2d 492, 499 (Iowa 2014) (holding that the trial court's use of the Second Restatement's proximate causation standard in crafting jury instructions could only prejudice the plaintiff, and could not prejudice the defendant, because that particular proximate causation instruction generally leads jurors to "conclude the act of negligence must be in the same location as the harm, that there might be only one legal cause of the injury, or that the cause must be the last substantial factor in a chain" and because all of those potential effects on jurors "tend to increase, not decrease, barriers to liability").

59. *See Thompson*, 774 N.W.2d at 837–38 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 27 cmt. j (Proposed Final Draft No. 1, 2005)).

60. *Id.* at 838 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 (Proposed Final Draft No. 1, 2005)) (internal quotation marks omitted).

61. *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. e (Proposed Final Draft No. 1, 2005)).

62. *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §

the importance of the foreseeability of harm in analyzing "the role of an intervening or superseding cause," and in cases where defendants have claimed a superseding cause absolved them of responsibility for subsequent harms, "the question of the foreseeability of the superseding force has been critical."[63]

In other areas, however, the adoption of this new standard heralded a profound shift in the way Iowa negligence actions would proceed. The *Thompson* court predicted the scope of liability rubric would help avoid the problems associated with hybrid analysis of questions of law and fact that made the proximate cause framework so difficult to apply; the new formulation "no longer include[d] a determination of whether the actor's conduct was a substantial factor in causing the harm at issue, a question properly addressed under the factual cause rubric."[64]

Furthermore, the transition to scope of liability appeared to be consistent with the *Thompson* court's dual goals: (1) allowing genuinely disputed factual issues to be preserved until they could be argued and resolved at trial and (2) clarifying the analytical framework the finder of fact should apply to resolve those issues. A coherent application of the scope of liability analysis to a particular case is extremely "fact-intensive as it requires consideration of the risks that made the actor's conduct tortious and a determination of whether the harm at issue is a result of any of those risks."[65] To protect that fact-intensive inquiry from premature adjudication, the *Thompson* court cautioned, a court ruling on a scope of liability question prior to trial should "initially consider all of the range of harms risked by the defendant's conduct that the jury *could* find as the basis for determining [the defendant's] conduct tortious" and "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."[66]

In its final thoughts on the value of the scope of liability standard, the *Thompson* court evaluated the new standard's potential to confuse a jury

29 & cmt. d (Proposed Final Draft No. 1, 2005)).

63. *Id.* at 838–39 (citing Summy v. City of Des Moines, 708 N.W.2d 333, 342 (Iowa 2006)).

64. *Id.* at 837–38 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 27 cmt. j (Proposed Final Draft No. 1, 2005)).

65. *Id.* at 838 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. d (Proposed Final Draft No. 1, 2005)).

66. *Id.* (alteration in original) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. d (Proposed Final Draft No. 1, 2005)).

attempting to apply the test. It agreed with the drafters of the Third Restatement that while a test that only asks whether a harm was foreseeable "risks being misunderstood because of uncertainty about what must be foreseen, by whom, and at what time," the risk standard analysis within the scope of liability test avoids these dangers because it contains a clearer formulation of the relevant foreseeability inquiry and "provides greater clarity, facilitates clearer analysis in a given case, and better reveals the reason for its existence."[67] On that basis, the *Thompson* court predicted that the new scope of liability standard for legal causation would clarify the factfinding task for juries.[68]

With that, the Iowa Supreme Court came full circle on foreseeability. It had rejected the use of foreseeability in analysis of the existence of a duty, while building foreseeability into the risk standard within the scope of liability analysis that now represents the touchstone for showing legal causation.[69]

What did this all mean for Thompson, Kaczinski, and Lockwood? The case was remanded because the facts were "not so clear in this case as to justify the district court's resolution of the issue as a matter of law at the summary judgment stage," and the ultimate determination of breach and

67. *Id.* at 839 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. j (Proposed Final Draft No. 1, 2005)) (internal quotation marks omitted). The court noted that the Third Restatement illustrates that any risk standard analysis inherently resembles a foreseeability test:

> Properly understood, both the risk standard and a foreseeability test exclude liability for harms that were sufficiently unforeseeable at the time of the actor's tortious conduct that they were not among the risks—potential harms—that made the actor negligent. . . . [W]hen scope of liability arises in a negligence case, the risks that make an actor negligent are limited to foreseeable ones, and the factfinder must determine whether the type of harm that occurred is among those reasonably foreseeable potential harms that made the actor's conduct negligent.

Id. (alterations in original) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. j (Proposed Final Draft No. 1, 2005)).

68. *See id. But see* United States v. Monzel, 746 F. Supp. 2d 76, 86 n.16 (D.D.C. 2010) ("Despite the well-established reputation of the [American Law Institute], the Court has strong concerns about whether the second prong of its causation analysis, which addresses the scope of liability, is going to be any easier or clearer for judges, who must write appropriate instructions on causation, or for jurors, who must apply them.").

69. *See Thompson*, 774 N.W.2d at 838.

causation was reserved for the jury to decide at trial. [70] A final resolution of the action would ultimately be decided by "whether the fact-finder [would] (1) find a breach of the general duty of care, and (2) find that the plaintiffs' harm was within the range of harms risked by the defendants' conduct."[71]

With regard to *Thompson*'s transformation of the elements of Iowa negligence actions, the bottom line is that foreseeability of harm is still relevant in negligence actions, but the nature of its impact on negligence claims has changed. While foreseeability no longer impacts the legal analysis of whether a duty of care existed, it is unquestionably relevant—even outcome determinative—on the issue of scope of liability within the risk standard rubric, and it requires a level of fact-specific, context-dependent, case-by-case analysis that will make it a focus of trials where it is not immediately clear whether it is fair to impart liability to the defendant for harms suffered by the plaintiff.[72]

D. *Coda: Justice Cady's Reminders on the Public Policy Exception and on the Burden of Proof at the Summary Judgment Stage*

Justice Mark Cady (now Chief Justice) agreed with the result reached by the majority, but remarked on two matters in his concurrence: one pertained to the existence of a duty, and the other pertained to the scope of liability issue.[73]

70. *Id.* at 839–40. Note the clear desire to let the jury decide the issue of whether the harm to Thompson was foreseeable: "A reasonable fact finder could determine Kaczinski and Lockwood should have known high winds occasionally occur in Iowa in September and a strong gust of wind could displace the unsecured trampoline parts the short distance from the yard to the roadway and endanger motorists." *See id.*

71. *See* Hecht, *supra* note 21, at 1032–33.

72. "In a negligence action, prior incidents or other facts evidencing risks may make certain risks foreseeable that otherwise were not, thereby changing the scope-of-liability analysis." *Thompson*, 774 N.W.2d at 839 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. d (Proposed Final Draft No. 1, 2005)) (internal quotation marks omitted).

73. *See id.* at 840 (Cady, J., concurring specially). None of the other Justices joined Justice Cady's concurrence. *See id.* Justice Cady became Chief Justice of the Iowa Supreme Court in 2011, with the unanimous support of his fellow Justices, after the November 2010 retention vote that ousted three other Justices (including then-Chief Justice Marsha Ternus) as a reaction to the court's 2009 decision striking down Iowa's law banning same-sex marriage. *See* Dar Danielson, *Supreme Court Makes Interim Chief Justice Permanent*, RADIOIOWA (Mar. 31, 2011), http://www.radioiowa.com/2011/03/31/supreme-court-makes-interim-chief-justice-permanent/.

First, he pointed out that he believed the duty of landowners to take reasonable care to secure their personal property from being displaced by windstorms should be "narrowly construed to the facts of this case."[74] Even though the majority had used this case as an opportunity to clarify the broad applicability of the common law duty of reasonable care to all actors who create a risk of harm to anyone else, Justice Cady was already beginning to contemplate "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."[75]

Justice Cady's broader disagreement with the majority stemmed from his view on the foreseeability issue in the context of summary judgment; he stated that the real reason why summary judgment should not have been granted on the element of causation was that the facts of the case were "unclear and uncertain" with regard to the foreseeability of the risk of harm to a passing motorist.[76] Because "[s]ummary judgment can only be granted when the facts are clear and undisputed,"[77] Lockwood and Kaczinski would have needed to establish that "the undisputed facts showed the trampoline tarp was attached to the metal ring and positioned flat on the ground" such that no reasonable person could conclude that any harm of the type that befell Thompson was foreseeable, which they did not do.[78] This point is worth remembering because it highlights the burden of proof that a defendant must carry in order to prove the harm that occurred was outside of the defendant's scope of liability as a matter of law: "Summary judgment can only be granted when the facts are clear and undisputed."[79]

Moreover, Justice Cady's concurrence is a reminder that plaintiffs must come forward with facts supporting their claim that the type of harm that occurred *was* foreseeable—and those facts must be sufficient to create a "genuine dispute of material fact" and a "genuine issue for trial"[80]—to

74. *Thompson*, 774 N.W.2d at 840 (Cady, J., concurring specially).

75. *Id.*

76. *Id.*

77. *Id.* (citing Griglione v. Martin, 525 N.W.2d 810, 813 (Iowa 1994)).

78. *Id.*

79. *Id.* (citing *Griglione*, 525 N.W.2d at 813).

80. *See generally* Bias v. Advantage Int'l, Inc., 905 F.2d 1558, 1560–61 (D.C. Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 587 (1986)). Iowa's rule of civil procedure regarding summary judgment contains language mirroring that of the Federal

oppose a motion for summary judgment. Justice Cady criticized the majority for absolving Thompson of that responsibility and assuming those facts were already shown, noting that it was "inappropriate for a court to make a legal determination that a reasonable person should have known or appreciated the ability of wind to lift and carry a trampoline without knowing the particular facts and circumstances."[81]

Justice Cady's concurrence was particularly insightful because its two points foreshadowed the considerable amount of attention that two specific issues would receive in subsequent cases interpreting and applying *Thompson*: (1) the unexplored boundaries of public policy exceptions to *Thompson*'s general duty of reasonable care, and (2) the clarification of the proper burdens of production and persuasion to be used for resolving dispositive motions on breach and legal causation elements of negligence claims.

III. SUBSEQUENT IOWA CASELAW AND THE IMMEDIATE EFFECTS OF ADOPTING THE THIRD RESTATEMENT'S REFORMULATION

Thompson's potential impact on Iowa courts' treatment of the duty element in negligence actions was readily apparent. In its immediate aftermath, a substantial number of cases have presented issues that required Iowa courts to determine the extent to which the generally applicable duty of care obviated existing law.[82] In contrast, the impact of the new scope of liability standard for legal causation has not been as readily observable, because in many cases it guides Iowa courts to results similar to those that would have been reached under the substantial factor test for proximate cause.[83] However, after *Thompson*, the emphasis Iowa courts have placed on

Rules. *Compare* IOWA R. CIV. P. 1.981(3), *with* FED. R. CIV. P. 56(a); *see also* Bitner v. Ottumwa Cmty. Sch. Dist., 549 N.W.2d 295, 300 (Iowa 1996) ("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" (quoting *Matsushita*, 475 U.S. at 587) (internal quotation marks omitted)).

81. *Thompson*, 774 N.W.2d at 840 (Cady, J., concurring specially).

82. *See infra* Part III.A.

83. *See, e.g.*, Brokaw v. Winfield-Mt. Union Cmty. Sch. Dist., 788 N.W.2d 386, 391 n.1 (Iowa 2010) ("Notwithstanding our decision to analyze this case using the framework of the Restatement (Third), we note that the result [regarding breach and scope of liability] would be the same under the Restatement (Second)."); Royal Indem. Co. v. Factory Mut. Ins. Co., 786 N.W.2d 839, 849 (Iowa 2010) ("For ease of understanding, we refer to the consolidated standard articulated in the Restatement (Third). We also note that the result under a Restatement (Second) analysis would be the same.").

the importance of reserving foreseeability determinations for the finder of fact has had a profound effect on their resolution of difficult breach and causation issues, including issues of defendants' liability for injuries produced by third-party misconduct or by other intervening causes.[84]

A. *The General Duty of Reasonable Care After* Thompson

More than anything else, *Thompson* stands for the principle that "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm," which forecloses any argument that no duty of care exists simply because the type of harm that occurred was unforeseeable.[85] In *Brokaw v. Winfield Mt. Union Community School District*,[86] a student's parents sued the school district for injuries their son sustained at the hands of an unruly rival during a basketball game;[87] the school district argued for summary judgment on the duty element and claimed that no duty existed because "there was no foreseeable risk under the facts presented."[88] The *Brokaw* court ruled that *Thompson* plainly foreclosed this argument because "'the assessment of the foreseeability of a risk' is no longer part of the duty analysis, but is 'to be considered when the [fact finder] decides if the defendant failed to exercise reasonable care.'"[89] Because the school district made no argument that this was an "exceptional case" in which the public policy exception or some other "articulated countervailing principle or policy"[90] should apply to limit the broadly applicable common law duty of reasonable care, the inevitable conclusion based on the analysis set out in *Thompson* was that "the general duty to exercise reasonable care applies here," as it does in most cases.[91]

84. *See infra* Part III.B.

85. *Brokaw*, 788 N.W.2d at 391 (alteration in original) (quoting *Thompson*, 774 N.W.2d at 834) (internal quotation marks omitted).

86. This case inspired Scenario (2), *supra* Part I.

87. *Brokaw*, 788 N.W.2d at 388.

88. *Id.* at 391.

89. *Id.* (alteration in original) (quoting *Thompson*, 774 N.W.2d at 835); *see also* Michael D. Green, *The Impact of the Civil Jury on American Tort Law*, 38 PEPP. L. REV. 337, 353 (2011) ("How can a court decide if a duty exists by using the same standards that the jury would use to decide if there was breach of that duty?").

90. *Brokaw*, 788 N.W.2d at 391 (quoting *Thompson*, 774 N.W.2d at 835).

91. *Id.* The *Brokaw* court noted that the school district did not even attempt to argue a public policy exception that "coaches as a class have no duty of reasonable care to control the actions of their players" and declined to address the merits of the argument the school district might have made on that point. *Id.* The school district also did not raise the contact sports exception, discussed *infra* Part III.A.3.b. Even if it had, lowering

In other cases, as Justice Cady's concurrence in *Thompson* foreshadowed,[92] the Iowa Supreme Court has not hesitated to apply public policy exceptions to limit the general applicability of the duty of reasonable care. Developments in Iowa caselaw governing the applicable duty of care in negligence actions seeking damages for economic losses, emotional distress, and physical injury will be considered in turn.

1. *General Refusal to Apply* Thompson *in Actions Seeking Damages for Economic Losses*

Negligence actions to recover damages for purely economic losses are relatively rare because "the economic loss rule bars recovery in negligence when the plaintiff has suffered only economic loss," except in negligent misrepresentation cases, certain professional negligence cases, and other cases "when the duty of care arises out of a principal-agent relationship."[93] If a plaintiff attempts to recover for economic losses through a claim that a defendant breached a duty of care arising out of an agency relationship, Iowa courts "will not rely on the concept of duty embodied in *Thompson*" to evaluate that claim; instead, they will apply unique rules for determining the existence of particular duties within the context of agency relationships.[94] In these negligence actions for economic damages, "when duty 'is based on agency principles and involves economic loss, the duty analysis adopted by this court in [*Thompson*], based on Restatement (Third) of Torts: Liability for Physical and Emotional Harm, is not dispositive.'"[95]

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the applicable duty of care would not have absolved the school district of liability because the short-tempered player committed an *intentional* battery, rather than a negligent act. *See id.* at 392.

92. *See supra* Part II.D.

93. Annett Holdings, Inc. v. Kum & Go, L.C., 801 N.W.2d 499, 503–04 (Iowa 2011) (citing Neb. Inneepers, Inc. v. Pittsburgh–Des Moines Corp., 435 N.W.2d 124, 126 (Iowa 1984)).

94. *See* Pitts v. Farm Bureau Life Ins. Co., 818 N.W.2d 91, 99 (Iowa 2012).

95. *Id.* at 98–99 (alteration in original) (quoting Langwith v. Am. Nat'l Gen. Ins. Co., 793 N.W.2d 215, 221 n.3 (Iowa 2010), *superseded by statute on other grounds*, IOWA CODE § 522B.11(7) (Supp. 2011)). Accordingly, when determining whether an insurance agent had a duty to the intended third-party beneficiary of a life insurance policy, the *Pitts* court stated that "[t]he critical element in establishing a duty is the foreseeability of harm to a potential plaintiff." *Id.* at 106 (quoting 12 JEFFREY E. THOMAS & FRANCIS J. MOOTZ, NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION 2D, § 2.07[1], at 2–84 (2011)) (internal quotation marks omitted); *see also* St. Malachy Roman Catholic Congregation of Geneseo v. Ingram, 841 N.W.2d 338, 349–50 (Iowa 2013) (reiterating from *Pitts* that the plaintiff must show that "damage to an intended beneficiary was

The Iowa Court of Appeals also declined to apply *Thompson*'s formulation of the general duty of reasonable care in an action involving economic losses arising out of a bailment, noting that the law's treatment of that unique duty of care reflects "specific reasons why there are varying degrees of care required in these relationships."[96] For bailments, which represent "a meld of contract and tort law,"[97] the general idea is that the duty owed to guard against economic harm resulting from damage to property "is clearly determined by the consideration provided" within the contractual relationship—the appeal of this idea is intuitive.[98] The generally applicable duty of reasonable care may retain relevance "where a gratuitous bailment exists" such that "the bailee is only liable if a reasonable degree of care is not exercised."[99] In such cases, "[t]he omission of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine."[100] However, the applicable duty of care is markedly different for bailments in which "both parties to the bailment contract receive some benefit flowing from the transaction."[101] "Where the bailment is for mutual benefit," the duty owed by the bailee is so dramatically heightened that it "creates a presumption" that *any* damage "is due to the bailee's lack of care."[102] Although the Iowa Supreme Court "has not had the occasion to determine whether the

foreseeable" to recover for economic losses and holding that an agent owes a duty of care to a "direct, intended, and specifically identifiable beneficiar[y]" of a written instrument executed by the principal (alteration in original) (quoting *Pitts*, 818 N.W.2d at 106) (internal quotation marks omitted)).

96. *In re* Estate of Martin, No. 11-0690, 2012 WL 1431490, at *5 (Iowa Ct. App. Apr. 25, 2012).

97. *Id.* at *4 (citing McPherrin v. Jennings, 24 N.W. 242, 244 (Iowa 1885)). *McPherrin v. Jennings* succinctly summarizes the intersection of negligence actions and contract law in bailments:

> Defendant had the horse in his possession as bailee. His duty to properly care for it grew out of the contract of bailment, and his liability for its loss arises out of his failure to perform his contract obligation. The immediate cause of the loss, it is true, was the negligence in failing to properly care for the animal; but this negligence constitutes a breach of contract, and the right of action is based on this breach.

McPherrin, 24 N.W. at 244.

98. *In re Estate of Martin*, 2012 WL 1431490, at *5.

99. *Id.*

100. *Id.* (quoting Sherwood v. Home Sav. Bank, 109 N.W. 9, 12 (Iowa 1906)).

101. *Id.* (citing 8A AM. JUR. 2D *Bailments* § 9, at 529 (2009)).

102. *Id.* (citing Naxera v. Wathan, 159 N.W.2d 513, 518 (Iowa 1968)).

Thompson holding [a]ffects the duties of care required in the context of bailments,"[103] it is easy to understand the "inherent justice in the requirement that one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay."[104]

2. *Context-Dependent Analysis in Actions for Damages for Emotional Distress*

When a plaintiff asserts only damages arising from emotional distress, the generally applicable duty of reasonable care still applies[105] but becomes less relevant as public policy considerations take center stage in the analysis of whether a specific duty to take reasonable care not to cause emotional trauma exists in the context of the relationship between the plaintiff and the defendant.[106] In *Miranda v. Said*, the Iowa Supreme Court clarified that "the existence of a duty of care to protect against emotional harm in negligence claims will turn on the nature of the relationship between the parties, as well as the nature of the transaction or arrangement responsible for creating the relationship."[107] But even a "highly emotional relationship" does not guarantee the existence of a corresponding duty of care to guard against inflicting emotional harm; "the inquiry narrows more specifically to further consider the policy considerations surrounding a particular class of cases and whether negligent conduct within the relationship is very likely to cause severe emotional distress," including the proximity of the defendant's allegedly negligent conduct to the emotional harm suffered by the plaintiff.[108]

While this analysis looks suspiciously similar to the pre-*Thompson* practice of using foreseeability of harm to determine whether a duty of care existed,[109] the Iowa Supreme Court clarified that it was using foreseeability

103. *Id.*

104. *Id.* (quoting Siesseger v. Puth, 239 N.W. 46, 52 (Iowa 1931)).

105. *See* Miranda v. Said, 836 N.W.2d 8, 28 n.13 (Iowa 2013) ("While we addressed scenarios involving physical harm in *Thompson*, the analysis is equally applicable in cases involving stand-alone emotional harm . . . .").

106. *See id.* at 28 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 (2010)).

107. *Id.*

108. *Id.* at 29–30.

109. The perilous resemblance to the pre-*Thompson* foreseeability analysis is clearest in the *Miranda* court's consideration of proximity or remoteness, where it stated

of emotional harm only as part of the analysis of whether to apply a public policy exception to a particular class of relationships:

> While courts have often considered whether an actor reasonably should have foreseen emotional harm in determining whether emotional harm is recoverable, the Restatement (Third) explains, and we agree, that foreseeability alone cannot appropriately be employed as the standard for limiting liability for emotional harm. Instead, consistent with our analysis in *Thompson* and consistent with the approach of the Restatement (Third), we think the policy issues "surrounding specific categories of undertakings, activities, and relationships must be examined to determine whether they merit inclusion" among the exceptions to the general historical rule of no liability for emotional damages.[110]

Because of the heart-wrenching nature of the specific facts at issue in *Miranda*, in which an immigration lawyer negligently advised his clients to pursue a course of action that resulted in their deportation and separation from their children for nearly a decade, the court was able to conclude that the plaintiffs and defendant had "the type of relationship in which negligent conduct was especially likely to cause severe emotional distress, supporting a duty of care to protect against such harm" without "go[ing] further to decide just where the line between duty and no duty may be drawn." [111] The precise contours of this evolving public policy exception remain uncertain.

3. *Public Policy Exceptions in Actions for Damages Arising from Physical Injury*

Even when a plaintiff asserts claims for damages arising from physical injuries, the generally applicable duty of reasonable care may still be obviated by factors relating to "the realities of the relationship" between the plaintiff and the defendant or the context in which the physical injury occurred.[112] A prime illustration is *Huck v. Wyeth, Inc.*, in which a plaintiff who developed tardive dyskinesia from taking generic metoclopramide sought to recover from the manufacturers of the brand-name drug by

that "remoteness between acts of negligence and the plaintiff militates against a duty of care by making the emotional harm less likely to result from the relationship." *Id.* at 30.

110. *Id.* at 29 n.13 (citation omitted) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 cmt. i (2010)).

111. *Id.* at 33.

112. Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689, 698 (Iowa 2009).

asserting that her reliance on their advertising had led her to take the generic version of their drug and had created the risk that she would develop a severe and incurable neurological disorder.[113] The plaintiff argued that the name-brand manufacturers' advertising statements negligently violated *Thompson*'s general duty of reasonable care, regardless of whose drug ultimately caused her injuries, but the Iowa Supreme Court disagreed, stating,

> *Thompson* was not a products liability case, and we have not applied section 7 of the Restatement (Third) of Torts in products liability actions. Rather, in products liability actions, we turn to the Products Restatement. . . . [I]ts specific provisions control over general tort principles found in the Restatement (Third) of Torts provisions adopted in *Thompson*.[114]

Thus, the *Huck* court refused to apply *Thompson*'s general duty of reasonable care and instead applied the rule that "a plaintiff in a products liability case must prove that the injury-causing product was a product manufactured or supplied by the defendant" in order to show that any duty of care existed.[115] Under this analysis, the brand-name manufacturers owed the plaintiff no duty even if their advertising had created the risk of physical harm.[116] A strong public policy argument may have been able to sway the court from this conclusion, but the plaintiff "fail[ed] to articulate any persuasive case that public health and safety would be advanced through imposing tort liability on brand defendants for injuries caused by generic products sold by competitors."[117] Indeed, the *Huck* court ruled that in light of the absence of a relationship between the plaintiff and the brand-name manufacturer, and in light of the generally parasitic relationship between generic imitators and the name-brand manufacturers whose products they imitate, "[e]conomic and public policy analyses strongly disfavor imposing

113. Huck v. Wyeth, Inc., 850 N.W.2d 353, 358–60 (Iowa 2014). "Tardive dyskinesia is a severe, often irreversible neurological disorder resulting in involuntary and uncontrollable repetitive body movements of slow or belated onset. Symptoms include 'grotesque facial grimacing and open-mouthed, uncontrollable tongue movements, tongue thrusting, [and] tongue chewing.'" *Id.* at 359 (alteration in original) (quoting Fisher v. Pelstring, 817 F. Supp. 2d 791, 802 (D.S.C. 2011)).

114. *Id.* at 373.

115. *Id.* at 371 (quoting Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 76 (Iowa 1986)) (internal quotation mark omitted).

116. *See id.*

117. *Id.* at 377.

tort liability on brand manufacturers for harm caused by generic competitors."[118]

Even in run-of-the-mill negligence cases where *Thompson*'s general duty of reasonable care would seem most readily applicable, the Iowa Supreme Court has been willing to apply various public policy exceptions that moderate the degree of care required or dispose of the duty of care entirely.[119] Two public policy exceptions the Iowa Supreme Court has applied to recent cases involving physical injury will be examined in turn: (1) the control principle, which may apply when the defendant's lack of control over the mechanism of injury militates against the imposition of a duty of care and (2) the "contact sports exception," which may apply when the plaintiff's injury arises out of voluntary participation in an inherently dangerous activity.

a. *The control principle.* In *Van Fossen v. MidAmerican Energy Co.*, the plaintiff was a contractor who regularly dealt with "various asbestos-containing products" in the course of construction work, and he routinely brought his work clothes home and threw them in with the rest of the laundry, which his wife would handle.[120] When she developed a fatal case of "malignant peritoneal mesothelioma, a cancer associated with exposure to asbestos," he sued the owners of various worksites where he had come into contact with asbestos, alleging that they "negligently failed to warn [his wife] of the health risks associated with exposure to asbestos."[121] By the time *Thompson* was decided, the district court had already granted summary judgment for the defendants, concluding that the defendants owed no legal duty to the plaintiff's wife and that no exceptions to the principle limiting the liability of employers of independent contractors for the acts of those contractors were applicable.[122]

118. *Id.* (citing Richard A. Epstein, *What Tort Theory Tells Us About Federal Preemption: The Tragic Saga of* Wyeth v. Levine, 65 N.Y.U. ANN. SURV. AM. L. 485 (2010)).

119. *See, e.g.*, Feld v. Borkowski, 790 N.W.2d 72, 76 (2010); Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689, 691 (2009).

120. *Van Fossen*, 777 N.W.2d at 692.

121. *Id.*

122. *Id.* at 695–96, 699. To clarify, the independent contractors were two companies called Ebasco and Klinger; the owners of the work sites employed the contractors, who each employed the plaintiff during various periods when he worked on the sites where

The Iowa Supreme Court stated that "[a]lthough the district court considered the foreseeability of a risk of physical injury to [the plaintiff's wife] in its analysis of the duty issue because it did not have the benefit of our decision in *Thompson*, summary judgment was nonetheless proper under our newly adopted analytical principles" because the defendants retained no control over the independent contractors' operations at the work sites or their handling of asbestos safety issues.[123] The *Van Fossen* court set out that "[i]nstead of the broad general duty of due care" that had been adopted in *Thompson*, the employer of an independent contractor owes those at risk of harm from the contractor's activities "only [a] limited duty" and "is not liable unless he retains control of the contractor's day-to-day operations."[124] This was phrased as a recognition of an "articulated policy or principle . . . for a no-duty ruling"[125] that "takes into account the realities of the relationship between employers and their contractors," including the reality that "[t]he contractors' knowledge and expertise places them in the best position to understand the nature of the work, the risks to which workers will be exposed in the course of performing the work, and the precautions best calculated to manage those risks."[126]

The *Van Fossen* court's emphasis on "realities" made it clear that the analysis that led it to endorse a limited duty of care in this particular case focused more on policy than principle.[127] Indeed, four years later, the Iowa Court of Appeals used a policy argument to reaffirm an exception to the rule from *Van Fossen* limiting contractor liability to subcontractors' employees,

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he was exposed to asbestos. *See id.* at 691–92.

123. *See id.* at 696.

124. *Id.* at 696–97 (citing Hoffnagle v. McDonald's Corp., 522 N.W.2d 808, 813 (Iowa 1994)).

125. Thompson v. Kaczinski, 774 N.W.2d 829, 835 (Iowa 2009) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. j (Proposed Final Draft No. 1, 2005)) (internal quotation mark omitted).

126. *Van Fossen*, 777 N.W.2d at 698; *see also* Smith v. HD Supply Water Works, Inc., No. 10-1459, 2011 WL 6655356, at *3 (Iowa Ct. App. Dec. 21, 2011) (Eisenhauer, J., dissenting) (endorsing a rule limiting shippers' duty of care and placing final responsibility for safe loading of property on the carrier because it "reflects the practice and understanding in the trucking industry as to carriers having final responsibility for the loads they haul" (quoting Vargo-Shaper v. Weyerhaeuser Co., 619 F.3d 845, 849 (8th Cir. 2010)) (internal quotation marks omitted)).

127. "As one court has noted, 'if the law imposed on the principal liability for failure to supervise or monitor the contractor's activities, the result is added cost for minimal benefit.'" *Van Fossen*, 777 N.W.2d at 698 (quoting PSI Energy, Inc. v. Roberts, 829 N.E.2d 943, 953 (Ind. 2005)).

holding that "where a contract imposes responsibility on the general contractor for the safety of the employees of the subcontractor, the general contractor may not escape the responsibility of seeing that duty performed by delegating it to an independent contractor."[128] In situations where "the defendant general contractor assumed a duty under its contract . . . for the safety of the workers," the duty must be treated as "nondelegable" to effectuate the terms of the contract as bargained for by the subcontractor.[129] Thus, while "the general contractor is free to delegate the duty of performing the task" to ensure the subcontractors' employees' safety, the general contractor "cannot avoid the liabilities arising from the delegated duties if breached."[130] Ultimately, for policy reasons, the "liability buck" must stop with each party that contractually assumed responsibility for workers' safety, and the control principle cannot absolve them of their contractually assumed duty.[131]

The contours of the control principle as a public policy exception was revisited in *McCormick v. Nikkel & Associates, Inc.*, a "duty to warn" case that examined Iowa negligence cases before and after *Thompson* to extract "a common principle: *liability is premised upon control*."[132] In this particular case, plaintiff McCormick received a severe electrical shock when he attempted to perform maintenance on a switchgear cabinet; when McCormick sued the subcontractor who had turned on the power a week earlier, the subcontractor argued that the "relevant duties" rested with McCormick's employer, who "owned and controlled the switchgear box and controlled the work being performed by McCormick at the time of the accident."[133] The Iowa Supreme Court agreed and overtly stated the pragmatic policy considerations in play:

> Application of the control principle makes sense here from a public policy perspective. Consider the implications of a contrary rule that a party has created a nondelegable risk of harm if the electricity is on when it leaves the premises. No matter that the accident occurred a

128. Sec. Nat'l Bank v. Am. Piping Grp., Inc., No. 12-1466, 2013 WL 2145763, at *2 (Iowa Ct. App. May 15, 2013) (citing Giarratano v. Weitz Co., 147 N.W.2d 824, 831–32 (Iowa 1967), *abrogated on other grounds by Van Fossen*, 777 N.W.2d at 695 n.6).

129. *Id.* at *5 (citing *Giarratano*, 147 N.W.2d at 832).

130. *Id.* (citing Kragel v. Wal-Mart Stores, Inc., 537 N.W.2d 699, 703 (Iowa 1995)).

131. *Id.*

132. McCormick v. Nikkel & Assocs., Inc., 819 N.W.2d 368, 372 (Iowa 2012) (quoting *Van Essen*, 599 N.W.2d at 720 n.3) (internal quotation mark omitted).

133. *Id.* at 370.

> week later, or that the facility could not operate without electricity, or that the owner was fully aware of the relevant risks, or that the equipment had been locked up. To avoid potential liability, various parties (owners, landlords, repairpersons, etc.) would need to turn off utilities that involve any risk of hazard (e.g., gas, electricity) whenever they leave a property. These unnecessary shutoffs would result in burdens and inconveniences to businesses and the general public.[134]

This treatment of public policy concerns illustrates that, in practice, it is critically important to make public policy arguments that the control principle should apply (in addition to arguments from legal theory or from analogous precedent asserting that it already does apply) because the *McCormick* court devoted most of its attention to the factual question of whether it was the subcontractor or McCormick's employer who was "in the best position to have prevented the accident."[135] McCormick might have prevailed if he had successfully shown that the subcontractor knew or should have known that taking steps to convey or post a warning would "reduce the risk of physical harm to which a third person is exposed."[136]

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134. *Id.* at 373. Additionally, the *McCormick* court observed that the control principle comports well with the way that the law inoculates parties with an absolute lack of control over the cause of the plaintiff's injury against *all* liability even absent public policy considerations, simply because their conduct cannot "create a 'risk of physical harm' giving rise to a general duty [of reasonable care] under section 7(a) of the Third Restatement" if another party is charged with total control over the equipment or facilities that served as the mechanism of injury. *Id.* at 375. This same "[f]undamental tort principle[] of risk apportionment" supported a finding that the brand-name manufacturers in *Huck* owed no duty of care to the plaintiff who took the generic version of their drug, because the brand-name manufacturers

> d[id] not place [the generic product] in commerce, ha[d] no ability to control the quality of the product or the conformance of the product with its design, and d[id] not have the opportunity to treat the risk of producing the product as a cost of production against which liability insurance can be obtained.

Huck v. Wyeth, Inc., 850 N.W.2d 353, 378 (Iowa 2014) (alterations in original) (quoting CHARLES J. NAGY, JR., AM. L. PROD. LIAB. 3d § 5:10 (2014)).

135. *See McCormick*, 819 N.W.2d at 375 ("When a party performs defective work, the negligence occurs at the time of performance, and the party that performed the work normally is in the best position to have prevented the accident; when the allegation is a failure to warn, though, that failure (like any 'failure') occurs over a period of time, and other parties may be in a better position to warn for multiple reasons.").

136. *See* Megan Bittakis, *Duty Under Negligent Breach of Contract Claims*, 62 DRAKE L. REV. 619, 648 (2014) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR

Justice Daryl Hecht, who authored the majority opinion in *Thompson*, wrote a scathing partial dissent in *McCormick*.[137] He maintained the majority had delved too deeply into the specific facts of the case in fashioning the exception, to the point where it had issued a factual finding on the scope of liability issue under the guise of a public policy exception.[138] Essentially, Justice Hecht argued that the "class of cases" exempted by the majority's purportedly categorical ruling

> that "a subcontractor that properly performs electrical work on a jobsite, then locks up the work and transfers control to the property owner [does not owe] a duty to an employee of the owner electrocuted six days later when the owner fails to deenergize the work site in contravention of various warnings and regulations"

contained only the singular case before the court.[139]

Justice Hecht's critique is a pointed reminder that a public policy exception must be argued as "a clear, bright-line rule of law applicable to a particular class of cases" and based on "factors applicable to categories of actors or patterns of conduct," rather than on "factual, case-specific details."[140] If there are "factors specific to an individual case" that impact the

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PHYSICAL & EMOTIONAL HARM § 43 (2010)) (internal quotation mark omitted). Alternatively, the subcontractor might have had a duty to McCormick stemming from a contractual obligation to leave the plant in a safe work condition after the job was completed.

> One example of this is [*Evans v. Otis Elevator Co.*]. If the defendant has a duty to inspect and maintain an elevator, complying with that duty will prevent injuries because an inspection would uncover potentially dangerous flaws, and maintenance would prevent flaws from materializing. The contractual duty—inspecting and maintaining elevators—reduces the possibility of physical harm, and therefore the defendant has a duty to strangers to the contract.

See id. at 649 (footnotes omitted) (citing Evans v. Otis Elevator Co., 168 A.2d 573, 575–76 (Pa. 1961)).

137. *See McCormick*, 819 N.W.2d at 377–83 (Hecht, J., concurring in part and dissenting in part).

138. *See id.* at 382.

139. *See id.* at 378 (alteration in original) (quoting *McCormick*, 819 N.W.2d at 369 (majority opinion)).

140. *See id.* at 377–78 (citations omitted) (internal quotation mark omitted); *see also* W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 729 (2008) ("Duty should not be narrowed to the point that it becomes a ticket for a single ride on the tort railroad; when it does, the court has cut the jury out of its historical and proper role in the system.").

defendant's liability for a particular harm the plaintiff suffered, "the appropriate analytical rubric is scope of liability."[141] Consequently, considering any substantial amount of case-specific fact questions within the legal analysis of the duty element "demonstrates a fundamental misunderstanding of the distinction between duty and scope of liability and results in a conflation of the two issues."[142] Justice Hecht would have held that the generally applicable duty of reasonable care from *Thompson* applied, finding "no articulated countervailing principle or policy that warrants denying or limiting the liability of electrical contractors as a class of actors for risks of injury created by their own acts or omissions at a construction site," and would have reserved the fact-intensive issues of "foreseeability, breach of duty, and scope of liability" for the jury at trial.[143]

The control principle is also applicable in contexts involving leased property. When a tenant exercises control over leased premises, the tenant is "subject to all of the liabilities of one in possession,"[144] simply because of the maxim that "liability is premised upon control."[145] As such, when a landowner no longer exercises direct control over leased premises, the landlord's "general duty to exercise reasonable care is appropriately displaced."[146] In such cases, even "a landlord's awareness of a dangerous condition existing when a tenant first takes possession" will not impose liability, as long as the tenant knows or reasonably should know about the dangerous condition, "has the opportunity to protect others from the dangerous condition," and "fails to do so."[147] The policy justification for this exception to the generally applicable duty of reasonable care is readily apparent, because "imposing a duty on a landowner under these facts is

141. *See McCormick*, 819 N.W.2d at 377 (Hecht, J., concurring in part and dissenting in part) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. a (2010)) (internal quotation marks omitted).

142. *See id.*

143. *See id.* at 382–83.

144. Patterson v. Rank, No. 10-0566, 2010 WL 5394623, at *5 (Iowa Ct. App. Dec. 22, 2010) (quoting RESTATEMENT (SECOND) OF TORTS § 356 cmt. a (1965)) (internal quotation mark omitted).

145. *Id.* (quoting Allison *ex rel.* Fox v. Page, 545 N.W.2d 281, 283 (Iowa 1996)) (internal quotation marks omitted).

146. *Id.* (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. j (2010)).

147. *Id.* (quoting Frobig v. Gordon, 881 P.2d 226, 230 (Wash. 1994)) (internal quotation marks omitted).

equivalent to a policy of strict liability for the landowner"[148] and would "require [the landlord], as the owner of the building, to be an insurer for the acts of his tenant."[149]

In *Patterson v. Rank*, the Bartlett family leased a house to a couple who owned "a pit bull named Chopper," and charged the couple an additional $30 per month for the dog's presence on the property, pursuant to the terms of the lease; inevitably, Chopper bit a passerby, who sued both the tenants and the Bartletts to recover damages for his injuries.[150] The Bartletts successfully moved for summary judgment on the duty element—absolving themselves, but not their tenants, of liability—and the Iowa Court of Appeals affirmed.[151] Even though the Bartletts knew about the dog and contractually consented to its presence on their property, the control principle absolved them of all liability in this particular instance, because "[b]oth statutory law and case law impose a duty of care on the dog owner" stemming entirely from "the dog owner's control over the dog."[152] But the *Patterson* court showed it was considering policy implications as well, stating that "imposing a duty on the landlord in this case would 'render it difficult, either through unavailability or prohibitive cost, for prospective tenants with dogs to find housing.'"[153]

The control principle has thus been articulated and endorsed as a public policy exception to *Thompson*'s generally applicable duty of care, and it will certainly continue to evolve as new factual contexts and new policy considerations present themselves in Iowa courts.

b. *"Contact sports" and other dangerous activities.* Those who participate in inherently dangerous activities voluntarily accept a certain amount of risk; accordingly, "some activities or circumstances have been excepted from the reasonable-care duty in favor of the imposition of a less stringent duty of care for participants in the activity to protect others from

148. *Id.*

149. *Id.* (alteration in original) (quoting Gonzales v. Wilkinson, 227 N.W.2d 907, 910 (Wis. 1975)).

150. *Id.* at *1.

151. *Id.* at *1, *6.

152. *Id.* at *5. The *Patterson* court quoted an Iowa statute that set out, in part, that "[t]he owner of a dog shall be liable to an injured party for all damages done by the dog . . . except when the party damaged is doing an unlawful act, directly contributing to the injury." *Id.* (quoting IOWA CODE § 351.28 (2009)).

153. *Id.* at *6 (quoting Gilbert v. Christiansen, 259 N.W.2d 896, 898 (Minn. 1977)).

injury."[154] In *Feld v. Borkowski*, the plaintiff was playing first base in a slow-pitch softball practice session when the defendant hit a pop fly deep into left field; everyone present was focused on tracking the ball's trajectory as it sailed over third base, and nobody noticed the aluminum bat that had flown out of the defendant's hands, "directly down the first baseline," until it struck the plaintiff's head, injuring him.[155] The Iowa Supreme Court held that slow-pitch softball fell within the contact sports exception to the general duty of reasonable care, which applies to sports in which "players accept risks of harm" that are inherently associated with the activities encompassed by the sport, "both derived from activities that are executed as contemplated by the sport and activities that are improperly executed."[156] This includes risks inherent in correct execution of elements of the sport, like a successful tackle, but also extends to include risks associated with flawed or failed executions, "such as when players run into punters in football, midfielders are high-sticked in lacrosse, basketball players are fouled, batters are hit by pitched balls in baseball, and hockey players are tripped,"[157] simply because "no participant can play the game error free."[158] However, the contact sports exception does not insulate athletes from all liability; "athletes who step onto the playing field to compete are not completely free from legal responsibility for their conduct that creates a risk of injury, but are restrained under a substantially lower duty of care" that only prohibits reckless or intentionally tortious conduct.[159]

The term "contact sports exception" is something of a misnomer, because it applies to activities that may not typically be thought of as contact sports; the "analysis does not focus on whether the participants were engaged in a formally organized or coached sport, but instead centers on whether the activity inherently involves the risk of injurious contact to

154. Feld v. Borkoswki, 790 N.W.2d 72, 76 (Iowa 2010). In contexts where the plaintiff engaged in activities that were dangerous because of the factual context specific to the case—not because of the inherent risks to be associated with an entire category of activities—the "implicit assumption of risk" defense would not negate the existence of a defendant's duty of reasonable care but would instead militate toward precluding recovery under Iowa's comparative fault statute. *See* IOWA CODE § 668.3(1) (2011) (establishing that a plaintiff who is at least 50 percent at fault cannot recover).

155. *Feld*, 790 N.W.2d at 74.

156. *Id.* at 77.

157. *Id.* (citing Leonard *ex rel.* Meyer v. Behrens, 601 N.W.2d 76, 80 (Iowa 1999)).

158. *Id.*

159. *Id.* (citing Nabozny v. Barnhill, 334 N.E.2d 258, 260–61 (Ill. App. Ct. 1975)).

participants."[160] Under this broad definition of contact sports, "if the risk of harm of injurious contact was known and understood as a part of the sport," that generally known and understood risk of harm is "sufficient to transform liability for an injury sustained by a participant while engaged in the sport from a standard of negligence to a standard of recklessness."[161]

The majority in *Feld* applied the contact sports exception and its lowered duty of care, noting that neither party "challenge[d] the viability of the contact-sports exception in Iowa" after *Thompson*; because neither party raised the issue, the *Feld* court stated that it would not "consider or forecast whether or not that controlling law should be abandoned or changed in favor of a duty of reasonable care or modified by a standard staking out some middle ground."[162] Accordingly, the contact sports exception, along with other context-dependent exceptions based on a similar "underlying assumption-of-the-risk premise" may be vulnerable to attack after *Thompson*.[163]

B. *Breach and Scope of Liability Analysis After* Thompson

Although *Thompson* excised foreseeability from the analysis of the existence of a duty of care, foreseeability of harm is still unquestionably relevant in analyzing both breach and scope of liability elements. Since *Thompson*, Iowa courts have increasingly referenced the test for breach set out in the Third Restatement—which primarily focuses on "the foreseeable likelihood that the person's conduct will result in harm" and "the

160. *Id.* at 78 (citing *Leonard*, 601 N.W.2d at 80–81); *see Leonard*, 601 N.W.2d at 80–81 (classifying paintballing as a contact sport).

161. *Feld*, 790 N.W.2d at 78–79.

162. *Id.* at 78 & n.4. Concurring opinions by Justice Brent Appel and Justice David Wiggins argued that "the question of the continued viability of the contact-sports exception" was clearly presented and needed to be decided before the action was remanded to the district court. *See id.* at 81 (Wiggins, J., concurring specially); *id.* at 86 (Appel, J., concurring in part and dissenting in part).

163. *See id.* at 79 (majority opinion).

> The continued validity of the contact-sports exception and its viability and scope under the Restatement (Third) of Torts are not addressed by a majority of the members of the court and therefore remain open questions. The court may have reached a result on this appeal, but it has left the law in this area murky and uncertain.

Id. at 86 (Appel, J., concurring in part and dissenting in part). Justice Appel's concurrence is a stirring read and will provide substantial support for any future challenges to the contact sports exception.

foreseeable severity of any harm that may ensue"—to determine whether a defendant breached a duty of care.[164] Similarly, the Iowa Supreme Court has held that post-*Thompson* legal causation determinations must be made under the scope of liability standard and must depend on "whether the type of harm that occurred is among those reasonably foreseeable potential harms that made the actor's conduct negligent."[165] *Thompson*'s impact on the analysis of each element will be examined in turn.

1. *Breach, Reasonable Care, and Foreseeability of Third-Party Misconduct*

A defendant can breach the duty of reasonable care through conduct that "foreseeably combines with or permits the improper conduct of the plaintiff or a third party."[166] In *Brokaw,* when assessing whether the coach of the rival team breached the duty of reasonable care by allowing the short-tempered player (McSorely) to play, the district court "framed the question

164. Hill v. Damm, 804 N.W.2d 95, 99 (Iowa Ct. App. 2011) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (2010); *see also* Hoyt v. Gutterz Bowl & Lounge, L.L.C., 829 N.W.2d 772, 777–78 (Iowa 2013) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (2010)).

165. Royal Indem. Co. v. Factory Mut. Ins. Co., 786 N.W.2d 839, 850 (Iowa 2010) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. j (Proposed Final Draft No. 1, 2005)). Even beyond negligence actions, Iowa courts have already begun to import this standard for use in other contexts where proximate causation standards were previously used, replacing the word "negligent" with "culpable," "liable," or "criminal" depending on the case at hand. *See* Spreitzer v. Hawkeye State Bank, 779 N.W.2d 726, 741 (Iowa 2009) ("As with the scope of liability for unintentional torts, 'intentional and reckless tortfeasors are not liable for harms whose risks were not increased by the tortious conduct, even if that conduct was a factual cause of the harm.'" (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 33(c) & cmt. f (Proposed Final Draft No. 1, 2005))); State v. Hoon, No. 11-0459, 2012 WL 836698, at *5 (Iowa Ct. App. Mar. 14, 2012) (citing State v. Fox, 810 N.W.2d 888, 892 n.2 (Iowa Ct. App. 2011)) (holding that, after *Thompson*, the legal causation framework for determining if potentially criminal conduct caused the requisite harm to a victim should prompt the finder of fact to "consider the risks that led to criminalizing the defendant's conduct, and ask if the harm to the victim was the result of any of those risks"); *see also* Union County v. Piper Jaffray & Co., 788 F. Supp. 2d 902, 921 (S.D. Iowa 2009) (quoting Thompson v. Kaczinski, 744 N.W.2d 829, 837 (Iowa 2009)) (fraudulent misrepresentation); *In re* J.S., No. 13-0174, 2013 WL 5291959, at *3 (Iowa Ct. App. Sept. 18, 2013) (victim restitution following criminal conviction).

166. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 9 (2010). The foreseeability of a third party's misconduct "also raises an issue of whether the plaintiff's harm is within the defendant's scope of liability." *Id.* at cmt. c; *see* discussion *infra* Part III.B.2.

as whether the school district knew, or in the exercise of reasonable care should have known, that McSorley was likely to commit a battery against an opposing player."[167] Although it criticized the district court's treatment of the duty element,[168] the Iowa Supreme Court held that "the district court posed the proper question in determining whether a breach of duty occurred, i.e., whether the harm that occurred here—McSorley's intentional battery—was a foreseeable risk under the circumstances."[169]

Brokaw is important because it demonstrates that *Thompson* and the Third Restatement altered the framework for analyzing whether a defendant breached a duty of reasonable care by permitting another party's misconduct—those determinations now "largely depend on consideration of the primary negligence factors" used for determination of breach in any other negligence action.[170]

> One factor is the foreseeable likelihood of improper conduct on the part of a plaintiff or a third party. A second factor is the severity of the injury that can result if a harmful episode occurs. The third factor concerns the burden of precautions available to the defendant that would protect against the prospect of improper conduct by the plaintiff or a third party. The same rationales of fairness and deterrence that in general justify negligence liability likewise render appropriate findings of actionable negligence under [Section 19 of the Third Restatement].[171]

These factors—the foreseeable likelihood of harm, the foreseeable severity of harm, and the burden of taking precautions—are patterned after the three

167. Brokaw v. Winfield-Mt. Union Cmty. Sch. Dist., 788 N.W.2d 386, 393 (Iowa 2010).

168. *See supra* notes 86–91 and accompanying text.

169. *Brokaw*, 788 N.W.2d at 393.

170. *Id.* at 392 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 19 cmt. d (2010)).

171. *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 19 cmt. d (2010)).When a plaintiff's own misconduct contributes to the injury, Iowa comparative fault law bars that plaintiff from recovering any damages if the plaintiff was more than 50 percent at fault. *See* IOWA CODE § 668.3(1) (2011). The Iowa Supreme Court has held that, even in situations where the plaintiff's contributory negligence was so egregious as to implicate "questions of fairness" regarding whether a viable negligence claim against any defendant could be brought, the underlying contributory negligence and fairness questions "are better left to fact finders applying (1) the relevant breach and scope-of-liability analyses, and (2) comparative fault law." Hoyt v. Gutterz Bowl & Lounge, L.L.C., 829 N.W.2d 772, 782 (Iowa 2013) (citing IOWA CODE § 668.3(1)(a)).

factors considered in analyzing the breach element in any negligence action.[172] In cases where a defendant has "sufficient knowledge of the immediate circumstances or the general character of the third party to foresee that party's misconduct," the risk of harm becomes sufficiently foreseeable to warrant precautionary measures and to find that the duty of reasonable care is breached if precautions are not taken.[173] Thus, the foreseeability of the harm that ultimately occurred is pivotal because if "the immediate circumstances or the general character of the player should [have] alert[ed] the coach that misconduct [was] foreseeable, then reasonable care would require the coach to make the decision to bench that player," and the decision to allow him to play would have been negligent.[174]

Because this inquiry is so fact-intensive, the impact of *Thompson* on the burden of proof that defendants must carry to win summary judgment on the breach element—particularly in actions alleging negligent failure to prevent third-party misconduct—cannot be ignored. In *Hoyt v. Gutterz Bowl & Lounge*, the Iowa Supreme Court heard an appeal from a summary judgment ruling in favor of Gutterz, a bowling alley and bar, on the element of breach.[175] The plaintiff alleged that Gutterz negligently failed to prevent two inebriated patrons from assaulting him in the parking lot after a night of heavy drinking.[176] The district court granted summary judgment for Gutterz based largely on the conclusion that the injury to the plaintiff was unforeseeable, and therefore, a failure to prevent that injury was not a breach of the duty of reasonable care as a matter of law.[177]

172. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (2010) ("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.").

173. *Brokaw*, 788 N.W.2d at 392–93 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 19 cmt. f (2010)).

174. *Id.* at 393. However, the *Brokaw* court noted that "even when [a third party's] improper conduct can be regarded as somewhat foreseeable," courts must take care to give a fair amount of weight to the burden-of-precautions factor "to avoid requiring excessive precautions" and to prevent the duty of reasonable care from becoming a limitless duty to prevent tortious actions of others. *Id.* at 392 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 9 cmts. g, h (2010)).

175. *Hoyt*, 829 N.W.2d at 773–74.

176. *Id.* The facts of this case inspired Scenario (3), *supra* Part I.

177. *Id.* at 774. The district court had not clearly addressed the issue of the existence of a duty of care; the Iowa Supreme Court took the opportunity to confirm that no public policy exception applied to exempt bar owners from the general duty to take reasonable

The Iowa Supreme Court found that it could not conclude, as the district court had, that "the record established as a matter of law that an injury to [the plaintiff] was unforeseeable"—primarily because foreseeability of harm is a fact-intensive inquiry that "should be evaluated in the relevant frame of time and place."[178] Foreseeability becomes a critical factual issue in determining whether a breach occurred in contexts in which a defendant has created or increased the likelihood of physical harm to the plaintiff, including situations where "the defendant's business operations may create a physical environment where instances of misconduct are likely to take place."[179] When breach depends on whether the defendant could "foresee a considerable risk, either on account of the general prospect of other persons' negligence during the relevant frame of time and place, or because the actor has knowledge of the propensities of the particular person or persons who are in a position to act negligently," summary judgment on breach is likely inappropriate absent an indisputable showing that the harm to the plaintiff could not have been foreseen.[180]

In such a context, it was improper for the district court to grant summary judgment based on its factual finding "that the information available to Gutterz at the time failed to suggest any possibility of harm."[181] The *Hoyt* court held that "given the relevant context of a bar and the conduct known to occur there," it was impossible to "conclude that the risk of harm to [the plaintiff] was unforeseeable as a matter of law as contemplated by [Restatement (Third)] sections 3, 19, and 40" and similarly impossible to conclude that Gutterz did not breach its duty to take reasonable care to guard against foreseeable risks as a matter of law.[182] Again emphasizing that

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care to prevent physical injury to their patrons:

> Removing foreseeability from the duty analysis, we must consider whether some principle or strong policy consideration justifies exempting Gutterz, or the class of tavern owners in general, from the duty to exercise reasonable care. The parties have not advanced, and we cannot discern, any such considerations compelling exemption of tavern owners from the duty.

Id. at 777; *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 cmt. h (2010).

178. *Hoyt*, 829 N.W.2d at 779.

179. *Id.* at 778 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 19 cmt. e (2010)).

180. *Id.* at 779 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 19 cmt. f (2010)).

181. *Id.*

182. *Id.* at 779–80 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL &

"[s]mall changes in the facts may make dramatic changes in how much risk is foreseeable," the Iowa Supreme Court's holding in *Hoyt* instructed Iowa courts to "leave the breach question's foreseeability determination to juries unless no reasonable person could differ on the matter."[183]

2. *Scope of Liability and the Foreseeability of Intervening Causes of Harm*

The scope of liability standard embodies the general rule that "an actor's liability is limited to those physical harms that result from the risks that make an actor's conduct tortious."[184] If the finder of fact determines that "the type of harm that occur[red] is among those reasonably foreseeable potential harms" that would cause a reasonable person to deem the conduct negligent, it is just to impose liability for that harm.[185] While this approach is intuitively appealing (if not slightly tautological), the real impact of this new scope of liability standard for legal causation emerges when there are competing "plausible characterizations of the range of reasonably foreseeable harms arising from the defendant's conduct leading to different outcomes and requiring the drawing of an arbitrary line."[186]

The arbitrary line that will be drawn in any given case frequently lies somewhere between the parties' "competing characterizations of the harm suffered" and, especially in cases involving harms produced by intervening causes, often hinges upon the "level of generality or specificity" the finder of fact chooses to use when evaluating the nature of the harm that occurred.[187] If a finder of fact is persuaded to adopt a more generalized approach to "the relevant range of risks" inherent to the defendant's

EMOTIONAL HARM §§ 3, 19, 40 (2010)); *but see id.* at 784–85 (Waterman, J., dissenting) ("In the case at bar there was no evidence of a potential danger to [the plaintiff] from [the assailant]. Because of that total lack of evidence, a fact question of whether Gutterz exercised reasonable care to discover the existence of a danger is not generated.").

183. *Id.* at 780 (majority opinion) (citing Thompson v Kaczinski, 774 N.W.2d 829, 836 (Iowa 2009)); *see also* Jean v. Hy-Vee, Inc., No. 12-0246, 2012 WL 5539738, at *6 (Iowa Ct. App. Nov. 15, 2012) ("Where reasonable minds can differ in evaluating whether the business owner's conduct lacked reasonable care, the responsibility for making this evaluation rests with the jury." (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 8(b) (Proposed Final Draft No. 1, 2005))).

184. *Hoyt*, 829 N.W.2d at 780 (citing *Thompson*, 774 N.W.2d at 838).

185. *Id.* at 781 (citing *Thompson*, 774 N.W.2d at 839).

186. *Id.* (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. i (2010)).

187. Mitchell v. Cedar Rapids Cmty. Sch. Dist., 832 N.W.2d 689, 700 (Iowa 2013) (citing *Hoyt*, 829 N.W.2d at 781).

conduct, then that finder of fact will be more likely to determine that the harm suffered by the plaintiff fell within those risks and within the scope of the defendant's liability.[188] In response, defendants often urge the finder of fact to accept a characterization of the relevant range of risks with more specificity or more qualifications to prompt a finding that a particular harm fell outside of carefully drawn boundaries of the defendant's liability.[189] When this occurs—when "contending plausible characterizations of the range of reasonably foreseeable harms arising from the defendant's conduct lead to different outcomes and require line-drawing"—Iowa courts are instructed to "leave the case to the judgment and common sense of the fact finder."[190]

This was the approach taken in *Mitchell v. Cedar Rapids Community School District*; in this case, parents of a mentally challenged minor brought a negligence action against her school district after she skipped class, left school grounds with another student during the school day, and was sexually assaulted by that student later that afternoon.[191] On appeal from the district court's ruling denying the school district's motion for directed verdict on the legal causation element,[192] the Iowa Supreme Court affirmed, holding that "there was sufficient evidence to generate a jury question on the issue of whether the harm [the minor] suffered was among the potential harms that made [the school district]'s conduct tortious."[193] The fact that an intervening but-for cause was present between the school district's failure to supervise the student and the subsequent sexual assault was unquestionably relevant, as "questions regarding the foreseeability, culpability, and significance of an intervening act all bear on whether the harm is within the scope of liability," but because those questions usually involve fact-intensive inquiries, the *Mitchell* court believed that "these determinations are typically best left to

188. *See Hoyt*, 829 N.W.2d at 781–82.

189. *See, e.g.*, *id.* at 781 ("According to Gutterz, the relevant range of risks did not include the risk that a verbally aggressive patron in a bar might suffer retaliatory harm from a patron who showed no signs of physical aggression inside the bar.").

190. *Mitchell*, 832 N.W.2d at 700 (citing *Hoyt*, 829 N.W.2d at 781).

191. *See id.* at 691–93.

192. *Id.* at 694.

193. *Id.* at 700. The school district's response to the minor student's absence from class was to record it in a computer system, which notified the student's parents of their child's absence from class later that evening; this insufficient response was alleged to be a negligent "failure to supervise" that "increased the risk [the student] would leave the campus unsupervised . . . and suffer the harm found by the jury in this case." *Id.* at 701.

juries, as was the case here."[194]

The *Mitchell* court's preference for leaving questions of foreseeability and determinations of "the limits on liability" to the jury—especially in cases "where suggested limits on liability require careful attention to the specific facts of a case, and difficult, often amorphous evaluative judgments for which modest differences in the factual circumstances may change the outcome"[195]—had important implications for Iowa courts confronted with dispositive motions asserting that an intervening cause relieved a defendant of liability for a plaintiff's injury. If resolving those fact-intensive questions was "the proper role of the jury in tort cases," the *Mitchell* court reasoned, cases requiring a fact-based "scope of liability" analysis must survive motions for summary judgment and directed verdict.[196] Thus, *Mitchell* can be read as a strong statement that a harm resulting from an intervening cause may still be within the defendant's scope of liability; furthermore, when reasonable minds could differ on whether that is the case, such determinations *must* be left to the ultimate finder of fact and cannot be made through a ruling on a motion for summary judgment or directed verdict.[197] Of course, when the plaintiff provides "no evidence" that the intervening cause or the harm suffered were "reasonably foreseeable," the court may grant a dispositive motion based on the plaintiff's failure to meet the burden of production.[198]

194. *Id.* at 701 n.6 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 34 cmt. e (2010)). This outcome was "[c]onsistent with the goals of the drafters of the Restatement (Third)." *Id.*

195. *Id.* at 702 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. f (2010)); *see also* Hill v. Damm, 804 N.W.2d 95, 102 (Iowa Ct. App. 2011) (reversing a directed verdict for the defendant on the scope of liability element because "the court failed to consider facts particular to this case evidencing risks making certain risks foreseeable that otherwise were not" (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. d (2010))).

196. *See Mitchell*, 832 N.W.2d at 702 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. f (2010)).

197. *See id.* at 700–02.

198. *See id.* at 708 (Waterman, J., dissenting). Justice Thomas Waterman would have granted the school district's motion for directed verdict on the elements of duty, breach, and scope of liability. *See id.* at 713. On the scope of liability issue, his dissent focused on two points: (1) he believed that "the intervening criminal act was not reasonably foreseeable" and that the plaintiff had provided no evidence to show otherwise, and (2) he found no evidence that the school district's negligence had *increased* the risk of harm to the minor student, because her willful and deliberate attempts to evade supervision meant the harm that occurred "was likely to occur somewhere, sometime whether or not

The strong preference for allowing juries to decide issues of scope of liability also prevents judges from assuming the power to decide on the appropriate level of generality or specificity to use to describe a harm that occurred.[199] In *Hill v. Damm*, the plaintiffs alleged that the defendant bus company allowed their 13-year-old daughter to get off of her school bus at a certain stop, after the parents had warned the bus company of a particularized danger presented by an adult who owned an auto dealership at that location—and that the 13-year-old subsequently met up with that adult, who abducted and murdered her.[200] The defendant argued that while it may have been foreseeable that she would be sexually abused if she were allowed to meet up with that adult, it was not reasonably foreseeable that she would be murdered, and thus, the harm that occurred was outside of the bus company's scope of liability.[201]

The Iowa Court of Appeals stated that when the district court granted the defendant's motion for directed verdict, it had correctly framed the question—"At what level of generality should the type of harm in this case be described?"—but had erred in substituting its own answer for the jury's.[202] Because the plaintiffs had provided evidence that the defendant "was aware [the victim's] bus route was changed for her overall safety in general, not just to prevent further sexual abuse," the *Hill* court held that this was a case in which "reasonable minds could differ as to whether the type of harm suffered . . . was among the harms whose risks made [the defendant]'s conduct tortious."[203] Thus, it was for the jury to decide the appropriate level of generality or specificity to use to evaluate whether the harm that the plaintiff suffered was within the scope of the defendant's liability.[204]

Although issues of generality or specificity are usually for the jury, the scope of liability standard contains an important limitation on defendants'

she skipped her last class." *See id.* at 708–10.

199. *Hill*, 804 N.W.2d at 100–01.

200. *Id.* at 96–97. This case inspired Scenario (4), *supra* Part I.

201. *Id.* at 98, 100–01.

202. *Id.*

203. *Id.* at 102–03 (citations omitted).

204. The *Hill* court implied that if the level of generality that the plaintiffs argued was so far beyond the relevant range of risks—for example, if the victim had "been attacked by some unforeseen angry dog" after she was dropped off at the wrong bus stop—then a directed verdict may have been appropriate. *See id.* at 103 n.2. However, this was not the case; the same man who was known to pose a threat to the victim caused the harm that occurred, so neither the facts nor the law "requir[ed] the splitting of hairs employed by the trial court here." *Id.* at 103.

liability that courts *can* rely on in ruling on dispositive motions: any harm suffered is outside of an actor's scope of liability if "the tortious aspect of the actor's conduct was of a type that does not generally increase the risk of that harm."[205] In *Royal Indemnity Co. v. Factory Mutual Insurance Co.*, the plaintiff was the insurer responsible for paying for millions of dollars of inventory lost after a John Deere warehouse burned to the ground; neither the warehouse sprinkler systems nor the fire department could extinguish the blaze because of a malfunction relating to inadequate water pressure.[206] Although the cause of the fire was never determined, the plaintiff alleged that the defendant, who was responsible for maintaining the warehouse fire alarm and sprinkler systems until their contract to provide those services expired three months prior to the fire, had caused the multimillion dollar loss because its inspections had negligently failed to disclose the problems with the sprinkler systems.[207] The district court denied the defendant's motion for directed verdict on the plaintiff's breach of contract claim, but granted a motion for directed verdict for the defendant on the causation element of the plaintiff's negligence claim.[208]

The Iowa Supreme Court affirmed the district court's grant of directed verdict for the defendant on the scope of liability issue because the plaintiff provided no evidence that could lead a reasonable finder of fact to believe that "the loss was more likely to occur because of the deficiencies in the inspection."[209] Even though the *Royal Indemnity* court found that the plaintiff had established factual causation—that "but for the bad inspection, it would not have leased the facility"[210]—there was no evidence that could lead a reasonable jury to find that the defendant's inspection increased the

205. Royal Indem. Co. v. Factory Mut. Ins. Co., 786 N.W.2d 839, 850 (Iowa 2010) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 30 (Proposed Final Draft No. 1, 2005)) (internal quotation mark omitted).

206. *Id.* at 843–44.

207. *Id.* "Deere's fire expert identified three possible causes of the fire. These included: (1) arson, (2) electrical failure or malfunction, and (3) an accident or careless human act as cigarette butts were found at the fire's point of origin." *Id.* at 844.

208. *Id.* at 844. On the breach of contract claim, the jury returned a verdict for the plaintiff to the tune of $39,509,145; the court applied the *pro tanto* rule and reduced the judgment by the amount already recovered from other named defendants in settlement agreements, leaving it at $34,986,617. *Id.* The verdict on this count was overturned; the district court's directed verdict on the negligence count was treated separately and was not disturbed on appeal. *See id.* at 845–49, 52.

209. *Id.* at 851.

210. *Id.* (citing Berte v. Bode, 692 N.W.2d 368, 372 (Iowa 2005)).

risk of either the fire or the sprinkler system malfunction:

> To use the analysis of the Restatement (Third), the alleged deficiencies of the inspection would not have made this loss more likely to occur than if the inspection had been properly performed. An adequate inspection would not have stopped arson or careless smoking, nor does Royal claim it would have disclosed an electrical failure or malfunction. . . . The loss of water pressure remains a mystery as well. No problem that could have been discovered by a reasonable inspection is thought to have been the cause of the loss.[211]

In this case, the intervening causes—both the fire and the sprinkler system failure—may or may not have been foreseeable, but the question of their foreseeability was mooted by the bright-line rule "[l]imiting liability to instances in which the tortious conduct increased the risk of harm" and precluding recovery in cases where the plaintiff shows "a merely serendipitous causal connection between the tortious aspect of the actor's conduct and the other's harm."[212] As such, the Iowa Supreme Court held that because the plaintiff had not shown that the defendant's actions or omissions had "increased the risk of the loss that actually occurred," the harm was not within the scope of the defendant's liability as a matter of law, and the district court was correct in granting the defendant's motion for directed verdict and withholding this matter from the jury.[213]

To summarize, two basic principles underlying Iowa courts' recent treatment of duty, breach, and scope of liability have emerged from these cases. First, the generally applicable duty of reasonable care applies to any defendant whose actions created or increased the risk of physical harm to the plaintiff, regardless of whether that harm was foreseeable—unless an articulated exception pertaining to either the relationship between the

211. *Id.* at 851–52.

212. *Id.* at 851 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 30 cmt. b (Proposed Final Draft No. 1, 2005)). The *Royal Indemnity* court believed this bright-line limitation was "important for creating appropriate incentives to deter tortious behavior and to address corrective-justice concerns." *Id.* (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 30 cmt. b (Proposed Final Draft No. 1, 2005)). This principle formed the basis for Justice Waterman's dissent from the majority's holding on the scope of liability issue in *Hoyt*, discussed *supra* Part III.B.1, in which he argued that "there is no evidence that *Gutterz* did or failed to do anything that *increased* the risk. . . . To the contrary, Gutterz reduced the risk those men would come to blows by ejecting [the plaintiff], who was harassing [the assailant]." Hoyt v. Gutterz Bowl & Lounge, 829 N.W.2d 772, 785 (Iowa 2013) (Waterman, J., dissenting).

213. *Royal Indem.*, 786 N.W.2d at 852.

parties or a countervailing public policy interest justifies a conclusion that the case at hand falls within a broad category of cases in which departure from that generally applicable standard of care is justified. Second, whenever *any* evidence is presented that supports a finding that the defendant's actions unreasonably increased the risk that a plaintiff would suffer a reasonably foreseeable harm—even if that harm ultimately came about through third-party misconduct or some other intervening cause—Iowa courts must refrain from granting summary judgment or directed verdict on the elements of breach and scope of liability and instead preserve those questions for the finder of fact.

IV. STRATEGIC INCENTIVES, TACTICAL CONSIDERATIONS, AND THOUGHTS ON THE IMPACT OF THE NEW RULES OF THE GAME

By changing the rules that govern Iowa negligence actions, *Thompson* and its progeny have given rise to new opportunities for attorneys who are aware of recent developments in Iowa negligence law to gain an advantage over those who are not. Strategic concerns and tactical considerations that arise at the filing and pleading stages, in arguing dispositive motions, in submitting a case to the jury, and in arguing a case on appeal will each be considered in turn.

A. *Filing the Complaint and First Answer*

1. *Take Advantage of New Options Regarding Choice of Law*

For most tort actions, a state's choice of law provisions generally lead courts to apply the tort law of the state where the action giving rise to the case occurred.[214] However, the specific tests used to determine which state's

214. *See* Kevin Tuninga, *Forty-Plus Years of Iowa Choice-of-Law Precedent: The Aftermath of the Restatement (Second) of Conflict of Laws*, 43 CREIGHTON L. REV. 205, 208 (2009) (noting that, in most tort cases, "the tort rule of general application under Iowa's Second Restatement approach will yield the same result" as the First Restatement's *lex loci delicti* rule). Iowa courts still follow the Second Restatement of Conflicts approach with regard to choice of law in tort actions. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey*, 62 AM. J. COMP. L. 223, 282 (2014). Disputes over whether an Iowa court should apply another state's substantive law in a negligence action will thus require the court to weigh seven factors to determine which state's law should apply:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum [state], (c) the relevant policies of other interested states and the

substantive law applies in a given action vary from state to state with startling diversity.[215] Because the choice-of-law rules of the forum state where the action was originally filed will determine which state's substantive law should apply,[216] attorneys who are preparing to file a complaint in a negligence action would be well served to investigate each potential forum's choice of law provisions to determine if any of the available options will change the rules of the game to the plaintiff's advantage.

Whenever possible, both in Iowa and in other states, plaintiffs seeking to avoid the issue of foreseeability at the summary judgment stage should file in a forum where local choice of law rules will lead the court to apply Iowa substantive law or the substantive law of another state that has adopted a general duty of reasonable care to foreclose the possibility of a no-duty ruling on a motion for summary judgment.[217] Conversely, whenever the facts of the case support the argument, defendants should argue for the application of the law of a state that has not adopted the general duty of reasonable care.[218] This would enable defendants to move for summary judgment on the duty element if they can present the argument that the harm suffered by the plaintiff was unforeseeable, thus circumventing the generally plaintiff-friendly effects of *Thompson* and the Third Restatement.[219]

> relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

215. *See* Symeonides, *supra* note 214.

216. *See* Ferens v. John Deere Co., 494 U.S. 516, 519 (1990) (affirming the rule from Van Dusen v. Barrack, 376 U.S. 612 (1964)).

217. States that have similar substantive law in this respect include Arizona, *see* Gipson v. Kasey, 150 P.3d 228, 231–32 (Ariz. 2007); Nebraska, *see* A.W. v. Lancaster Cnty. Sch. Dist., 784 N.W.2d 907, 918 (Neb. 2010); Washington, *see* Michaels v. CH2M Hill, Inc., 257 P.3d 532, 543 (Wash. 2011); and Wisconsin, *see* Behrendt v. Gulf Underwriters Ins. Co., 768 N.W.2d 568, 575–76 (Wis. 2009).

218. A 50-state survey is beyond the scope of this Note. For a more thorough look at the variations in methods that states use to analyze the duty element, see Cardi, *supra* note 40, at 1879–90; for an analysis that focuses specifically on states that have explicitly adopted or rejected portions of the Third Restatement's reformulation, see Mike Steenson, *Minnesota Negligence Law and the Restatement (Third) of Torts: Liability for Physical and Emotional Harms*, 37 WM. MITCHELL L. REV. 1055, 1062–86 (2011).

219. *See* Steenson, *supra* note 218, at 1064.

2. *Identify When the Complaint States a Claim Under* Thompson

The defense that a complaint "[f]ail[s] to state a claim upon which any relief may be granted" may be raised by preanswer motion or in the first responsive pleading.[220] In general, this is "rarely an appropriate vehicle for disposing of actions without trial."[221] Nevertheless, attorneys filing negligence actions in Iowa should take care to avoid dismissal by crafting complaints that state a claim that survives the test of "legal sufficiency" and states well-pleaded facts that support the plaintiff's "right of recovery" under the new formulation of the elements of negligence set out in *Thompson*.[222] Defense attorneys, in turn, must know how to immediately identify any pleadings that state facts insufficient to support a right of recovery after *Thompson*; if the motion to dismiss for failure to state a claim is not raised in the first responsive pleading or by amendment to the answer within 20 days of service, it is waived and cannot be raised at all.[223]

Some commentators have theorized that "[a]ny petition or complaint that alleges 'proximate cause' in a case governed by the Restatement (Third) is subject to an Iowa R. Civ. P. 1.421(1)(f) or Fed. R. Civ. P. 12(b)(6) motion for 'failure to state a claim upon which any relief can be granted.'"[224] This statement is almost certainly overbroad; it is likely that Iowa courts are willing to be lenient regarding the precise phrasing required within the complaint, especially considering that the term "proximate cause" still appears in Iowa statutes dealing with tort liability.[225] Accordingly, the mere use of the phrase "proximate cause" is unlikely to cause a trial court to

220. IOWA R. CIV. P. 1.421(1)(f); *see also* FED R. CIV. P. 12(b)(6).

221. Mlynarik v. Bergantzel, 675 N.W.2d 584, 586 (Iowa 2004) (citing Am. Nat'l Bank v. Sivers, 387 N.W.2d 138, 140 (Iowa 1986)).

222. Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 608–09 (Iowa 2012) (citations omitted). The Iowa Supreme Court has considered and rejected the *Twombly–Iqbal* standard of "plausible facts" adopted by the U.S. Supreme Court for applying Federal Rule 12(b)(6). *Id.* at 607–08 (citations omitted). Iowa continues to use a "no right of recovery under any state of facts" standard for motions to dismiss under Iowa Rule 1.421(1)(f). *Id.* at 609 (quoting U.S. Bank v. Barbour, 770 N.W.2d 350, 353–54 (Iowa 2009)).

223. *See* IOWA R. CIV. P. 1.421(1).

224. Thomas B. Read & Kevin M. Reynolds, *The Restatement (Third), Duty, Breach of Duty and "Scope of Liability"*, DEFENSE UPDATE: THE IOWA DEFENSE COUNSEL ASSOCIATION NEWSLETTER, Summer 2012, at 12, *available at* http://www.whitfieldlaw.com/media/cms/2012IDCADefenseUpdate_Summer_C24BC9FB045AB.pdf.

225. *See* IOWA CODE § 668.1(2) (2015) ("The legal requirements of cause in fact and proximate cause apply both to fault as the basis for liability and to contributory fault.").

dismiss an otherwise actionable negligence claim.[226]

However, a savvy defense lawyer can avoid wasting time on frivolous negligence claims when it is plain from the complaint that one of the following is true: (1) there is no conceivable set of facts under which the defendant's actions created or increased the risk of harm to the plaintiff, which would justify an automatic no-duty ruling,[227] or (2) there is no conceivable set of facts under which the harm that befell the plaintiff was even remotely foreseeable, which would justify an automatic no-breach or no-causation ruling.[228] Accordingly, any plaintiff's lawyer should know not to file such a complaint.[229] Because such claims are likely to be frivolous for other reasons, it is unlikely that *Thompson* will lead to the dismissal of any previously actionable claims. Still, defense attorneys would be wise to gain the level of familiarity required to explain the required elements of post-*Thompson* negligence actions convincingly, both in oral argument and in writing, should the need arise.[230]

B. *Arguing Dispositive Motions*

1. *As the Plaintiff, Clarify the Risk that Triggers the General Duty of Care*

After *Thompson*, plaintiffs' attorneys benefit from a presumption that any "actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."[231] Plaintiffs seeking to recover damages for a physical injury they suffered will benefit from this

226. Indeed, some judges in Iowa's lower courts still use the comfortable phrase "proximate cause" when defining the elements of negligence claims, before proceeding to apply the scope of liability standard for legal causation. *See, e.g.*, Bozarth v. Danville Care Ctr., Healthcare of Iowa, Inc., No. LALA003599, 2012 WL 5269507, at *3 (Iowa Dist. Ct. July 12, 2012) (citing and applying *Thompson* after stating that the elements of a negligence action are "duty to conform to a standard of conduct, a breach of the duty, causation (proximate cause), and damages").

227. *See supra* Part III.A.

228. *See supra* Part III.B.

229. *See* IOWA R. CIV. P. 1.413(1) (providing that counsel must certify that every pleading filed "is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" and setting out the court's authority to impose sanctions for violations of this rule).

230. *See* IOWA R. CIV. P. 1.421(6) ("Motions under this rule must specify how the pleading they attack is claimed to be insufficient.").

231. Thompson v. Kaczinski, 774 N.W.2d 829, 834 (Iowa 2009) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7(a) (Proposed Final Draft No. 1, 2005)) (internal quotation mark omitted).

presumption, as will any plaintiff's attorney who has no time to waste on "pointless, confusing, and sometimes obfuscating efforts to find a basis for a duty when a defendant created a risk of physical harm to others."[232] A preliminary explanation of the risk created by the defendant's conduct and the way in which it produced the plaintiff's injury will usually be sufficient to shift the burden of persuasion on the duty element to the defendant; plaintiffs' attorneys should explain this principle as a matter of course at the beginning of every dispositive motion filing and hearing to clarify the starting point of the duty analysis for the court and for opposing counsel.

Defense attorneys will need to realize that, in most cases where the plaintiff has suffered a physical injury, the defendant will have the burden of persuading the judge that the generally applicable duty of reasonable care should not apply. This represents a "180-degree shift in the burden of proof" that "should be of serious concern to all defense counsel and their clients."[233] Unless the clear and undisputed facts show that the defendant "did not create a 'risk of physical harm' giving rise to a general duty under section 7(a) of the Third Restatement,"[234] defense counsel will need to be prepared to argue for a departure from the "general rule . . . that every person owes a duty to exercise reasonable care to avoid causing injuries to others."[235]

2. *As the Defendant, Argue Public Policy Exceptions Proactively*

To meet this new burden of persuasion on the duty element and evade the generally applicable duty of reasonable care, defense attorneys should always consider arguing that their particular case embodies "a point when public policy considerations would intervene to narrow the duty" and preclude its application to the defendant's conduct.[236] In arguing public policy, the defense can encourage the court to "[c]onsider the implications" of a rule that imposes a duty of reasonable care on this defendant and other similarly situated actors, including the "burdens and inconveniences" that various parties would be forced to endure as the result of precautionary

232. Cardi & Green, *supra* note 140, at 727.

233. Kevin M. Reynolds & William C. Scales, *Liability for Physical and Emotional Harm: The "New" Duty and Causation Analysis*, 52 FOR THE DEFENSE, no. 11, Nov. 2010, at 10, *available at* http://www.dritoday.org/ftd/2010-11F.pdf.

234. McCormick v. Nikkel & Assocs., Inc., 819 N.W.2d 368, 375 (Iowa 2012) (citing Porter v. Iowa Power & Light Co., 217 N.W.2d 221, 232 (Iowa 1974)).

235. Feld v. Borkowski, 790 N.W.2d 72, 75 (Iowa 2010) (citing *Thompson*, 774 N.W.2d at 834).

236. *Thompson*, 774 N.W.2d at 840 (Cady, J., concurring specially).

measures required "[t]o avoid potential liability" in a world where such a duty of care existed.[237] This argument would invite the court to conclude that "[t]he policy of the law therefore justifies the rule placing the primary responsibility . . . for assuring proper precautions will be taken to manage risks" on someone other than the defendant.[238]

To find that a public policy exception applies, the trial court must be able to "promulgate relatively clear, categorical, bright-line rules of law applicable *to a particular class of cases*" that would "modify or displace an actor's general duty of reasonable care,"[239] and plaintiffs' attorneys should attack any public policy argument couched in facts that are overly case-specific as a violation of this requirement. A defense attorney may respond by stressing that a search for a bright-line category in a vacuum is frequently unhelpful and often "provide[s] precious little general guidance" in determining whether an existing public policy exception should be extended or whether a new exception should be recognized, and therefore any analysis of a public policy exception argument must necessarily entail a limited inquiry into the realities surrounding the case, with a focus on "identifying the policy factors that stand apart from risk-utility balancing and applying those factors to the facts of the case to see whether a duty of care is appropriate."[240]

Alternatively, a defense attorney can decide to embrace the opportunity to argue for a categorical, bright-line rule to be applied to a large class of cases; the advantage to this strategy is that it may give the defense license to argue foreseeability of harm in analyzing the duty of care.[241] But it

237. *McCormick*, 819 N.W.2d at 373.

238. *Id.* at 372.

239. *Id.* at 378 (Hecht, J., concurring in part and dissenting in part) (citing *Thompson*, 774 N.W.2d at 835).

240. Aaron D. Twerski, *The Cleaver, the Violin, and the Scalpel: Duty and the* Restatement (Third) of Torts, 60 HASTINGS L.J. 1, 22–23 (2008). Professor Twerski recognizes the danger that a court that "abandons categories" may make no-duty rulings too aggressively in cases that should be sent to the jury; however, he argues "the answer must be to insist that courts differentiate those policy factors that motivate the no-duty determinations from those that are merely every day applications of negligence law." *Id.* at 23.

241. "Reasons of policy and principle justifying a departure from the general duty to exercise reasonable care do not depend on the foreseeability of harm *based on the specific facts of a case*." *Thompson*, 774 N.W.2d at 835 (emphasis added) (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. j (Proposed Final Draft No. 1, 2005)). This is the justification underlying the continued use of a

is critically important that defense attorneys recognize the difference between a category-level foreseeability argument, which attacks the plaintiff's claim on the duty element, and a fact-specific foreseeability argument, which attacks the claim on the breach and scope of liability elements.

> The real hazard concerning duty and foreseeability occurs where there is a good unforeseeability argument at the individual level, such that a jury might be led by this argument to reject the plaintiff's claim on the breach element. In some of these cases, defendants surreptitiously persuade courts to transform this good unforeseeability argument for "no breach" into a good unforeseeability argument on the no-duty issue, which illegitimately stops the case from ever getting to the jury. The best way to combat this is not to deny the role of foreseeability in duty, but to recognize that duty happens at the category level and that an individual case of low foreseeability cannot generate a category-level argument of principle or policy based on foreseeability.[242]

If a defense attorney can envision a category-level public policy exception to the generally applicable duty of reasonable care that transcends the specific facts of the case at hand, it is permissible to use foreseeability or unforeseeability of harm to potential plaintiffs to argue its validity and viability.

Public policy arguments should always be argued proactively by defense attorneys and reactively by plaintiffs' attorneys. No defense attorney wants his or her failure to conceptualize, research, and articulate the grounds for an available public policy argument to be exposed by a reviewing court on appeal.[243] Likewise, no plaintiff's attorney should give ground on the duty of care element by forfeiting an opportunity to challenge either the viability or applicability of a public policy exception raised by the defense, unless such an argument has clearly been foreclosed by post-*Thompson* caselaw.[244]

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foreseeability framework for analyzing the duty of care in cases seeking damages from emotional distress. *See* discussion *supra* Part III.A.2.

242. Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1264 (2009).

243. *See, e.g.*, Brokaw v. Winfield–Mt. Union Cmty. Sch. Dist., 788 N.W.2d 386, 391 (Iowa 2010) (assuming that duty of reasonable care applies because the defendant "does not argue that coaches as a class have no duty of reasonable care to control the actions of their players").

244. *See, e.g.*, Feld v. Borkowski, 790 N.W.2d 72, 78 (Iowa 2010) (assuming the contact sports exception is still viable after *Thompson* because the parties "do not

Finally, defense attorneys must take care to present and argue the issue to the trial court judge in a way that ensures a favorable ruling will expressly "articulate a countervailing principle or policy that would warrant limiting liability," rather than summarily concluding that a duty does not apply, in order to protect against reversal on appeal.[245]

3. *On the Breach and Causation Elements, Recognize the Burden of Production*

Justice Cady's concurrence in *Thompson* emphasized that summary judgment is only appropriate "when the facts are clear and undisputed."[246] Although one Iowa Supreme Court justice has claimed that "recent adoption of sections of the Restatement (Third) of Torts is not the death knell for summary judgments in negligence cases," that statement comes attached to a citation that calls its validity into question, specifically regarding judgments granted as a matter of law on the elements of breach or scope of liability.[247] Iowa courts have been directed to apply *Thompson* and its progeny in a manner that has made it more difficult for a defendant to win on a motion for summary judgment or directed verdict in any case where there is sufficient evidence to support a jury question on whether the harm suffered by the plaintiff was foreseeable, which impacts treatment of dispositive motions on both the breach element[248] and the scope of liability element.[249]

challenge [its] viability . . . but only challenge its application to the sport of softball").

245. Smith v. HD Supply Water Works, Inc., No. 10-1459, 2011 WL 6655356, at *4 (Iowa Ct. App. Dec. 21, 2011) (reversing a grant of summary judgment on the duty element because the district court applied the *Savage* rule—limiting the carrier's duty to inspect products loaded by the shipper—without "consider[ing] how its special assignment of liability fit with our supreme court's recent embrace of the Restatement (Third)" and without explicitly articulating any "countervailing principle or policy"). This case inspired Scenario (5), *supra* Part I.

246. *Thompson*, 774 N.W.2d at 840 (Cady, J., concurring specially); *see also* IOWA R. CIV. P. 1.981(3) (providing that summary judgment is appropriate only when "there is no genuine issue as to any material fact").

247. Mitchell v. Cedar Rapids Cmty. Sch. Dist., 832 N.W.2d 689, 710 (Iowa 2013) (Waterman, J., dissenting) (quoting Hoyt v. Gutterz Bowl & Lounge, L.L.C., 829 N.W.2d 772, 783 (Iowa 2013) (Waterman, J., dissenting)) (internal quotation mark omitted).

248. *See Hoyt*, 829 N.W.2d at 780 ("Small changes in the facts may make dramatic changes in how much risk is foreseeable, and thus we leave the breach question's foreseeability determination to juries unless no reasonable person could differ on the matter." (citing *Thompson*, 774 N.W.2d at 836)).

249. *See Mitchell*, 832 N.W.2d at 700 ("[W]here contending plausible characterizations of the range of reasonably foreseeable harms arising from the

On the element of breach, which hinges almost entirely upon the foreseeability of harm, plaintiffs' attorneys should develop and present any and all factual evidence tending to show that a reasonable person could find that the harm was foreseeable enough that failing to guard against it was unreasonable, including evidence pertaining to "the relevant frame of time and place" where harm occurred[250] and the defendant's "knowledge of the immediate circumstances or the general character" of a potential source of harm.[251] Further, a plaintiff's attorney should use "every legitimate inference that can reasonably be deduced from the evidence" to support the argument that the harm to the plaintiff was foreseeable enough that a reasonable finder of fact could find in the plaintiff's favor on the breach element,[252] which includes inferences regarding the defendant's intentions, knowledge, and emotional state.[253] To resist a dispositive motion, the plaintiff must carry a burden of production—usually an easy task—and plaintiffs' attorneys should remind the court that this reflects a "preference for the jury's assessment of reasonable care" over the trial court's.[254]

Once this burden of production is met on the breach element, defense attorneys hoping for summary judgment or directed verdict on the breach element must prepare exceptionally strong evidence and reasoning to make an incontrovertible showing that the defendant did not unreasonably disregard a risk of foreseeable harm to the plaintiff. Because the bar to be met is so high, it may be fruitless for defense attorneys to present the evidence or reasoning most damning to the plaintiff's case at the summary judgment phase; in cases where it is feasible to do so, the defense could gain a tactical advantage by pulling its hardest-hitting punches until the fight it actually stands a chance of winning.

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defendant's conduct lead to different outcomes and require line-drawing, we have seen fit to leave the case to the judgment and common sense of the fact finder." (citing *Hoyt*, 829 N.W.2d at 781)).

250. *See Hoyt*, 829 N.W.2d at 779.

251. *See* Brokaw v. Winfield–Mt. Union Cmty. Sch. Dist., 788 N.W.2d 386, 392–93 (Iowa 2010) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 19 cmt. f (2010)).

252. *See* Feld v. Borkowski, 790 N.W.2d 72, 81 (Iowa 2010) (quoting Cent. Nat'l Ins. Co. v. Ins. Co. of N. Am., 522 N.W.2d 39, 42 (Iowa 1994)) (internal quotation marks omitted).

253. *See id.* (finding that a jury could conclude that the defendant, "knowing he had swung ahead of the pitch," acted recklessly because of "momentary frustration and anger").

254. *Hoyt*, 829 N.W.2d at 780.

On scope of liability, an Iowa court ruling on dispositive motions "considers the range of harms risked by the defendant's conduct that the jury *could* find tortious, and then compares the plaintiff's harm with the harms risked by the defendant to determine whether a reasonable jury might find the plaintiff's harm is amongst those risked by the defendant."[255] Plaintiffs' attorneys should meet this burden of production by producing a comprehensive list that encompasses the risks of foreseeable harm that a jury could reasonably find were both (1) the type of injury the plaintiff suffered and (2) created or increased by the defendant's conduct.[256] Because both elements include the foreseeability inquiry, there may be significant evidentiary overlap between the facts that the plaintiff can use to establish breach and scope of liability; plaintiff's attorneys should not shy away from using the same critical evidence of foreseeability of harm to prove that the defendant was both negligent and liable for the resultant injury, when appropriate. Finally, like the burden of production on the element of breach, plaintiff's counsel should make it clear that the standard that must be met to survive judgment as a matter of law on scope of liability reflects the maxim that "[c]ausation is a question for the jury, '*save in very exceptional cases* where the facts are so clear and undisputed, and the relation of cause and effect so apparent to every candid mind, that but one conclusion may be fairly drawn therefrom.'"[257]

Defense attorneys arguing that the court should grant a dispositive motion on the scope of liability element should mount the strongest attack supported by the evidence on each theory of risk, while recognizing that it is unlikely that the plaintiff's scope of liability theory will be dismissed as a matter of law unless the defense can convincingly show that either (1) an intervening cause of the plaintiff's injury was "so manifestly superseding in

255. Bozarth v. Danville Care Ctr., Healthcare of Iowa, Inc., No. LALA003599, 2012 WL 5269507, at *3 (Iowa Dist. Ct. July 12, 2012) (citing Thompson v. Kaczinski, 774 N.W.2d 829, 838 (Iowa 2009)); *see* Hill v. Damm, 804 N.W.2d 95, 100 (Iowa Ct. App. 2011) ("When defendants, as here, 'move for a determination that the plaintiff's harm is beyond the scope of liability as a matter of law, courts must initially consider all of the range of harms risked by the defendant's conduct that the jury *could* find as the basis for determining that conduct tortious. Then, the court can compare the plaintiff's harm with the range of harms risked by the defendant to determine whether a reasonable jury might find the former among the latter.'" (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. d (2010))).

256. *See, e.g.*, *Bozarth*, 2012 WL 5269507, at *3 (evaluating and finding five specific harms that the plaintiff argued, in resistance to summary judgment, were within the range of harms risked by a defendant's conduct).

257. *Hill*, 804 N.W.2d at 101 (quoting *Thompson*, 774 N.W.2d at 836).

nature as to cut off liability for prior negligence,"[258] or (2) the defendant's conduct was not linked to any cause or risk of harm to the plaintiff except through a "serendipitous causal connection" unrelated to the reason that conduct is considered negligent or tortious.[259]

When a plaintiff attempts to meet the burden of production by asking the court to draw questionable inferences from insufficient evidence, the single most helpful authority may be Justice Cady's concurrence in *Thompson*, which urges the Iowa courts not to supplement "common knowledge" in the absence of evidence of "the particular facts and circumstances."[260] While legitimate inferences from evidence in the record may support an argument against a dispositive motion, the court may not credit inferences made from a "total lack of evidence," nor draw its own. [261]

C. *Submitting a Case to the Jury*

This subpart will briefly outline a general rule for arguing theories of foreseeability or unforeseeability to the finder of fact, suggest ideas ripe for further exploration, and then transition to focus on the technical aspects surrounding the use of jury instructions in Iowa negligence actions after *Thompson*, analyzing how attorneys can exert control over the questions presented to the jury to increase the likelihood that the jury returns a favorable answer and to protect that answer from posttrial attack.

1. *Through Argument, Link (or Decouple) the Alleged Breach and the Injury*

The emphasis placed on foreseeability of harm by the reformulated framework for analyzing breach and legal causation creates a unique problem for trial attorneys. What can a defense attorney say to convince a juror, after the fact, that something that occurred was unforeseeable? And what can a plaintiff's attorney say to refute witness testimony that the harm that produced the injury suffered was not foreseeable? Answering that question fully would require an extensive discussion of best practices in trial

258. Waugh v. Sygenta Seeds, No. LACV027106, 2011 WL 10548732, at pt. E (Iowa Dist. Ct. June 30, 2011).

259. Royal Indem. Co. v. Factory Mut. Ins. Co., 786 N.W.2d 839, 851 (Iowa 2010) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 30 cmt. b (Proposed Final Draft No. 1, 2005)).

260. *See Thompson*, 774 N.W.2d at 840 (Cady, J., concurring specially).

261. Hoyt v. Gutterz Bowl & Lounge, L.L.C, 829 N.W.2d 772, 784 (Iowa 2013) (Waterman, J., dissenting).

advocacy that is beyond the scope of this Note; this subsection focuses on two general principles that trial attorneys can explore and leverage to argue case theories hinging on foreseeability or unforeseeability more effectively.

First, trial attorneys should recognize the value of tropes and themes that can emphasize or deemphasize the causal relationship between the alleged breach and the plaintiff's injury. Stories told at trial should always be internally consistent if at all possible—that is, litigants should avoid undermining their own case by presenting contradictory pieces of evidence—but stories told to the jury may be more persuasive if they are also externally valid—meaning that they should resonate with juror's experiences and "fulfill popular expectations about what reality looks like."[262] Attorneys for both plaintiffs and defendants can leverage jurors' expectations by weaving themes and tropes into their stories about foreseeability.[263]

262. Richard K. Sherwin, *A Manifesto for Visual Legal Realism*, 40 LOY. L.A. L. REV. 719, 729 (2007).

> We link perceptions into happenings, happenings into events, events into stories; and our narrative expectations tell us how each story hangs together and how it will end. Jurors bring this everyday sense-making process to their work and use it to descry the "facts" from the evidence. Trial lawyers seeking to persuade jurors of a particular version of the facts need to tap into the process.

Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 5–6 (2005) (footnote omitted).

263. While every attorney and law student is familiar with the idea of using a theme at trial, the term "trope" is less frequently encountered and less widely understood. As used to describe a narrative device or storytelling technique, the term "trope" has a unique and specialized meaning:

> Merriam-Webster gives a definition of "trope" as a "figure of speech." In storytelling, a trope is just that—a conceptual figure of speech, a storytelling shorthand for a concept that the audience will recognize and understand instantly.
>
> Above all, a trope is a convention. It can be a plot trick, a setup, a narrative structure, a character type, a linguistic idiom. . . you know it when you see it.

Trope, TV TROPES, http://tvtropes.org/pmwiki/pmwiki.php/Main/Trope (last visited Mar. 21, 2015) (alteration in original). While fictional stories and reality-based trial narratives are different, tropes and themes from fiction are readily applicable to narratives describing real events because jurors use the same scripts to decode both.

> Stock scripts and stock stories accreted from exposure to the accountings and recountings that continually bombard us . . . provide all of us with walk-through

For example, plaintiffs' attorneys can prepare the jury to treat the events that produced the plaintiff's injury as foreseeable by invoking the "super-trope" popularly known as Chekhov's Gun; jurors have been conditioned to expect that when a storyteller shows them a rifle hanging on a wall early on in a narrative, by the end of the story "it absolutely must go off."[264] A plaintiff's attorney who opens the narrative to the jury by describing a latent danger in detail can prime jurors to expect that very danger to be the cause of harm before the story is concluded and to wonder why the defendants did not expect the same.[265]

Leveraging Chekhov's Gun tropes exploits the plaintiff's advantage in foreseeability arguments; it gives the jury the pieces of the narrative puzzle and allows jurors to foresee the inevitable injury before it occurs within the story, and it disguises the influence of hindsight. Defense attorneys can counter this tactic by framing the entire sequence of events leading up to the plaintiff's injury as a tragic instance of dramatic irony. The story should be framed from the perspective of the defendants at the time of the alleged breach, described in a way that shows that "what they're saying or doing is

> models of how life is lived, how crimes are committed, how reality unfolds. When a juror perceives the familiar lineaments of one or another of these narratives emerging from the evidence, s/he "recognizes" what is afoot and s/he is cued to interpret other pieces of evidence and eventually the whole of it consistently with the familiar story line.

Alper et al., *supra* note 262, at 7; *see also* Sherwin, *supra* note 262 ("When an audience unwittingly responds to a factual presentation aided by familiar fiction forms, the default mode—credulity—kicks in. . . . [S]tored fictions effortlessly come to mind when a familiar narrative genre or character or situation type stimulates recollection.").

264. *Chekhov's Gun*, TV TROPES, http://tvtropes.org/pmwiki/pmwiki.php/Main/ChekhovsGun (last visited Mar. 21, 2015) (quoting S. Shchukin, *Memoirs* (1911)); *see also* Alper et al., *supra* note 262, at 13 ("Another important characteristic of narrative thinking is that it generates expectations through a presumption of relevancy. This is why a reader knows that if s/he is told in Chapter One there is a gun hanging on the wall, s/he can expect a gunshot and a dead body or at least a near miss by the end of Chapter Three."). For a collection of humorous variations on Chekhov's famous idea, see David Henne, *Lesser-Known Chekhovian Techniques*, MCSWEENEY'S (Apr. 18, 2012), http://www.mcsweeneys.net/articles/lesser-known-chekhovian-techniques.

265. "These aspects of narrative thinking can be used to imbue small items or events with large significance." Alper et al., *supra* note 262, at 13. Likewise, a negligent omission that produces injury is a classic example of a reverse Chekhov's Gun; when the audience is shown "a normally armed character forgetting his gun when leaving the house," drawing attention to the omission on that fateful day primes the audience to expect that "this will become the day he needs it the most." *Chekhov's Gun*, TV TROPES, *supra* note 264.

perfectly sensible based on the knowledge they have" and told in a way that emphasizes the tragically unforeseeable nature of the harm that occurred.[266] Likewise, defense attorneys should remind jurors that none of the defendants had the benefit of the jury's knowledge that those events would become the basis for a negligence action; the harms that are easily foreseen by anyone hearing the plaintiff's attorney frame the case in opening argument were not so easily foreseen by the defendants who were, at the time, tragically unaware that they had been cast as characters in a story about a freak accident.[267]

Second, trial attorneys should explore the use of visual mediums to link or decouple the events leading up to the injury. A plaintiff's attorney should keep in mind "that the perception of causation can be evoked simply by showing the juxtaposition of two events in sequence."[268] As such, using visual timelines or visual comparisons to show the legally significant acts or omissions in close proximity to the injuries they caused can leverage "[t]he discourse of professionalism in conjunction with the visual construction of

266. *Dramatic Irony*, TV TROPES, http://tvtropes.org/pmwiki/pmwiki.php/Main/DramaticIrony (last visited Mar. 21, 2015). Tragic irony is a specific subtype of dramatic irony, in which "[t]he character's words or even actions are not ironic to them (or perhaps anyone in the story), but the audience is fully aware that their actions will bring about a tragic or deadly result." *Irony*, TV TROPES, http://tvtropes.org/pmwiki/pmwiki.php/Main/Irony (last visited Mar. 21, 2015).

267. In a sense, defense attorneys should remind jurors that in real life, we are all "genre blind" and largely unable to foresee the type of story that will be told about our actions in retrospect:

> Genre Blindness is what keeps the cast of *Three's Company* leaping to outrageous conclusions even after the hundredth stupid misunderstanding, instead of sitting down and talking things out. It makes young girls go for walks alone in the woods after midnight without a flashlight or a weapon when there's an axe murderer or a vampire around. It makes the supergenius supervillains in *James Bond* movies stuff the hero into an elaborate melodramatic Death Trap from which he inevitably escapes instead of just shooting him.

Genre Blindness, TV TROPES, http://tvtropes.org/pmwiki/pmwiki.php/Main/GenreBlindness (last visited Mar. 21, 2015). Indeed, the defense may tell a story about how, based on the defendants' rational and reasonable expectations, none of them could have foreseen that their actions would produce a story worth telling at all. *See* Alper et al., *supra* note 262, at 6 n.24 (quoting Jerome Bruner, *The Narrative Construction of Reality*, 18 CRIT. INQUIRY 1, 11 (1991)).

268. Sherwin, *supra* note 262, at 735 (citing JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 17 (1986)).

causation" to emphasize the foreseeability of the injury.[269] Conversely, defense attorneys should approach visual mediums with the objective of decoupling the injury that plaintiffs have suffered from the defendants' alleged negligence, which requires introducing additional context about the defendants' reasonable expectations, the defendants' attempts to safeguard against harm, and intervening causes of the injury.[270]

This sub-subsection has been an extremely cursory overview of some of the strategic and tactical considerations that savvy attorneys can consider to gain an advantage in arguing foreseeability to finders of fact in a post-*Thompson* world. Since this task is now the *sine qua non* of trying negligence cases in Iowa, its complexities and challenges warrant a far more in-depth exploration than this Note can provide.

2. *Craft and Offer Jury Instructions to Conform to* Thompson*'s New Framework*

Some of the Iowa Uniform Civil Jury Instructions on the breach and causation elements of negligence were revised or rewritten after *Thompson* to conform to its reformulation.[271] However, other jury instructions have

269. *See id.* This use of visual mediums can add to the persuasive power of even the most effective oral advocacy because the two methods of presenting argument to juries convey meaning through different cognitive and emotive processes.

> Notably, visual stories use a different code for making meaning than do written texts or oral advocacy. They are non-linear and they work by association. Often, their meanings are implicit. They are also rich in emotional appeal, which is deeply tied to the communicative power of imagery. This power stems in part from the impression that visual images are unmediated. They seem to be caused by the reality they depict.

Christina O. Spiesel et al., *Law in the Age of Images: The Challenge of Visual Imagery*, *in* CONTEMPORARY ISSUES OF THE SEMIOTICS OF LAW 231, 237 (A. Wagner et al. eds., 2005); *see generally* Lenora Ledwon, *Understanding Visual Metaphors: What Graphic Novels Can Teach Lawyers About Visual Storytelling*, 63 DRAKE L. REV. 193 (2015).

270. *See* Sherwin, *supra* note 262, at 736 ("Visual meaning is highly malleable. . . . If you do not provide a context of meaning, if you do not wrap a sequence of images in a narrative of your own, you will leave open the possibility that their meaning will be captured by the narrative of another.").

271. *Compare* IOWA CIVIL JURY INSTRUCTIONS § 700.3 (2004) ("The conduct of a party is a proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct."), *with* IOWA CIVIL JURY INSTRUCTIONS § 700.3A (2012) ("The plaintiff[']s claimed harm is within the scope of a defendant's liability if that harm arises from the same general types of danger

been left unrevised, save for the addition of a caveat stating that the Uniform Court Instruction Committee "takes no position on the validity of this instruction after *Thompson v. Kaczinski*."[272] And some, after their revision, do not instruct on the factors that juries are expected to consider during deliberations—the model instruction on breach lacks any mention of the factors that the finder of fact is purportedly asked to weigh.[273] Astonishingly, many of these unrevised jury instructions that no longer accurately reflect negligence law are still read to juries without any modification in some Iowa courts.[274] Attorneys need to be able to identify these instructions that no longer accurately reflect the law, need to be prepared to make "all objections to giving or failing to give any instruction" at the close of the evidence before the instructions are given, and need to have a level of familiarity with the applicable law that enables them to make objections "specifying the matter objected to and on what grounds."[275]

When jury instructions that no longer track Iowa negligence law are submitted, an attorney interested in resolving the matter at the heart of the trial with any measure of finality should firmly argue that any verdict reached after an instruction on breach or causation that misleads the jury by misstating the relevant inquiry would be extremely vulnerable to a challenge on appeal because a "trial court commits prejudicial error when it materially

that the defendant should have taken reasonable steps [or other tort obligation] to avoid." (second alteration in original)).

272. *See* IOWA CIVIL JURY INSTRUCTIONS § 700.5 (2012) (sole proximate cause); *id.* § 700.6 (superseding-intervening causes).

273. *See id.* § 700.2 (defining negligence and failure to take reasonable care as "doing something a reasonably careful person would not do under similar circumstances," without reference to foreseeability of harm, severity of foreseeable harm, or burden of taking precautions); *see also* Read & Reynolds, *supra* note 224 ("The jury instruction committee has not drafted a new uniform instruction on the issue of breach of duty.").

274. *See, e.g.*, Asher v. OB–GYN Specialists, P.C., No. LACV104182, 2012 WL 485340, at pt. C (Iowa Dist. Ct. Jan. 13, 2012) (addressing and dismissing the argument that "it was improper for the Court to submit Instruction No. 13 related to proximate cause [and modeled on the pre-*Thompson* model instruction] based upon the decision by the Iowa Supreme court in *Thompson v. Kaczinski*"), *aff'd*, 846 N.W.2d 492 (Iowa 2014).

275. *See* IOWA R. CIV. P. 1.924; *see also* Mitchell v. Cedar Rapids Cmty. Sch. Dist., 832 N.W.2d 689, 703 (Iowa 2013) (citing Moser v. Stallings, 387 N.W.2d 599, 604 (Iowa 1986)) ("Objections [to jury instructions] must be specific enough to put the trial court on notice of the basis of the complaint so the court may appropriately correct any errors before placing the case in the hands of the jury.").

misstates the law."[276] To the extent that relevant model instructions have not been updated for post-*Thompson* use, this will require Iowa attorneys to take matters into their own hands and craft jury instructions that will protect the finality of the trial's outcome upon review. And even if it were true that the pre-*Thompson* era jury instructions were simpler and easier for the jury to understand, it would not absolve the trial court of the responsibility to "instruct a jury on all legal issues presented in a case," which necessarily entails that "in an action based on negligence, the court is required to define all legal standards, including the applicable standard of care."[277]

Plaintiffs' attorneys may consider requesting an instruction on breach that more closely resembles the foreseeability-focused inquiry presented in the Third Restatement.[278] The Uniform Court Instruction Committee likely

276. *See* Anderson v. Webster City Cmty. Sch. Dist., 620 N.W.2d 263, 265 (Iowa 2000) (citing Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co., 606 N.W.2d 376, 379 (Iowa 2000)). However, the Iowa Supreme Court recently found that the use of an outdated proximate causation instruction—the substantial factor test—did not create prejudicial error because it represented a more demanding test than the scope of liability analysis under the facts presented in that case and because the jury found for the plaintiff notwithstanding the heightened burden created by the outdated substantial factor instruction.

> Here, we can easily conclude the erroneous substantial-factor instruction created a more demanding instruction than the proper Restatement (Third) scope-of-liability instruction. The brachial plexus injury was established as a matter of law to be within [the defendant's] scope of liability. Therefore, submission of any instruction on causation to the jury beyond one pertaining only to factual causation increased Asher's burden by making it more difficult for her to obtain a favorable verdict. Because the jury found in favor of Asher notwithstanding her increased burden, the error was not prejudicial and does not constitute reversible error.

Asher, 846 N.W.2d at 499.

277. *Anderson*, 620 N.W.2d at 265–66 (citations omitted); *see also* Feld v. Borkowski, 790 N.W.2d 72, 82 (Wiggins, J., concurring specially) (noting, on remand, the trial court's obligation to consider adopted and relevant portions of the Third Restatement in crafting jury instructions because "[t]he court has an obligation to cover all the legal principles involved in a case when it instructs the jury" (citing Greninger v. City of Des Moines, 264 N.W.2d 615, 617 (Iowa 1978))).

278. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (2010). Thomas Read and Kevin Reynolds have considered the need for new jury instructions after *Thompson* and have suggested that until a new model jury instruction on breach is issued, counsel for both sides should "consider requesting this instruction," which is pulled word-for-word from the Third Restatement:

has its reasons for omitting any mention of the concept of foreseeability within its uniform instruction on negligence and reasonable care,[279] but the element of breach hinges upon the foreseeability of harm on its most fundamental level—and Iowa courts have recognized that this is the case.[280] A plaintiff's lawyer who intends to present an argument that the defendant should have exercised greater care because of a readily foreseeable harm should offer an instruction that prepares the jury to evaluate and weigh that argument in accordance with the applicable law, on the grounds that "a trial court is generally required to give a required instruction 'when it states a correct rule of law having application to the facts of the case.'"[281]

Conversely, defense attorneys are more likely to gain ground by focusing their attention on ensuring appropriate instructions are given on the scope of liability element. The comment to the model jury instruction on scope of liability states that "[i]n most cases, scope of liability will not be in dispute or will be adjudicated by the court on a dispositive motion" and that the instruction on scope of liability "should be given only if under the facts of the particular case scope of liability is a question for the jury."[282] Defense counsel should ensure that the trial court judge does not confiscate questions of scope of liability from the jury and subsequently resolve them in favor of the plaintiff without creating some sort of record to preserve the issue for

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> Ordinary Care—Common Law Negligence—Defined
>
> 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.

Read & Reynolds, *supra* note 224 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (2010)).

279. *See* IOWA CIVIL JURY INSTRUCTIONS § 700.2 (2012).

280. *See, e.g.*, Hill v. Damm, 804 N.W.2d 95, 99 (Iowa Ct. App. 2012) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (2010), in full); *see also* Brokaw v. Winfield–Mt. Union Cmty. Sch. Dist., 788 N.W.2d 386, 393 (Iowa 2010) (noting that "the proper question in determining whether a breach of duty occurred" is "whether the harm that occurred . . . was a foreseeable risk under the circumstances").

281. Hagenow v. Schmidt, 842 N.W.2d 661, 670 (Iowa 2014) (quoting Pexa v. Auto Owners Ins. Co., 686 N.W.2d 150, 160 (Iowa 2004)).

282. IOWA CIVIL JURY INSTRUCTIONS § 700.3A cmt (2012).

appeal.[283] In cases where scope of liability has not been resolved by a dispositive motion, the defense gains an additional route to a favorable verdict that precludes the plaintiff from recovering if it reminds the trial court that "the jury should be told that, in deciding whether the plaintiff's harm is within the scope of liability, it should go back to the reasons for finding the defendant engaged in negligent or other tortious conduct" and determine whether "the harms risked by that tortious conduct include the general sort of harm suffered by the plaintiff."[284] Defense counsel should also consider adding more verbiage to the uniform instruction on scope of liability to give the jury additional guidance on the meaning of the term.[285]

3. *Highlight (or Limit) Disputed Factual Issues with Specifications of Negligence*

In most cases in which the plaintiff alleges an entire course of conduct or a set of omissions were negligent, the trial court will usually give a modified breach instruction containing specifications of negligent acts or omissions that could support a finding that the defendant breached the duty

283. *See infra* Part IV.D.1. The comment to the model jury instruction on scope of liability is in line with the Iowa Supreme Court's reasoning on this issue. *See* Asher v. OB-GYN Specialists, P.C., 846 N.W.2d 492, 499 (Iowa 2014) (agreeing that, in many cases, "the alleged tortfeasor's scope of liability will not be an issue" and may be resolved as a matter of law); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. a (2010) ("Ordinarily, the plaintiff's harm is self-evidently within the defendant's scope of liability and requires no further attention. Thus, scope of liability functions as a limitation on liability in a select group of cases, operating more like an affirmative defense, although formally it is not one.").

284. Mitchell v. Cedar Rapids Cmty. Sch. Dist., 832 N.W.2d 689, 699 (Iowa 2013) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. d (2010)).

285. Read and Reynolds suggest using uniform instruction 700.3A on scope of liability and supplementing it with this additional language from the Third Restatement:

> In determining whether the harm arises from the same general types of danger that the defendant should have taken reasonable steps to avoid, you may consider the following:
>
> a) The risk that the defendant was seeking to avoid,
>
> b) The manner in which the injury came about, and
>
> c) Whether the type of injury was different from the injury that was contemplated or foreseen by anyone.

Read & Reynolds, *supra* note 224.

of care.[286] This focuses the jury's breach inquiry and helps the jury to "give consideration to each of the alleged acts or omissions in determining the overall question of breach of duty."[287] At the same time, this limits the jury's inquiry to "only those acts or omissions upon which the court has had an opportunity to make a preliminary determination of the sufficiency of the evidence to generate a jury question."[288] Thus, any breach instruction containing specifications of negligence must strike a balance; the plaintiff is "entitled to have the jury instructed concerning each alleged act or omission that found support in the evidence,"[289] while the defendant is entitled to object to needlessly cumulative or repetitive specifications that are already "adequately incorporated" into other specifications,[290] as well as specifications that outline acts and omissions on which no jury question was generated because the plaintiff "failed to present substantial evidence."[291]

Plaintiffs' attorneys hoping to persuade a trial court to give instructions that guide the jury to consider a multitude of ways in which they could find the defendant breached the duty of care would do well to remember that the "sufficient evidence to generate a jury question" burden, which must be met for each specification of negligence requested,[292] has two prongs: (1) there must be sufficient evidence that the specified act or omission occurred,[293] and (2) there must be sufficient evidence that the specified act or omission somehow *caused* the plaintiff to suffer some harm.[294] Defense counsel should be ready to respond to a requested specification of negligence that is not

286. *See, e.g.*, *Mitchell*, 832 N.W.2d at 702 (reviewing a breach instruction stating that the jury could find a breach of duty if the school's officials "failed 'to look for [the student], contact the office, call the police, or notify school security when she was absent from class'").

287. Herbst v. State, 616 N.W.2d 582, 585 (Iowa 2000) (quoting Bigalk v. Bigalk, 540 N.W.2d 247, 249 (Iowa 1995)).

288. *Id.* (quoting Coker v. Abell-Howe Co., 491 N.W.2d 143, 151 (Iowa 1992)).

289. *Id.* at 586 (citing *Bigalk*, 540 N.W.2d at 250).

290. *Id.* (citing Schuller v. Hy-Vee Food Stores, Inc., 328 N.W.2d 328, 332 (Iowa 1982)).

291. Cagle v. Pilot Travel Ctrs., L.L.C., No. 11-0597, 2012 WL 3026403, at *3 (Iowa Ct. App. July 25, 2012).

292. *See* Mitchell v. Cedar Rapids Cmty. Sch. Dist., 832 N.W.2d 689, 700 (Iowa 2013).

293. *E.g.*, *id.* at 703 ("A reasonable juror could find on this record that [the school] failed to take any of the specified measures after [the student] had gone missing from school on the day in question.").

294. *E.g.*, *Cagle*, 2012 WL 3026403, at *3 (affirming the district court's decision not to give additional specifications because "the record does not show evidence that any of the additional alleged negligent acts had a causal relationship to Cagle's fall or injury").

supported by sufficient evidence to generate a jury question on both prongs with an argument specific enough to call the trial court's attention to the reasons to reject the proposed specification or risk waiving all opportunities for review at later stages.[295]

However, a specification of negligence may ask the jury to decide whether a defendant committed an act or omission that was not per se negligent, but was made negligent because that act or omission was unreasonable under the circumstances. Once the plaintiff makes the threshold showing necessary to send the specification to the jury, it is "for the jury to decide as a matter of fact whether [the defendant] in fact took those measures, and whether if it [did], it acted unreasonably."[296] Because that reasonableness determination now encompasses the analysis of foreseeability of harm as set out in *Thompson* and the Third Restatement, this signals a change in the law. Defense attorneys who are unfamiliar with *Thompson* may urge the court to find that the plaintiff's injury was an unforeseeable result of an act or omission outlined in a proposed specification, under the assumption that the court can remove that specification from the breach instruction after making such a finding. Plaintiffs' attorneys should vigorously resist by arguing that, after *Thompson*, foreseeability is now reserved for the finder of fact to resolve within the breach and scope of liability inquiries.[297] As a result, the jury should be instructed on the proposed specification, instructed to determine whether the defendant committed the allegedly unreasonable acts or omissions described in the specifications, and further instructed to determine whether the harm that befell the plaintiff was foreseeable enough to transform the specified conduct into a breach of the generally applicable duty of reasonable care.

295. *See* IOWA R. CIV. P. 1.924; *see also Mitchell*, 832 N.W.2d at 703 (citing Moser v. Stallings, 387 N.W.2d 599, 604 (Iowa 1986)) (dismissing a factual cause challenge to a particular specification of negligence because the argument was not "sufficiently specified in the objections below").

296. *Mitchell*, 832 N.W.2d at 703; *see also* Hoyt v. Gutterz Bowl & Lounge, L.L.C, 829 N.W.2d 772, 780 (Iowa 2013) ("[T]he question of what reasonable care required under these circumstances is for the jury; it is only in exceptional cases that such questions may be decided as matters of law.").

297. *See* Daughetee v. Chr. Hansen, Inc., 960 F. Supp. 2d 849, 865 (N.D. Iowa 2013) (rejecting defendants' argument that the harm to plaintiff was unforeseeable and therefore no applicable duty could have been breached because "the Iowa Supreme Court has held that 'foreseeability should not enter into the duty calculus but should be considered in determining whether the defendant was negligent'" (quoting McCormick v. Nikkel & Assocs., 819 N.W.2d 368, 371 (Iowa 2012))).

D. *Arguing a Case on Appeal*

1. *Preserve Error by Arguing on Each Element Separately and Distinctly*

Many defense lawyers who grew comfortable with the pre-*Thompson* catch-all applicability of the term "foreseeability" in negligence actions may inadvertently fail to preserve important arguments for appeal by failing to make separate arguments on the duty element and on the breach and causation elements during a motion for directed verdict.[298] For example, the defense attorney in *Mitchell* likely did not realize that he had made a mistake and lost access to an argument on appeal.[299] Here is his argument in his motion for directed verdict, reproduced in full:

> [T]he Defendant would move for a directed verdict on all the issues in this case based on the fact the conduct complained of in this case by [the victim] was beyond the scope of the Defendant's liability. The evidence in this case has shown that this incident occurred off school grounds, after school hours, did not in any way, shape, or form involve an employee of the Cedar Rapids Community School District; was certainly not the type of incident that could be *reasonably foreseen* as to logically follow from the fact that a student might skip school.
>
> As a result, under the Restatement (Third) of Torts, the *Thompson v. Kaczinski* case, *Royal Indemnity* and *Hill v. Damm*, we believe the Defendant is entitled to a directed verdict in its favor. Thank you.[300]

This is a perfectly cogent argument for directed verdict on the legal causation element vis-à-vis scope of liability; however, the mention of foreseeability and the passing reference to *Thompson*, *Royal Indemnity*, and *Hill* could not transform it into an argument for directed verdict on the duty element in the eyes of the trial court judge.[301] After trial, when the defendant moved for judgment notwithstanding the verdict on the grounds that "no duty exists because the harm did not occur at school, during school hours or at a school-sponsored event," the court ruled that the no-duty argument could not be considered posttrial because it had not been raised in the

298. *See Mitchell*, 832 N.W.2d at 695 ("A motion for judgment notwithstanding the verdict must stand on grounds raised in the motion for directed verdict." (citing Field v. Palmer, 592 N.W.2d 347, 350 (Iowa 1999))).

299. *See id.*

300. *Id.* (alteration in original) (emphasis added).

301. *See id.*

motion for directed verdict.[302]

The Iowa Supreme Court agreed that the no-duty argument had not been properly preserved for consideration on appeal, stating that "[t]he motion's reference to foreseeability is not helpful to [the defense's] preservation argument, as we have previously explained foreseeability may play a role in breach and scope-of-liability determinations, but it no longer has a place in duty determinations."[303] Additionally, the *Mitchell* court held that the flurry of citations "cannot be said to have highlighted the duty issue for the district court" because "[n]either *Royal Indemnity* nor *Hill* considered a no-duty claim"[304] and because *Thompson* "examined a duty determination, but in the process [the Iowa Supreme Court] established that [it] ordinarily recognize[s] a general duty of reasonable care without consideration of foreseeability, absent exceptional circumstances."[305]

As a result, even though the defense attorney's motion for directed verdict and his motion for judgment notwithstanding the verdict contained nearly identical language,[306] his omission of the word "duty" from his motion meant that he had forfeited the right to make a no-duty argument posttrial

302. *Id.* (internal quotation marks omitted).

303. *Id.* at 696 (citing Thompson v. Kaczinski, 774 N.W.2d 829, 835 (Iowa 2009)).

304. *Id.* (citations omitted).

305. *Id.* (citing *Thompson*, 774 N.W.2d at 834–35).

306. Compare these two excerpts: (1) "this incident occurred off school grounds, after school hours, [and] did not in any way, shape, or form involve an employee of the Cedar Rapids Community School District" and (2) "no duty exists because the harm did not occur at school, during school hours or at a school-sponsored event." *Id.* at 695 (internal quotation marks omitted). Chief Justice Cady concurred in the judgment; his view was that the argument was preserved for appeal because he instantly identified the phrase from the motion for directed verdict as an argument on the duty element:

> The argument by the school district that it could not be liable because the harm occurred after school and outside school property is a duty argument. It asks the court to draw a line where its duty ends. This was the argument made at trial and on appeal by the school district.

Id. at 704 (Cady, C.J., concurring specially). Justice Waterman dissented on the scope of liability issue but agreed with Chief Justice Cady that the no-duty argument was adequately preserved for appeal. *See id.* at 706 (Waterman, J., dissenting) (pointing out that because defense counsel "clearly intended to include a no-duty ground" and because the Iowa Supreme Court "only recently adopted the Restatement (Third) scope-of-liability approach, when neither side raised or briefed the issue," the court should have been "more forgiving as to the specificity required to avoid an involuntary waiver").

and on appeal.[307] Attorneys trying negligence cases in Iowa should view *Mitchell* as a cautionary tale and raise arguments regarding each element of negligence with enough specificity as to eliminate all doubt as to whether the arguments were "timely brought to the attention of the district court."[308]

2. *Accept and Prepare for the Possibility an Issue Will Be Considered Sua Sponte*

In *Thompson*, the Iowa Supreme Court took the opportunity to adopt the Third Restatement's reformulated analysis of the elements of negligence, even though neither party had briefed or argued those issues before the court.[309] However, some subsequent decisions have shown a desire to refrain from "creat[ing] issues or unnecessarily overturn[ing] existing law sua sponte when the parties have not advocated for such a change," absent some compelling need to do so.[310] Ironically, in the wake of a sea change like *Thompson*, this sometimes leaves courts unsure about which preexisting concepts and standards in tort law have retained their validity.[311]

307. *Id.* at 698 (majority opinion).

308. *Id.* at 695 (citing Summy v. City of Des Moines, 708 N.W.2d 333, 338 (Iowa 2006)); *see also* Rossiter v. Evans, No. 08-1815, 2009 WL 5125922, at *3–4 (Iowa Ct. App. Dec. 30, 2009) ("A motion for judgment notwithstanding the verdict must stand or fall on the grounds asserted in the motion for directed verdict. Appellate review is limited to those grounds." (citing Channon v. United Parcel Serv., Inc., 629 N.W.2d 835, 859 (Iowa 2001)). For a more in-depth review of issues related to preservation of error in Iowa, see generally Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 DRAKE L. REV. 39 (2006).

309. *See supra* Parts II.B–C; *see also Mitchell*, 832 N.W.2d at 706 (Waterman, J., dissenting) (noting that "neither side raised or briefed the issue" of adopting the Third Restatement's approach in *Thompson*). For a discussion of this phenomenon and its attendant issues in other contexts, see generally Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1289 (2002) ("Do sua sponte decisions—without opportunity for briefing—violate due process? If not, are they, at a minimum, an abuse of judicial power?").

310. Feld v. Borkowski, 790 N.W.2d 72, 78 n.4 (Iowa 2010); *see also* Hagenow v. Schmidt, 842 N.W.2d 661, 676–77 (Iowa 2014) (noting that "neither the parties nor the district court raised the provisions of the Restatement (Third)" and choosing to "defer for another day" the decision whether to "adopt[] the provisions of the Restatement (Third) relevant to a sudden medical emergency").

311. *Feld* provides an instructive example; the majority opinion noted that "the standard [for recklessness] provided in the Restatement (Third) differs from the Restatement (Second) by focusing on the obviousness of the danger presented by the conduct" but declined to address "the issue of adopting the substance of the Restatement

While there is no way to predict a decision like *Thompson* with any sort of reliability, attorneys arguing cases before the Iowa Supreme Court can take measures to minimize exposure to the risk that a decision will be made "independent of any construction [of the law] advocated by the parties."[312] After *Thompson*, it would be extremely wise for any attorney arguing a case before the Iowa Supreme Court to seek out any applicable sections of the Third Restatement and consider preemptively arguing for or against their adoption.[313] Additionally, a well-read attorney can gain an advantage by identifying areas where the analytical framework used by Iowa courts has been confusing, inconsistently applied, amorphous, overly complicated, or otherwise flawed; those are the areas in which the court is most likely to search for alternative legal frameworks of its own accord.[314] Particularly in those cases, attorneys arguing before the Iowa Supreme Court should be mindful of the unfortunate possibility that they might be chosen to assume the role of advocate for an imperfect status quo, and should be prepared to mount arguments extolling its value and virtues.

(Third) standard for recklessness in this case." *Feld*, 790 N.W.2d at 77–78 n.3. Justice Wiggins noted the obvious—that this would inevitably create problems for the district court on remand and lead to unnecessarily protracted litigation:

> By not reaching [the contact sports exception] issue, the majority leaves the district court and the parties with a terrible dilemma. . . . The Felds will probably urge the court to hold the contact-sports exception does not have a sound foundation in today's sports world and that it has no viability under a Restatement (Third) analysis. Therefore, they will urge the court to instruct the jury as it would in any other negligence action. On the other hand, Borkowski will probably urge the court to keep the contact-sports exception and request the court to instruct the jury using a recklessness standard. At that time, the district court will have to decide if the contact-sports exception is still viable under a Restatement (Third) analysis. No matter how the court rules, we will probably see another appeal where we must decide if the contact-sports exception is still viable under a Restatement (Third) analysis.

Id. at 82 (Wiggins, J., concurring specially).

312. *Id.* at 78 n.4 (majority opinion).

313. *See* Justice Paul H. Anderson, Symposium, *Flying Trampolines and Falling Bookcases: Understanding the Third Restatement of Torts (Spring 2010)*, 37 WM. MITCHELL L. REV. 1042, 1046 (2011) ("Anytime we have a case where the law is developing, and we find something in the restatement that addresses the development, we can almost always depend on having a colleague cite the restatement and say that we would be wise to follow the restatement.").

314. *See* Hecht, *supra* note 21, at 1028–33 (discussing the various problems with courts' treatment of elements of Iowa negligence law that led the Iowa Supreme Court to adopt the Third Restatement in *Thompson*).

Thompson illustrates that a ruling beyond the scope of the issues presented is always a possibility, even in cases that present mundane issues of established law. No attorney should be faulted for failing to foresee or prevent an adverse ruling on an issue raised sua sponte. With the right research focus, with enough time and thought invested in briefing carefully crafted arguments, and with more than a little bit of luck, the sharpest attorneys might have a chance at successfully predicting when and how the Iowa Supreme Court will suddenly depart from an established point of law. But, really, who could have seen this coming?

V. CONCLUSION: EVERYONE'S OPINION MATTERS

At the end of the day, Iowa judges still have the responsibility of determining whether each defendant was duty-bound to exercise reasonable care; *Thompson* has simplified that task in some ways, while complicating it in others. The difficult task of determining whether the plaintiff suffered harm that was reasonably foreseeable as a risk associated with the defendant's conduct has not been made any easier; it has only been confiscated from the trial court judge and pressed more firmly into the hands of the ultimate finder of fact. And, as always, the responsibility to investigate and identify the relevant facts in each case, adapt them to rapidly shifting points of law, argue them persuasively in front of judges and juries, and preserve them within the record for appellate review is reserved for Iowa lawyers. Clients depend on their attorneys to make strategic and tactical decisions in the course of advocacy and litigation; attorneys representing clients in a negligence actions must take care to ensure they are up-to-date on recent developments in applicable caselaw, informed about the opportunities and dangers presented at various stages in the trial process, and well-prepared for the challengingly complex task of seeing a case through to completion.

For one final illustration of the impact of *Thompson* on negligence actions in Iowa—one you can witness firsthand—this Author encourages you to tear out the introduction section of this Note, hand it to a friend or family member who never went to law school, and ask that friend to assume the role of a juror deciding whether the harm in each case: (a) was a reasonably foreseeable result of the defendant's actions and (b) arose "from the same general types of dangers that the defendant should have taken reasonable steps . . . to avoid."[315] Your juror friend's answers to this question

315. IOWA CIVIL JURY INSTRUCTIONS § 700.3A (2012). I suppose that was

may be entirely unsurprising, or they may be unpredictable. Either way, pay close attention to the reasoning behind the answers. To an Iowa lawyer trying negligence cases in a post-*Thompson* world, jurors' answers to questions of foreseeability are increasingly likely to be the only ones that matter.

*Louis S. Sloven**

unnecessarily melodramatic. You could photocopy those pages instead of tearing them out if you wanted to avoid defacing this copy of the *Drake Law Review*.

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