A Dereliction of Duty? The Iowa Supreme Court's Careless Treatment of No-duty Doctrines Under the Restatement (Third) of Torts

Brendan Smith[*]

ABSTRACT: In 2009, the Iowa Supreme Court became one of the first jurisdictions to adopt the Restatement's (Third) innovative formulation of the duty element in a negligence claim. Under this new conception of duty, Iowa removed foreseeability from its duty analysis and adopted a presumption of a general duty of care absent some exceptional circumstance. This Note reviews Iowa's treatment of no-duty doctrines under the Restatement (Third). It concludes that, when considering a no-duty doctrine, the Iowa Supreme Court has oftentimes failed to presume that a general duty of care exists and has instead relied on vague public policy justifications to support a no-duty determination in violation of the Restatement's (Third) guidelines. The Note offers three principles based in the Restatement (Third) that will infuse more structure and consistency into Iowa's duty analysis. By adhering to these principles, Iowa can become a model state for other jurisdictions looking to adopt the Restatement (Third).

[*] Candidate for Juris Doctor, The University of Iowa College of Law, May 2022. The author would like to thank the Journal's peer reviewers and staff for their insightful feedback and suggestions.

I. INTRODUCTION

As any law student can explain, torts—both intentional and unintentional—serve an essential function in society by helping to assign the blame arising from some actor's wrongdoing.[1] Claims arising from unintentional wrongs generally fall within the broad tort of negligence.[2] Negligence claims recognize that, even when an actor unintentionally harms a victim, that actor should still bear some responsibility for their failure to exercise reasonable care.[3] Since this broad motivation could theoretically result in liability for any careless action,[4] a plaintiff must establish four elements in any negligence claim: (1) that the defendant owed the plaintiff a

1. *See, e.g.*, Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1104–05 (Fla. 2008).

2. WILLIAM LLOYD PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 161 (W. Page Keeton et al. eds., 5th ed. 1984) (explaining the origins of negligence and its role as the main cause of action for any accidental injuries).

3. *Negligence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/negligence [https://perma.cc/SUU9-EHFK] (defining negligence as "[a] failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances"). *But see* Matthew Myers, *What is Negligence? Here's a Definition You Can Understand*, MYERS L. FIRM (Dec. 18, 2018), https://www.myerslegal.com/what-is-negligence [https://perma.cc/R7C8-4FBB] (explaining how this need to exercise a certain level of care only warrants a negligence claim when the fact patterns satisfy the four elements of negligence).

4. *See* Myers, *supra* note 3 ("If lawyers and courts defined negligence using the ordinary definition you'll find in Google or a non-legal dictionary, people could sue a chef for overcooking salmon or a dry cleaner for shrinking a shirt.").

duty to exercise some level of care, (2) that the defendant breached their duty by not exercising that level of care, (3) that this carelessness caused the harm, and (4) that there was indeed some actual harm (or "damages") to the plaintiff.[5] Although all four of these elements contain nuances and complexity, this Note will focus specifically on the first element: the defendant's duty owed to the plaintiff.

In order to satisfy the first element of a negligence claim, an actor must owe a duty of care to the victim. The court determines whether this duty exists as a question of law.[6] Since states control negligence law, the exact details of duty vary by jurisdiction.[7] This Note analyzes only the development of Iowa negligence law over the past twelve years. Before 2009, Iowa assessed duty by considering factors such as the relationship between the plaintiff and defendant, foreseeability of the harm, and any public policy concerns.[8] In late 2009, however, Iowa drastically modified its duty analysis by adopting the definition of duty in the Restatement (Third) of Torts: Physical and Emotional Harm ("Restatement (Third)").[9] This new definition of duty instructs courts to exclude foreseeability from their analysis and to presume that a general duty of care exists absent some exceptional circumstance.[10] The Restatement (Third) lists factors to consider when finding an exceptional case of no duty and generally discourages courts from concluding that a duty does not exist.[11]

Since adopting the Restatement (Third), the Iowa Supreme Court has reaffirmed several "no-duty doctrines."[12] A no-duty doctrine holds that, as a matter of law, some class of individuals owes no duty to another class of individuals. The most common example of a no-duty doctrine is the absence of a duty to rescue a stranger in need. For instance, four teens in Florida who stood by and filmed a man drowning faced no liability for their failure to help the man in any way.[13] Another no-duty doctrine, called the continuing storm doctrine, holds that a property owner owes no duty during a storm to shovel or clear their land until the storm has ended. If a guest enters their property during the storm and slips on an icy patch, the landowner is not liable to the

5. Patrick C. Manning, *4 Elements Necessary to Establish a Successful Negligence Claim*, HARRINGTON, HOPPE & MITCHELL (Apr. 30, 2019), https://hhmlaw.com/4-elements-necessary-to-establish-a-successful-negligence-claim [https://perma.cc/Y7X9-QABJ].

6. Dilan A. Esper & Gregory C. Keating, *Abusing "Duty"*, 79 S. CAL. L. REV. 265, 265–66 (2006).

7. *See infra* note 80 and accompanying text.

8. J.A.H. *ex rel.* R.M.H. v. Wadle & Assocs., P.C., 589 N.W.2d 256, 258 (Iowa 1999) (citing Larsen v. United Fed. Sav. & Loan Ass'n, 300 N.W.2d 281, 285 (Iowa 1981)).

9. Thompson v. Kaczinski, 774 N.W.2d 829, 835 (Iowa 2009).

10. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 (AM. L. INST. 2010).

11. *See id.*

12. *See infra* Part III.

13. J.D. Gallop, *Teens Mock Drowning Man While Filming Him: Cocoa Tragedy Still Resonates with Families 1 Year Later*, FLA. TODAY (July 25, 2018, 8:59 PM), https://www.floridatoday.com/story/news/2018/07/25/teens-mock-drowning-man-florida/804741002 [https://perma.cc/S85X-SGSJ].

guest as a matter of law.[14] Although these doctrines may be perfectly consistent with the Restatement (Third), Iowa courts should carefully analyze each no-duty doctrine's underlying justifications to ensure that they align with the new principles embodied in the Restatement (Third).

This Note argues that Iowa must adopt a new approach to assessing the relevance of its no-duty doctrines that better aligns with the text of the Restatement (Third) as adopted in *Thompson v. Kaczinski*. Part II summarizes the historical formulation of duty in Iowa, the Restatement's (Third) definition of duty, and Iowa's adoption of that definition in *Thompson* in 2009. Part III analyzes the Iowa Supreme Court's approach to reaffirming no-duty doctrines under its new definition of duty and explains why that approach contradicts much of the Restatement (Third) in ways that have created a confusing, difficult to apply body of common law. Part IV proposes three principles that Iowa courts should adopt to ensure that they predictably and consistently analyze the duty element in future negligence claims.

II. TREATMENT OF DUTY IN IOWA AND THE RESTATEMENT (THIRD)

Negligence claims traditionally have four elements: duty, breach, cause (including both proximate and factual cause), and damages.[15] Beneath these four elements, however, lies significant disagreement on what each one contains.[16] Although the elements within any claim will never be perfectly distinct, too much overlap creates confusion for actors in the legal system, such as plaintiffs, defendants, juries, and even judges.[17] The unclear role of foreseeability in negligence claims is one example of such an overlap. Specifically, jurisdictions disagree on whether the foreseeability of harm to the plaintiff properly belongs in an analysis of duty, proximate cause, or both.[18]

The debate on the role of foreseeability in negligence law is perhaps best encapsulated in a classic case involving an explosion at a New York train

14. Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699, 711 (Iowa 2016); Gries v. Ames Ecumenical Hous., Inc., 944 N.W.2d 626, 628 (Iowa 2020).

15. PROSSER & KEETON, *supra* note 2, at 164–65.

16. David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1672–73 (2007) ("[C]ourts and commentators continue to disagree on what the four elements should contain, [and] on just how the various ideas recognized as essential to negligence claims should be stuffed into the four pigeonholes.").

17. Rory Bahadur, *Almost a Century and Three Restatements After Green It's Time to Admit and Remedy the Nonsense of Negligence*, 38 N. KY. L. REV. 61, 61–64 (2011) (summarizing the problems created when courts allow foreseeability to overlap across multiple elements of negligence); W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf*: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1875 (2011) ("[I]nternal contradictions and overlapping inquiries within negligence doctrine lead to sometimes laughable opinions.").

18. *See infra* note 80 and accompanying text.

station.[19] In *Palsgraf v. Long Island R.R. Co.*, a man was boarding a moving train while carrying a package.[20] In an attempt to help this man, a guard reached forward and shoved him onto the train, which in turn caused him to drop the package.[21] Unfortunately, the package was filled with fireworks and exploded upon hitting the ground.[22] This explosion caused some scales to fall over and injure Ms. Palsgraf, who was standing elsewhere in the station.[23] She proceeded to sue the railroad company for negligence.[24]

The disagreement in *Palsgraf* centered on a fundamental problem in negligence law: How far should the duty of care extend, and what legal tool justifies that decision? Writing for the majority, then-Chief Judge Cardozo proclaimed that "negligence in the air, so to speak, will not do."[25] Instead, the existence of negligence hinges on a duty that some actor owes directly to some other individual. Thus, although the railroad guard owed a duty of care to the man carrying the package of fireworks, he owed no duty to a woman standing many feet away at the train station.[26] As for the legal test to support this principle, Chief Judge Cardozo proposed that the "risk to another or to others within the range of apprehension"—also known as foreseeability of harm—should determine when some actor owes a duty of care to another.[27] Since the harm to Ms. Palsgraf was completely unforeseeable to the railroad guard, he owed no duty of care to her while pushing the man onto the train.

In his dissent, Judge Andrews expounded on his much broader view of the "duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone."[28] Under this view, an actor owes a duty of care not just to the specific people around them, but to everyone else in the world. Andrews would have held that the railroad guard (and the railroad itself through principles of vicarious liability) owed Ms. Palsgraf a duty of care, like he owed everyone else a duty.[29] Since this broad view of duty

19. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99 (N.Y. 1928). This case is often cited as an early example of the distinction between duty and proximate cause. Interestingly, Chief Judge Cardozo—the author of the majority opinion—attended a meeting with Reporters of the Restatement (Second) of Torts where they discussed *Palsgraf* and the role of duty before it had even been appealed to the New York Court of Appeals. Thus, it is no surprise that the majority opinion in *Palsgraf* reflects the prevailing view in the Restatement (Second). William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 4 (1953).

20. *Palsgraf*, 162 N.E. at 99.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 100.

28. *Id.* at 102 (Andrews, J., dissenting).

29. The railroad may have owed Ms. Palsgraf a duty of care under either model. This is because, assuming that she bought a ticket, the railroad probably owed Ms. Palsgraf the highest

could impose excessive liability on careless actors, Judge Andrews envisioned proximate cause working as a tool to limit liability. "What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."[30] Thus, *Palsgraf* frames the debate between a narrow duty based on foreseeability (the Cardozo model) and a general duty of care coupled with a narrower version of proximate cause (the Andrews model).

Section II.A begins by summarizing Cardozo's approach to duty that Iowa followed until 2009. Then, Section II.B outlines the key provisions of the Restatement (Third) that relate to duty and explain how they closely align with Justice Andrew's vision. Finally, Section II.C discusses *Thompson*, the case in which Iowa adopted the Restatement's (Third) definition of duty.

A. DUTY LAW IN IOWA PRIOR TO ADOPTING THE RESTATEMENT (THIRD)

Prior to the *Thompson* opinion in 2009, Iowa's definition of duty—along with the Restatement (Second) and the majority of other jurisdictions—aligned more closely with Chief Judge Cardozo's conception of duty.[31] Iowa's test for duty required the court to weigh three separate factors: "(1) the relationship between the parties, (2) [the] reasonable foreseeability of harm to the person who is injured, and (3) public policy considerations."[32] These three factors resembled Cardozo's analysis because they limited the scope of liability by imposing a duty only on a specific, identifiable class of actors. Much like Cardozo's analysis of the relationship between the train station guard and Ms. Palsgraf, the first element hinged on the relationship between the actor and the person injured by their action.[33] Under this analysis, for example, the court has held that a police officer's legal duty to rescue others depends on whether he is working at the time of an incident.[34] During work hours, a police officer has a special relationship with those around him and therefore has a heightened duty to provide aid to others.[35] When that officer is not working,

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duty of care as a common carrier. *See* Prosser, *supra* note 19, at 7. However, since the attorneys representing Ms. Palsgraf likely did not think of this argument, the court never addressed it. *Id.* at 8.

30. *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

31. *See* Cardi, *supra* note 17, at 1890–92 ("When faced with the issue, thirty-three (of fifty-one) courts hold with fair consistency that whether the plaintiff was a foreseeable victim is a question to be decided in the duty context. Only four jurisdictions clearly follow Judge Andrews in holding that plaintiff-foreseeability is properly and solely a matter for proximate cause." (footnote omitted)).

32. J.A.H. *ex rel.* R.M.H. v. Wadle & Assocs., P.C., 589 N.W.2d 256, 258 (Iowa 1999) (citing Leonard v. State, 491 N.W.2d 508, 509–12 (Iowa 1992)).

33. Sankey v. Richenberger, 456 N.W.2d 206, 209 (Iowa 1990) (citing Larsen v. United Fed. Sav. & Loan Ass'n, 300 N.W.2d 281, 285 (Iowa 1981)) ("An actionable duty is defined by the relationship between individuals; it is a legal obligation imposed upon one individual for the benefit of another person or particularized class of persons.").

34. *Id.*

35. *Id.*

he has no special relationship with his community and therefore does not have any elevated duty to aid nearby strangers.[36]

The second element of Iowa's pre-*Thompson* duty required a plaintiff to "establish that the risk of harm . . . was reasonably foreseeable to the defendant in order to establish a duty."[37] Although the duty element in negligence is a question of law,[38] courts in many jurisdictions scrutinize the available facts and evidence to decide if the damages were foreseeable.[39] For example, when assessing a landowner's duty to protect a tenant against criminal acts, the Iowa Supreme Court has relied on evidence of prior crime on the premises,[40] whether the landlord gave keys to anyone besides the current tenant,[41] and whether the landlord had provided working locks to the tenant[42] to determine whether the crime was foreseeable to the landlord. These examples illustrate the type of fact-specific analysis that courts often engage in when looking at foreseeability.

As the final step of its pre-*Thompson* duty analysis, the court considered public policy factors that may weigh in favor of, or against, holding the defendant liable. In some ways, this public policy element represented the lasting mark of Judge Andrews's explanation of proximate cause in *Palsgraf*. As he said, "because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."[43] Although Judge Andrews envisioned this statement shaping the law of proximate cause, it was more clearly present in the public policy element of Iowa's duty analysis. For example, the Iowa Supreme Court has held that a psychologist does not owe a duty of care to her patient's child because such a duty would harm psychologist-patient relationships by weakening their confidentiality and by creating divided loyalties.[44] This conclusion resembles "the law arbitrarily declin[ing] to trace a series of events" to its logical conclusion due to "public policy[] [and] a rough sense of justice."[45]

Iowa's relational, fact-specific analysis of duty has led to a number of narrow and extremely specific no-duty rulings.[46] One purpose of negligence

36. *See id.*

37. Tenney v. Atl. Assocs., 594 N.W.2d 11, 18 (Iowa 1999).

38. *Id.* at 15.

39. *Id.* at 18.

40. *Id.* (citing Galloway v. Bankers Trust Co., 420 N.W.2d 437, 439–40 (Iowa 1988)).

41. *Id.* at 19 (citing Kendall v. Gore Props., Inc., 236 F.2d 673, 678 (D.C. Cir. 1956)).

42. *Id.* at 20 (citing Paterson v. Deeb, 472 So. 2d 1210, 1216–18 (Fla. Dist. Ct. App. 1985)).

43. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

44. J.A.H. *ex rel.* R.M.H. v. Wadle & Assocs., P.C., 589 N.W.2d 256, 264 (Iowa 1999).

45. *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

46. There are far too many examples of narrow no-duty rulings to list here. However, some of the examples that follow show how specific these rulings could become. *See, e.g.*, Leonard v. State, 491 N.W.2d 508, 512 (Iowa 1992) ("We merely hold that a psychiatrist owes no duty of care to an individual member of the general public for decisions regarding the treatment and release of mentally ill persons from confinement."); *J.A.H. ex rel. R.M.H.*, 589 N.W.2d at 264

law is to create a set of norms and rules for the average person to follow.[47] Excessively specific no-duty rulings contradict this purpose by creating an inconsistent and confusing set of fact-specific standards for an actor to follow.[48] Furthermore, the duty element in a negligence claim is determined by the court as a matter of law.[49] When courts issue detailed, fact-intensive no-duty holdings as a matter of law, they expand the power of the judiciary by allowing it to adjudicate issues of fact without the input of the jury.[50] Since Iowa's pre-*Thompson* definition of duty included foreseeability—a question of fact—within it, no-duty rulings empowered the court to make decisions as a matter of law that were in some part based on factual, not legal, issues.

B. DUTY IN THE RESTATEMENT (THIRD)

Perhaps in response to judicial overuse of fact-specific no-duty rulings, the Reporters of the Restatement (Third) drastically altered the role of duty in negligence law.[51] To fully understand the impact of the Restatement (Third) on negligence law, it is necessary to piece together various sections dealing with negligence (section 3), liability (section 6), and duty (section 7).[52]

Section 3 contains a broad definition of negligence:

> 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

("[W]e conclude as a matter of law there is no duty running from a mental health care provider to nonpatient family members."); Rockafellow v. Rockwell City, 217 N.W.2d 246, 248 (Iowa 1974) ("A property owner . . . owes no duty to a pedestrian to clear, or make safe for walking, ice and snow which had naturally accumulated on the sidewalk . . . .") (citing Mutzel v. Nw. Bell Tel. Co., 72 N.W.2d 487, 489 (Iowa 1955)); Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647, 654 (Iowa 2000) (holding that a national fraternity organization owes no duty to protect a new initiate from excessive alcohol consumption).

47. Esper & Keating, *supra* note 6, at 272 ("A legal system is a set of public norms—rules, principles, and standards—designed to guide conduct. The rule of law is the enterprise of subjecting human conduct to the governance of relatively stable norms. To make duty a live issue in every case is to introduce a pervasive instability into negligence law, placing the standard governing legal conduct perpetually up for grabs.").

48. *Id.*

49. *Id.* at 265.

50. *Id.* at 272.

51. John C.P. Goldberg & Benjamin C. Zipursky, *The* Restatement (Third) *and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 661–62 (2001) (discussing the skepticism that many academics, including the Restatement's Reporters, have towards the role of duty in negligence claims).

52. The intended scope of these sections remains unclear. The sections appear to outline the general contours of negligence, but other sections of the Restatement (Third) then carve out subsets of negligence with different standards. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM ch. 3, scope note (AM. L. INST. 2010); Goldberg & Zipursky, *supra* note 51, at 664–66 (discussing a different version of the scope note in an earlier draft of the Restatement (Third) which raises similar concerns). This Note does not discuss those concerns because they have not played a role in Iowa.

> 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.[53]

Notably, this definition lacks any mention of the four elements used in virtually every state.[54] This divergence from the universally accepted definition of negligence provides an early tip that the Reporters may have been looking to reshape, rather than restate, the law.

Section 6 then defines the liability for harm caused by a negligent action. "An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty of reasonable care is inapplicable."[55] The comments explain that this section—albeit in unfamiliar wording—includes the standard elements of duty, breach, factual cause, proximate cause,[56] and physical harm.[57] However, the section drastically reduces the role of duty in a negligence claim by creating a presumption that, absent a court determination, a duty of care exists.[58] Thus, whereas courts have historically required a plaintiff to establish a duty as a first step in any negligence claim, this new definition assumes that a duty exists and requires a defendant to show that it does not.[59]

Section 7(a) codifies this general duty of care by stating that "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."[60] Although the Reporters claim that this generalized conception of duty is rooted in history,[61] the vast majority of jurisdictions analyze duty in a case-by-case, Cardozo-like framework by looking at the defendant's ability to foresee the harm to the plaintiff (among other

53. RESTATEMENT (THIRD) § 3. Although this was published in 2010, earlier drafts had been circulated and reviewed for at least ten years beforehand.

54. Goldberg & Zipursky, *supra* note 51, at 658–59.

55. RESTATEMENT (THIRD) § 6.

56. Proximate cause has been reshaped in the Restatement (Third) into "scope of liability." Reviewing this change is outside of the scope of this Note. For a detailed discussion of the difference between scope of liability and proximate cause, see Vicki Lawrence MacDougall, *The Jury Verdict Favored Helen Palsgraf: A Critique of the Restatement (Third) PEH and Foreseeability—"What Does It All Mean?"*, 43 OKLA. CITY U. L. REV. 1, 4–19 (2019).

57. RESTATEMENT (THIRD) § 6 cmt. b.

58. *Id.* § 6 cmt. f ("[I]n cases involving physical harm, courts ordinarily need not concern themselves with the existence or content of this ordinary duty. They may proceed directly to the elements of liability set forth in this Section."); *see also id.* § 6 cmt. b ("Except in unusual categories of cases in which courts have developed no-duty rules, an actor's duty to exercise reasonable care does not require attention from the court.").

59. MacDougall, *supra* note 56, at 26.

60. RESTATEMENT (THIRD) § 7(a).

61. *Id.* § 7 reps. note, cmt. a.

things).[62] The Restatement (Third) conflicts with the approach taken by most jurisdictions in at least three ways.

First, the Restatement (Third) removes any consideration of foreseeability from a duty analysis.[63] Instead of including Chief Judge Cardozo's foreseeability requirement, the Reporters embraced Judge Andrews's broader vision of imposing a general duty of care on all actors who create a risk of harm regardless of the foreseeability of the harm. As applied to *Palsgraf*, the Restatement's (Third) approach would hold that the railroad guard created a risk of harm when shoving the passenger into the train car and that he therefore had a general duty to do so carefully. The foreseeability of the chain of events that ultimately harmed Ms. Palsgraf is completely irrelevant to the Restatement's (Third) duty element; it imposes a general duty of care on anyone who engages in conduct that creates a risk of harm regardless of the person harmed and regardless of the foreseeability of that injury.[64] The Reporters made this change to protect the role of the jury as the triers of fact.[65] After all, foreseeability is a question of fact, whereas duty is a question of law.[66] Permitting courts to analyze foreseeability as a matter of law expanded the court's power at the expense of the jury by permitting it to determine a question of fact without jury input.

Second, this generalized notion of duty creates a rebuttable presumption that the defendant in a negligence claim owes a duty to the plaintiff. As the Reporters noted, "[i]n most cases, courts . . . need not refer to duty on a case-by-case basis."[67] One would therefore expect jurisdictions following the Restatement (Third) to spend very little time debating whether or not a duty exists. In the rare cases where the existence of duty is in question, that point should have been raised by the defendant.[68] Meanwhile, most jurisdictions not following the Restatement (Third) require the plaintiff to affirmatively prove that the defendant owed them a duty of care. This shifting of the burden of proof from the plaintiff to the defendant further cements the existence of a general duty of care in jurisdictions following the Restatement (Third).

Third, the Restatement's (Third) definition of duty requires all no-duty determinations to be broad and categorical, not fact or case-specific.[69] The

62. Cardi, *supra* note 17, at 1890–92.

63. RESTATEMENT (THIRD) § 7 cmt. j.

64. Note that the Restatement (Third) also includes changes to the causation element of a negligence claim in ways that should prevent defendants from facing sweeping liability for any action no matter how remote the harm. *See supra* note 56 and accompanying text.

65. RESTATEMENT (THIRD) § 7 cmt. j.

66. *Id.*

67. *Id.* § 7 cmt. a.

68. *Id.* § 7 cmt. b.

69. *Id.* § 7 cmt. j. ("A no-duty ruling represents a determination, a purely legal question, that no liability should be imposed on actors in a category of cases.").

"no duty to rescue" doctrine—which states that a person has no obligation to rescue another who is in peril[70]—would most likely pass the Restatement's (Third) guidelines for broad, generalized holdings of no duty. However, the Reporters would prefer that courts avoid narrow, situational determinations of no duty that would be better left to the jury.[71] Thus, Iowa's pre-*Thompson* determination "that a psychiatrist owes no duty of care to an individual member of the general public for decisions regarding the treatment and release of mentally ill persons from confinement" would likely be too narrow and fact-specific to survive the Restatement's (Third) proposed duty analysis.[72]

Section 7(b) instructs a court to find an absence of duty only "[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases."[73] Factors that a court may consider when looking for "an articulated countervailing principle or policy" include a conflict with social norms about responsibility,[74] a conflict with another area of law,[75] relational limitations between the two parties,[76] judicial competence to hear a claim,[77] and deference to the discretion of another branch of the government.[78] However, absent an

70. Christopher H. White, *No Good Deed Goes Unpunished: The Case for Reform of the Rescue Doctrine*, 97 NW. U. L. REV. 507, 507 (2002). This doctrine also includes an "absent a special relationship" exception that a duty may exist in certain situations, like where the two parties are co-adventurers or where one party has begun to provide care to the injured party. *Id.* at 510–11. Since the Restatement (Third) includes an exception to the general duty doctrine for reasons of a relational limitation between the two parties, this portion is also most likely consistent with the Restatement (Third).

71. For example, a California court recently wrote that:

> [I]n determining the scope of this duty we must decide as a matter of first impression whether a reasonably prudent driver of a vehicle traveling at the posted maximum speed limit in either the No. 2 lane or No. 3 lane of a dry and straight four-lane freeway, at night, and in light traffic during clear weather, owes a common law duty of ordinary care to other drivers and any involved passengers to move his or her vehicle to the right into the next slower lane if another driver approaches from behind in the same lane at a speed in excess of the posted maximum speed limit.

Monreal v. Tobin, 72 Cal. Rptr. 2d 168, 176 (Cal. Ct. App. 1998) (citations omitted).

72. Leonard v. State, 491 N.W.2d 508, 512 (Iowa 1992).

73. RESTATEMENT (THIRD) § 7(b).

74. *Id.* § 7 cmt. c. For example, this justification may support a no-duty rule "that commercial establishments that serve alcoholic beverages have a duty to use reasonable care to avoid injury to others who might be injured by an intoxicated customer, but that social hosts do not have a similar duty." *Id.* A court must "articulat[e] general social norms of responsibility as the basis for this determination." *Id.*

75. *Id.* § 7 cmt. d.

76. *Id.* § 7 cmt. e.

77. *Id.* § 7 cmt. f.

78. *Id.* § 7 cmt. g.

exceptional circumstance involving one of these factors, the Restatement (Third) advises jurisdictions to avoid spending much time on the issue of duty.

When analyzed together, these three sections drastically alter role of duty in negligence law. Courts following the Restatement (Third) should no longer analyze duty in the relational, foreseeability-based method that Chief Judge Cardozo preferred in *Palsgraf*. Instead, the Reporters embraced the notion of general duty—"[n]egligence in the air, so to speak"—that Judge Andrews preferred.[79] One would expect a jurisdiction that has adopted the Restatement (Third) to rarely examine duty in its negligence opinions; when a discussion of duty does appear, it should respond to points raised by the defense about why a duty does not exist. Additionally, any no-duty holdings should reference duty in a generalized way that describes a full class of cases and should be justified by concrete, clearly articulated rationale.

C. IOWA'S ADOPTION OF THE RESTATEMENT (THIRD) IN THOMPSON V. KACZINSKI

In 2009, Iowa became one of the first jurisdictions[80] to adopt the Restatement's (Third) reformulation of duty[81] and proximate cause.[82] In *Thompson v. Kaczinski*, a landowner disassembled a trampoline and left it in his yard with the intention of eventually disposing of it.[83] A storm blew the trampoline onto a nearby road that was approximately 38 feet away.[84] Mr. Thompson, who was driving on the road the morning after the storm, swerved off the road and into a ditch in an effort to avoid the trampoline.[85] This caused his car to roll several times.[86] In the subsequent lawsuit, the court granted summary judgment to the landowners because they had breached no duty.[87]

On appeal, the Iowa Supreme Court began by restating its traditional three-factor balancing test to establish a duty: the relationship of the parties, the foreseeability of the harm, and public policy considerations.[88] Instead of

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

80. As of 2011, only Wisconsin, Arizona, and Nebraska had adopted the Restatement's (Third) new framing of duty. Cardi, *supra* note 17, at 1892 n.48. Additionally, Louisiana, New York, and Washington have expressed that foreseeability does not belong in the duty element of negligence but have proceeded to rely on foreseeability in their discussions of duty. *Id.*

81. Thompson v. Kaczinski, 774 N.W.2d 829, 835 (Iowa 2009).

82. *Id.* at 836–39.

83. *Id.* at 831.

84. *Id.*

85. *Id.* at 831–32.

86. *Id.* at 832.

87. *Id.* The lower court also granted summary judgment because the damages were not proximately caused by the landowners' negligence. *Id.* However, since this Note focuses on the duty element of a negligence claim, it will not discuss this portion of the opinion.

88. *Id.* at 834. It is interesting to note that, although the trial court held that the landowners had *breached no duty*, the Iowa Supreme Court proceeded to analyze whether the defendants *owed a duty* under the Iowa highway right-of-way statute. *See id.* at 832–34. The right-of-way statute affirmatively imposed a duty on all landowners to avoid placing obstructions or causing

applying this usual test, however, the court adopted the general duty of care outlined in sections 7(a) and 7(b) of the Restatement (Third).[89] While it would be helpful to understand the court's motivation for making such a radical change, the opinion provided very little justification for adopting the Restatement (Third).[90] In its brief explanation, the court clearly endorsed the following principles from the Restatement (Third): (1) courts need not treat duty on a case-by-case basis and can generally presume that a duty of care exists, (2) this general duty of care may not exist in exceptional cases justified by "articulated policies or principles," (3) these policies or principles should not depend on the foreseeability of harm, and (4) this conception of duty should increase transparency in the court's assessment of duty and protect the role of the jury as the factfinder.[91]

Under this new test, the Iowa Supreme Court concluded that the landowners did owe a duty of care to Mr. Thompson because the Restatement (Third) imposes a general duty of care on all actors. Additionally, the court held that "no such principle or policy consideration exempts property owners from a duty to exercise reasonable care to avoid the placement of obstructions on a roadway."[92]

In his special concurrence, Justice Cady expressed his concerns with the majority opinion's imposition of a general duty of care on the landowner.[93] He stated that the duty holding "should [have] be[en] *narrowly construed to the facts* of this case. A narrow construction [wa]s necessary because there may be a point when *public-policy considerations* would intervene to narrow the duty to exclude some items of personal property placed or kept by homeowners and others outside a home . . . ."[94] Although Justice Cady agreed with the majority in form, the substance of his concurrence relied more on Iowa's old formulation of duty than on the Restatement (Third). After all, Iowa's old duty test consisted of public policy considerations and limiting the reach of duty as a means of reducing the scope of liability. Meanwhile, the Restatement

obstructions to be placed in the road. Therefore, the better analysis may be that, regardless of one's definition of duty, the right-of-way statute imposes a duty to avoid blocking the roadway; then, depending on the interpretation of the statute, an actor may only breach that duty by intentionally blocking the roadway. *Id.* at 832. Ironically, the Iowa Supreme Court adopted the Restatement's (Third) new definition of duty in a case that should arguably have been a review of whether a breach occurred under the right-of-way statute. *See id.* at 834–35.

89. *Id.* at 834–35.

90. *Id.* at 835. After summarizing the general duty of care in the Restatement (Third), the court justified adopting it with a single sentence. "We find the drafters' clarification of the duty analysis in the Restatement (Third) compelling, and we now, therefore, adopt it." *Id.* This haphazard explanation foreshadows the court's future treatment of the duty element in negligence claims.

91. *Id.* at 834–35.

92. *Id.* at 835.

93. *Id.* at 841 (Cady, J., concurring specially).

94. *Id.* (emphasis added).

(Third) discourages courts from using fact-specific analyses, opaque public policy considerations, and scope of liability concerns to justify no-duty determinations. As the next Part of this Note will show, the concerns raised in Justice Cady's special concurrence influenced the development of Iowa's new duty law over the next decade.

III. IOWA'S MESSY APPLICATION OF THE RESTATEMENT (THIRD) POST-*THOMPSON*

After it adopted the Restatement's (Third) general conception of duty in *Thompson*, Iowa's approach to negligence cases should have changed in several ways. First, Iowa's courts should generally reference duty far less than they previously had.[95] Second, if a court discusses the duty element, it should only do so because the defendant raised the issue of either a modified scope of duty or a no-duty doctrine.[96] Third, in the exceptional circumstances where a court finds the absence of duty, the decision should: (1) describe a category of cases, not just the facts at hand, and (2) be justified for the transparent reasons of principle or policy outlined in the Restatement (Third).[97]

This Part reviews cases since *Thompson* that have considered the continued relevance of certain no-duty doctrines and argues that those cases have inconsistently applied a mix of concepts from Iowa's pre-*Thompson* case law, Cardozo's relationship-based approach, and the Restatement (Third). This hybrid approach has made Iowa's duty law even more opaque and difficult to understand than it was before the court adopted the Restatement (Third) in *Thompson*. This Part first discusses cases reaffirming no-duty doctrines including the control doctrine, the contact sports doctrine, and the continuing storm doctrine.[98] Then, it reviews other negligence cases that discuss duty in slightly less detail and finds an inconsistent treatment of duty that draws from Iowa's pre-*Thompson* duty law, other jurisdictions with different definitions of duty, and the Restatement (Third).[99] It identifies four

95. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 6 cmt. b (AM. L. INST. 2010) ("Except in unusual categories of cases in which courts have developed no-duty rules, an actor's duty to exercise reasonable care does not require attention from the court.").

96. *Id.* § 7 cmt. b ("A defendant has the procedural obligation to raise the issue of whether a no-duty rule or some other modification of the ordinary duty of reasonable care applies in a particular case.").

97. These reasons include a conflict with social norms about responsibility, a conflict with another area of law, relational limitations between the two parties, judicial competence to hear a claim, and deference to the discretion of another branch of the government. *See supra* notes 69–78 and accompanying text.

98. This Part includes a selection of no-duty determinations since 2009, but it is not a conclusive list of negligence or duty cases since then. Additionally, this Note provides no opinion on the substantive merits of these no-duty exceptions. Instead, it analyzes the *process* the court followed to justify its no-duty determinations.

99. Since this Note looks specifically at cases with a no-duty holding, it would be illogical to use those cases as a sample of how Iowa *generally* discusses duty in negligence claims. After all, the

main problems throughout these holdings: failing to consistently presume that duty exists, citing to precedent from before *Thompson* and to other jurisdictions with different definitions of duty, relying excessively on opaque public policy justifications for a no-duty holding, and usurping the role of the jury by deciding on questions of fact which belong in the breach or scope of liability elements of a negligence claim.

A. *LAYING AN UNSTABLE FOUNDATION FOR IOWA'S TREATMENT OF THE RESTATEMENT (THIRD) BY REAFFIRMING THE CONTROL DOCTRINE*

The Iowa Supreme Court created its first exception to the general duty of care on the very same day that it adopted the Restatement (Third). In *Van Fossen v. MidAmerican Energy Co.*, the court concluded that a property owner owed no duty to the wife of an employee of an independent contractor who was working on that property.[100] The court supported this narrow, fact-specific no-duty determination using the control doctrine. The control doctrine holds that employers of independent contractors owe no duty of care to third parties for the actions of those contractors unless they retain some control over the contractor's daily operations. This Section will analyze the court's rationale for reaching its conclusion and will argue that this rationale is inconsistent with *Thompson*

In *Van Fossen*, a property owner hired an independent contracting agency, which in turn employed the plaintiff.[101] During his time working on the property, the plaintiff's clothes had been exposed to asbestos, and his wife, who had regularly washed his clothes, later died from mesothelioma.[102] The issue on appeal was whether the property owner owed a duty to the wife of an employee of an independent contractor.[103]

The *Van Fossen* court's first deviation from the Restatement (Third) came in its structuring of the duty discussion. One would expect a court following the Restatement (Third) to avoid a discussion of duty altogether unless the defendant raised it as a concern, which better reflects the underlying general duty presumption.[104] If there is a discussion of duty, it should be framed in the language of why the *defendant* does not owe a duty to the plaintiff. However, contrary to this expectation, the opinion's first section is titled "Duty

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cases that justify the application of a no-duty doctrine should by definition discuss duty in great detail. Thus, in order to assess whether Iowa has complied with the Restatement's (Third) instructions to rarely analyze duty, the Section will discuss cases that cite to *Thompson* but do not relate to a no-duty doctrine.

100. Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689, 699 (Iowa 2009).

101. *Id.* at 692.

102. *Id.* Mesothelioma is a deadly tumor caused by inhaling asbestos. Daniel A. Landau, *Mesothelioma*, ASBESTOS.COM (Feb. 26, 2021), https://www.asbestos.com/mesothelioma [https://perma.cc/Z3U5-WBH2].

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

104. *See supra* Section II.B. (discussing how the Restatement's (Third) definition of duty creates a presumption that the defendant owed a duty to the plaintiff).

Theories Asserted by [the Plaintiff]."[105] The court in that section summarized the various arguments *raised by the plaintiff* about why the property owner owed his wife a duty.[106] Furthermore, the court scrutinized and rejected each duty argument raised by the plaintiff in the remainder of the opinion.[107] This approach demonstrates a fundamental misunderstanding of the general duty standard the court adopted *that same day*.[108]

In the final section of the opinion, the court responded to the plaintiff's assertion that the property owner owed a general duty of reasonable care.[109] After summarizing the general duty included in the Restatement (Third), the court "conclude[d that] this case present[ed] an instance in which the general duty to exercise reasonable care [was] appropriately modified."[110] The court could have used this opportunity to present its framework for the exceptional circumstances where a no-duty exception exists. Instead, it analyzed the exception in a confusing three-page explanation that gave lower courts no guideposts to follow when applying a no-duty doctrine. The explanation included various attempts to support the no-duty exception such as limiting the vicarious liability of landowners to the employees of independent contractors,[111] applying the control doctrine (to be discussed in more detail later in this Section),[112] maintaining consistency with other jurisdictions,[113] and considering general public policy concerns related to risk allocation and limitless liability.[114]

Although this analysis touched upon some themes in the Restatement (Third), it had no anchor in the analysis outlined in section 7(b). Out of the five possible justifications for a no-duty determination in the Restatement

105. *Van Fossen*, 777 N.W.2d at 693.

106. *Id.*

107. *Id.* at 693–99.

108. One possible explanation for the inconsistency is that this case's trial occurred before the Iowa Supreme Court adopted the Restatement (Third). The court may therefore have been responding to the arguments raised at the trial level and at the appellate hearing. Since those arguments were pre-*Thompson*, it makes sense that the plaintiff would have raised the issue of duty more explicitly. However, even in this case, the court could have remanded the case back to a lower court to apply the Restatement's (Third) standard of duty.

109. *Van Fossen*, 777 N.W.2d at 696–99.

110. *Id.* at 696.

111. *Id.* at 696–97. These concerns about using duty as a tool to limit liability more closely resemble the conception of duty endorsed by Chief Judge Cardozo and the Restatement (Second). Under the Restatement (Third), the jury should use a scope of liability analysis to address this concern. *See* MacDougall, *supra* note 56, at 5–6.

112. *Van Fossen*, 777 N.W.2d at 697.

113. *Id.* at 697–98. This comparison to other jurisdictions continues to arise in future no-duty determinations. Relying on the no-duty rule in other jurisdictions is especially inconsistent with the Restatement (Third) because most jurisdictions incorporate foreseeability into their analysis of duty.

114. *Id.* at 698–99.

(Third),[115] the court's analysis had only a slight connection to two: relational limitations between the two parties and a conflict with social norms about responsibility. One might argue that Iowa is not bound to follow the text of the Restatement (Third) in the same way that it is bound to follow to the Constitution or statutes. While this is undoubtedly true, the court does have a responsibility to shape common law in a clear and reliable manner. The court abdicated its responsibility to do so when it adopted the general duty outlined in section 7 of the Restatement (Third), and then on the same day published an opinion more consistent with its old definition of duty than with that of the Restatement (Third). These mixed signals provide no clear guidance to lower courts and risk creating a body of post-*Thompson* duty law that is even less predictable than the court's old formulation.[116]

Three years later, the Iowa Supreme Court heard another case relating to employer and subcontractor liability that once again implicated the control doctrine.[117] In *McCormick v. Nikkel & Associates, Inc.*, the district court granted the defendant's motion for summary judgment because the defendant owed no duty to the plaintiff under the control doctrine.[118] Although the procedural history was limited, its framing in the opinion displayed an underlying presumption consistent with the Restatement (Third): that a duty generally exists and that the defendant must prove that a no-duty exception applies. The control doctrine, which is also discussed in *Van Fossen*, holds that employers of independent contractors owe no duty of care to third parties for the actions of those contractors unless they retain some control over the contractor's daily operations.[119] Like in *Van Fossen*, the court again considered whether the doctrine should still apply post-*Thompson*.[120]

The analysis in *McCormick* formalized many of the faulty assumptions in *Van Fossen*. The court's opinion began with the broad claim that in *Thompson*, it "did not erase the remaining law of duty; rather, [the court] reaffirmed it."[121] The court then added that, in *Van Fossen*, it "made clear again that [its]

115. *See supra* notes 73–78 and accompanying text (summarizing the reasons provided by the Restatement (Third) that would support a no-duty determination).

116. *See infra* Section III.D.

117. *See generally* McCormick v. Nikkel & Assocs., Inc., 819 N.W.2d 368 (Iowa 2012) (finding a subcontractor owed no duty of care in electrical work context).

118. *Id.* at 370–71.

119. *Id.* at 371 (citing *Van Fossen*, 777 N.W.2d at 697). For example, in this case, an ethanol plant hired a contractor to do some electrical work. *Id.* at 369. That contractor hired a subcontractor for certain installations. *Id.* After the subcontractor finished and left, the ethanol plant's employee was injured while doing additional work related to the subcontractor's installations. *Id.* at 370. The plant's employee sued the subcontractor for negligence. *Id.* The control doctrine protected the subcontractor because it had no control over the premises at the time of the injury to the employee. *Id.* at 373.

120. *Id.* at 371–72.

121. *Id.* at 371.

previous [pre-*Thompson*] law of duty was otherwise still alive and well."[122] Future cases frequently quote this passage as justification for reaffirming no-duty doctrines that existed pre-*Thompson*.[123] Although the court cited to two pages of *Thompson* to support the claim, neither *Thompson* nor the Restatement (Third) provide any support for the assertion that *Thompson* did not substantially change Iowa's law of duty. Virtually all commenters agree that the Restatement (Third) radically transformed negligence law by creating a general duty presumption and by removing foreseeability from the definition of duty.[124] How can Iowa fundamentally change its definition of duty while also simultaneously reaffirming it? That would be like the United States redefining its boundaries to exclude Texas while also simultaneously reaffirming that all Texans are U.S. citizens, that all of its laws apply to Texans, and that its previous relationship with Texas is unchanged; in other words, it simply does not make sense.

The analysis also built on *Van Fossen* by declaring that "a lack of duty may be found if either the *relationship between the parties* or *public considerations* warrants such a conclusion."[125] Interestingly, this test seems to combine the general duty of care from the Restatement (Third) with two of the three factors from Iowa's pre-*Thompson* case law (relationship between the two parties and public policy). The opinion proceeded to apply more pre-*Thompson* law by citing to the long history of case law supporting the control doctrine and by citing to other jurisdictions that have not adopted the Restatement (Third).[126] However, relying on pre-*Thompson* duty law in Iowa as well as duty law in other jurisdictions overlooks the fact that Iowa adopted a brand new definition of duty. Thus, this practice creates the risk of carrying

122. *Id.*

123. *See, e.g.*, Huck v. Wyeth, Inc., 850 N.W.2d 353, 375 (Iowa 2014) ("We have made clear that our adoption of section 7 of the Restatement (Third) of Torts in *Thompson* did not supersede our precedent limiting liability based on the relationships between the parties." (citing McCormick v. Nikkel & Assocs., 819 N.W.2d 368, 374 (Iowa 2012)); Gries v. Ames Ecumenical Hous., Inc., 944 N.W.2d 626, 629 (Iowa 2020) (citing *McCormick*, 819 N.W.2d at 373 as evidence that Iowa's preexisting body of no-duty law still applies).

124. *See, e.g.*, Tory A. Weigand, *Duty, Causation and* Palsgraf*: Massachusetts and the Restatement (Third) of Torts*, 96 MASS. L. REV. 55, 55 (2015) ("In that effort [to restate the law of duty], it reshapes traditional negligence principles and parlance and attempts to put to rest the duty versus causation divide . . . ."); Mike Steenson, *Minnesota Negligence Law and the Restatement (Third) of Torts: Liability for Physical and Emotional Harms*, 37 WM. MITCHELL L. REV. 1055, 1056 (2011) ("In separating foreseeability from duty and scope of liability (proximate cause) determinations and adopting a but-for standard to determine causation, the [Restatement (Third)] will seem to step on settled law in a way that is unfamiliar to lawyers and judges who are used to dealing with negligence law that integrates foreseeability in both duty and proximate cause . . . ."). *But see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 reps. note, cmt. a (AM. L. INST. 2010) ("Edward White plants the principle expressed in § 7(a) deep in the roots of tort history with his observation that the development of a duty of reasonable care owed to all was critical to the emergence of tort as a discrete subject of law in the 19th century.").

125. *McCormick*, 819 N.W.2d at 371 (emphasis added).

126. *Id.* at 372–73.

forward the old definition of duty by relying on cases that may have used foreseeability and relational (as opposed to general) duty frameworks. If the court continues blending pre-*Thompson* and post-*Thompson* case law, Iowa's common law duty may turn into a patchwork of no-duty exceptions justified by opaque notions of public policy and foreseeability. Ironically, this is exactly what the court was trying to avoid when it adopted the Restatement (Third) in *Thompson*.[127]

Finally, the court in *McCormick* justified its no-duty holding using public policy principles that closely resemble a foreseeability or proximate cause analysis. It explained that, without the control doctrine, an independent contractor could face liability in an unimaginable number of scenarios.[128] Thus, the court felt the need to cut off liability as a way to prevent all of these unforeseeable scenarios that may arise once an actor relinquishes control of the property. This rationale resembles that of Justice Cady's special concurrence in *Thompson*;[129] however, it no longer belongs in a duty analysis and overlooks the role of the other three elements of negligence. The Restatement (Third) empowers the jury to decide whether an actor breached the standard of care and whether the injury is within the scope of liability.[130] As the dissent noted, the court's public policy concerns fall within these elements of negligence, rather than within the duty element.[131] By taking this decision away from the jury, the *McCormick* court engaged in the exact type of behavior that it hoped to discourage when it adopted the Restatement (Third) in *Thompson*.[132]

In sum, the Iowa Supreme Court deviated in three ways from the Restatement (Third) in its first post-*Thompson* string of no duty cases reaffirming the control doctrine. First, the court placed a burden on the plaintiff to argue that a duty existed in *Van Fossen* even though the Restatement (Third) explicitly places the burden on the defendant to show that a duty does not exist.[133] Second, the court justified its no-duty determination using vague notions of public policy, which has a very tenuous connection to the justifications provided by the Restatement (Third). Finally, the court relied heavily on pre-*Thompson* case law and cases in other jurisdictions even though none of those cases used the same definition of duty while claiming that its "previous [pre-*Thompson*] law of duty was . . . alive and well."[134] While

127. *See supra* Section II.C.

128. *McCormick*, 819 N.W.2d at 372–73. ("No matter that the accident occurred a 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.").

129. *See supra* notes 93–94 and accompanying text.

130. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 8 (AM. L. INST. 2010) (discussing the role of the judge and jury); *Id.* § 29 (explaining the scope of liability analysis, which is a slight modification to the proximate cause analysis).

131. *McCormick*, 819 N.W.2d at 382–83 (Hecht, J., concurring in part and dissenting in part).

132. *See supra* note 91 and accompanying text.

133. *See* MacDougall, *supra* note 56, at 26.

134. *McCormick*, 819 N.W.2d at 371.

the court has no freestanding obligation to adhere to the text of the Restatement (Third), it does have a responsibility to shape common law clearly. These three deviations from the Restatement (Third) created an unstable foundation for Iowa's new body of duty law by applying *Thompson* and the Restatement (Third) in an unclear and inconsistent fashion.

B. CONTINUED DIVERGENCE FROM THE RESTATEMENT (THIRD) UNDER THE CONTACT SPORTS DOCTRINE

This pattern of deviation did not end with the control doctrine. In *Feld v. Borkowski*, the Iowa Supreme Court adopted its second no-duty doctrine since *Thompson*: the contact sports doctrine.[135] Feld and Borkowski were teammates on an intramural high school softball team.[136] During a practice, Borkowski lost control of the bat, which caused it to fly forwards and severely injure Feld.[137] In the subsequent lawsuit between the two parties, the trial judge granted summary judgment to Borkowski because softball is a "contact sport" and therefore falls within the contact sports doctrine.[138] This doctrine holds that, due to the inherent risks present in contact sports, individuals participating in those sports only have a duty to avoid reckless behavior with intent to injure.[139] Iowa's cases adopting the contact sports doctrine contain many similar problems to those that pervade the control doctrine cases.

First, like in *Van Fossen*, the *Feld* court gave conflicting signals about the existence of a general duty of care and the related burden of establishing whether a duty exists. At the start of its analysis, the court correctly explained that actors owe a general duty of care to one another.[140] This concession implies that, unlike in *Van Fossen*, the burden here correctly rested with the defendant to show that a duty did not exist. However, the court proceeded to apply the contact sports doctrine simply because neither party challenged its validity.[141] This approach is at odds with the court's recognition of a general duty of care. If a general duty exists post-*Thompson* and the criteria for establishing no duty have changed, the defendant should have the responsibility to *affirmatively prove* that a no-duty doctrine still applies under this new framework.[142] Therefore, the court should have at least considered

135. Feld v. Borkowski, 790 N.W.2d 72, 77 (Iowa 2010).

136. *Id.* at 74.

137. *Id.*

138. *Id.* at 74–75.

139. *Id.* at 76–78.

140. *Id.* at 75 ("As a general rule, our law recognizes that every person owes a duty to exercise reasonable care to avoid causing injuries to others.").

141. *Id.* at 78.

142. The two separate concurrences both recognized that "the question of the continued viability of the contact-sports exception is clearly before [the court]" even though neither party explicitly raised this in their arguments. *Id.* at 81 (Wiggins, J., concurring specially); *Id.* at 82–86 (Appel, J., concurring in part and dissenting in part) ("The continued validity of the contact-sports exception and its viability and scope under the Restatement (Third) of Torts are not

whether the contact sports doctrine aligned with Iowa's supposed general duty of care.

Second, like in both *Van Fossen* and *McCormick*, the *Feld* court relied on pre-*Thompson* case law as its primary justification for applying the contact sports doctrine.[143] It did so implicitly by claiming that the contact sports doctrine was the "the controlling law as advocated by the parties"[144]—thereby accepting that the prior case law establishing the no-duty doctrine still applied—and explicitly by citing to pre-*Thompson* cases that justify the doctrine.[145] On the other hand, Justice Appel's dissent analyzed the historical justifications of the contact sports doctrine in detail and concluded that the doctrine should have no longer applied under the Restatement (Third).[146] Justice Appel's approach of questioning a doctrine's underlying justifications and seeing if they still apply post-*Thompson* yields results that are much more consistent with *Thompson's* goal of increasing transparency in duty law.

Finally, the *Feld* court introduced a new complication into its analysis: mixing questions of fact and law. The court's framing of the main issue—whether softball qualifies as a contact sport under the contact sports doctrine[147]—should at least qualify as a mixed question of fact and law. Although the distinction between questions of law and fact can be murky in tort claims,[148] scholars commonly distinguish the two categories by looking at the expertise of a jury or judge to answer the question.[149] Reasonable minds could certainly differ on whether softball is a contact sport, and judges are no more qualified than the average jury member to answer this question. The court's assumption that this was a question of law again arose from its uncritical reliance on pre-*Thompson* precedent treating all aspects of the contact sports doctrine as issues of law.[150] However, as the Restatement (Third) acknowledges, "[w]hen resolution of disputed adjudicative facts bears on the existence or scope of a

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.").

143. *Id.* at 76–78.

144. *Id.* at 78 n.4 (refusing to question the validity of the contact sports doctrine sua sponte because the parties did not advocate for any change to the doctrine).

145. *Id.* at 76–78.

146. *Id.* at 89–93 (Appel, J., concurring in part and dissenting in part) ("[T]he majority does not adequately discuss the policy basis for such an exception for contact sports. I am fearful that under the approach of the majority, the groundwork has been laid for a series of judge-made exceptions, which if unabated could create a hodgepodge of our tort law."). Although Justice Appel relies too heavily on broad notions of public policy and not enough on the Restatement's (Third) five factors, his analysis draws upon themes that are much more consistent with the Restatement (Third) than the majority opinion. *Id.*

147. *Id.* at 79.

148. Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 111 (1924).

149. Bernard Schwartz, *Mixed Questions of Law and Fact and the Administrative Procedure Act*, 19 FORDHAM L. REV. 73, 73 (1950).

150. *Feld*, 790 N.W.2d at 79.

duty, the case should be submitted to the jury with alternative instructions."[151] When facing mixed questions of fact and law, the court should respect the Restatement's (Third) emphasis on separating the role of the judge and the jury by leaving any questions of fact (even if mixed with questions of law) to the jury to decide.[152]

C. *Relying on Similar Rationale to Reaffirm the Continuing Storm Doctrine*

In addition to the control doctrine and the contact sports doctrine, a recent Iowa Supreme Court decision reaffirmed another no-duty doctrine called the continuing storm doctrine. The rationale supporting this decision demonstrates the doctrinally confusing results of Iowa's haphazard adoption of the Restatement (Third). The continuing storm doctrine holds that landowners have no duty to keep their premises safe by removing snow, ice, and debris from their property while a storm is ongoing.[153] Like its decision in *Feld* about the contact sports doctrine explored in the previous section, the Iowa Supreme Court in 2016 refused to question whether the continuing storm doctrine still applied post-*Thompson* because the issue was not raised at the trial level.[154] However, in 2020, the court determined in *Gries v. Ames Ecumenical Housing, Inc.* that the doctrine still applied under the Restatement (Third).[155] Since its analysis relied heavily on the building blocks set by *Van Fossen*, *McCormick*, and *Feld*, this case serves as a useful model for how the court will likely analyze no-duty doctrines going forward.

The *Gries* court began its analysis by repeating its illogical conclusion that Iowa's pre-*Thompson* duty case law still applied under the Restatement (Third).[156] It then repeated the *McCormick* test, which looked primarily at "the relationship between the parties or public considerations" for support of a no-duty determination.[157] However, the court introduced a new wrinkle into its analysis by cherry-picking a quote from the Restatement (Third): that "[t]he principle or policy that is the basis for modifying or eliminating the ordinary duty of care contained in § 7(a) *may be reflected in longstanding precedent*."[158] Under the

151. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. b (AM. L. INST. 2010).

152. *Id.* § 8.

153. Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699, 711 (Iowa 2016) (citing Reuter v. Iowa Trust & Sav. Bank, 57 N.W.2d 225, 227 (Iowa 1953)).

154. *Id.* at 711–12.

155. Gries v. Ames Ecumenical Hous., Inc., 944 N.W.2d 626, 628 (Iowa 2020).

156. *See supra* notes 122–23 and accompanying text (explaining why this assertion does not make sense).

157. *Gries*, 944 N.W.2d at 630 (quoting McCormick v. Nikkel & Assocs., Inc., 819 N.W.2d 368, 371 (Iowa 2012)).

158. *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. a (AM. L. INST. 2010)) (emphasis added) (alterations omitted). The line was quoted parenthetically in *McCormick*, but the court relied on it much more heavily in this opinion. *McCormick*, 819 N.W.2d at 374; *see also* Huck v. Wyeth, Inc., 850 N.W.2d 353, 375 (Iowa 2014)

court's view, this quote provided additional support for its tendency to rely on pre-*Thompson* precedent to justify applying no-duty doctrines under the Restatement (Third). When read in context, the quote simply states that once a court has adopted a no-duty doctrine, it does not need to justify that rule every time it is invoked.[159] This "longstanding precedent" justification still requires the court to explain its rationale for affirming a no-duty doctrine the first time it does so post-*Thompson*. If this were not the case, the court would eventually have two distinct and active bodies of duty law: a set of pre-*Thompson* "longstanding precedent" no-duty doctrines justified by Iowa's previous definition of duty and a set of post-*Thompson* no-duty doctrines justified by the principles in the Restatement (Third). Such an outcome would lead to immense confusion for individuals attempting to navigate Iowa's duty law and would certainly not lead to the increased transparency and clarity desired by the court in *Thompson*.

Aside from this quote, the court's analysis resembles its other post-*Thompson* opinions and tends to diverge from the Restatement (Third) in similar ways. Like in *Van Fossen*, the court disregarded the Restatement's (Third) general duty presumption by requiring the plaintiff to show that a duty existed and that the continuing storm doctrine should not have applied.[160] Like in *McCormick* and in Justice Cady's special concurrence in *Thompson*, its public policy explanation walked the line between an analysis of duty, scope of liability, and foreseeability.[161] Additionally, the court displayed a similar lack of trust in the jury's ability to apply the other elements of negligence by claiming that a finding of duty would impose unreasonable burdens on the defendant.[162] Finally, like in *Feld*, the court used a no-duty doctrine to answer a question of fact: What constitutes a storm and when does that storm end?[163] As Justice Appel noted in his dissent:

> The so-called continuing storm doctrine is based on the proposition that jurors are incapable of sorting through negligent handling of

("We have made clear that our adoption of section 7 of the Restatement (Third) of Torts in *Thompson* did not supersede our precedent limiting liability based on the relationships between the parties.").

159. RESTATEMENT (THIRD) § 7 cmt. a.

160. *Gries*, 944 N.W.2d at 629 ("Gries makes no real doctrinal argument why the adoption of sections 7 and 51 of the Restatement (Third) counsels in favor of abandoning the continuing storm doctrine, and we see none.").

161. *Id.* at 630; Thompson v. Kaczinski, 774 N.W.2d 829, 840 (Iowa 2009) (Cady, J., concurring specially).

162. *Gries*, 944 N.W.2d at 630 (stating that eliminating the doctrine would require landowners "to undertake [the] Sisyphean task[] every time it snows" of shoveling during a storm while ignoring the fact that juries are capable of assessing the facts to determine whether it was reasonable for a landowner to decide not to shovel until the end of a storm) (quoting Alcala v. Marriot Int'l, Inc., 880 N.W.2d 699, 721–22 (Iowa 2016)).

163. *Id.* at 633 (clarifying that "there must be meaningful, ongoing accumulation of snow or ice" for the doctrine to apply while also helpfully explaining that "[t]he doctrine is not 'the continuing mist doctrine.'").

> snow and ice by premises owners from situations where it would be unreasonable to expect a property owner from abating hazards . . . . I see no reason to believe that Iowa jurors lack the capability to evaluate the reasonability of a premises owner's actions during inclement conditions.[164]

Indeed, one of the *Thompson* court's few stated motivations for adopting the Restatement (Third) was to respect the role of the jury as a factfinder. No-duty doctrines like the continuing storm doctrine undermine this purpose by showing a lack of trust in the jury to evaluate the severity of a storm and in the jury's ability to evaluate the reasonableness of a landlord's actions during such a storm.

D. FINDING AN INCONSISTENT TREATMENT OF DUTY IN OTHER CASE LAW

A review of the 19 Iowa negligence cases citing Thompson in the most depth shows a systematic misunderstanding and misapplication of duty post-*Thompson*.[165] Of those nineteen cases, two are discussed in detail in previous Sections[166] and ten do not contain any meaningful discussion of the trial court's treatment of duty. Four of these remaining seven cases employed language suggesting that the defendant owed a general duty of care to the plaintiff, and that the burden of showing an absence of this duty rested with the defendant.[167] Ironically, a discussion of *Thompson* by the U.S. District Court for the Southern District of Iowa in *Adam v. Sears Roebuck & Co.* was more faithful to the case than many of the Iowa Supreme Court's own opinions.[168] For example, that district court explained that there was a "general duty under Iowa law" to exercise reasonable care and that this duty did not depend on the particular relationship between the two parties.[169]

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164. *Id.* at 636 (Appel, J., concurring in part and dissenting in part).

165. These 19 cases cite to *Thompson* in the most depth according to Westlaw's KeyCite function. They represent only a sampling of cases that discuss negligence while citing *Thompson* and are far from a conclusive list.

166. *See supra* Section III.A (discussing McCormick v. Nikkel & Assocs., Inc., 819 N.W.2d 368 (Iowa 2012)); *supra* Section III.B (discussing Feld v. Borkowski, 790 N.W.2d 72 (Iowa 2010)).

167. Mitchell v. Cedar Rapids Cmty. Sch. Dist., 832 N.W.2d 689, 694–95 (Iowa 2013) (holding that defendant did not preserve the issue of duty because they did not raise the existence of duty as a concern at the trial level); Benninghoven v. Hawkeye Hotels, Inc., No. 16-1374, 2017 WL 2684351, at *2 (Iowa Ct. App. June 21, 2017) ("The defendants filed a motion for summary judgment, asserting they owed no duty to the plaintiffs for intentional torts committed by an employee who is off duty and off property."); Estate of Gottschalk *ex rel.* Rassler v. Pomeroy Dev., Inc., No. 14-1326, 2016 WL 1129995, at *2 (Iowa Ct. App. Mar. 23, 2016) (explaining that the state filed a motion for summary judgment by claiming that it owed no duty to the plaintiffs); Adam v. Sears Roebuck & Co., No. 3:09-CV-00035-TJS, 2010 WL 11614546, at *4 (S.D. Iowa May 7, 2010) (discussing a defendant's general duty of care under the Restatement (Third) and the defendant's assertion that they did not owe a duty in this case).

168. *Adam*, 2010 WL 11614546, at *4–5.

169. *Id.*

The three remaining cases discussed duty in a way that was inconsistent with the Restatement (Third).[170] These cases continued to reference duty as something the plaintiff must prove, which violates the general duty presumption as outlined in *Thompson* and in the Restatement (Third).[171] In *Bonney v. United States*, the U.S. District Court for the Southern District of Iowa cited directly to *McCormick* as evidence of the fact that a plaintiff has an obligation to show that a duty exists.[172] Although *McCormick* does not support this standard, the district court's confusion here is unsurprising due to the lack of clarity from the Iowa Supreme Court.[173] Indeed, this overall confusion with regard to Iowa's conception of duty—with courts sometimes applying the standard as explained in *Thompson* reasonably well and others continuing to misunderstand it—is a direct result of the unclear opinions coming from the Iowa Supreme Court.

IV. CORRECTING IOWA'S DUTY LAW

Since *Thompson*, the Iowa Supreme Court has not faithfully applied the Restatement's (Third) definition of duty. It has diverged from the guidelines in the Restatement (Third) in four primary ways: (1) failing to create a general presumption that duty exists absent concerns raised by the defendant, (2) relying too heavily on precedent and other jurisdictions that have not adopted the Restatement (Third), (3) prioritizing broad and vague public policy justifications for a no-duty holding over other rationales in the Restatement (Third), and (4) answering questions of fact that belong with the jury.[174]

These deviations are problematic because they contradict the text of the Restatement (Third) that the Iowa Supreme Court adopted in *Thompson*. The Restatement (Third) clearly creates a general presumption of duty, requires a narrow, concrete justification for a no-duty determination, and emphasizes

170. Huck v. Wyeth, Inc., 850 N.W.2d 353, 375 (Iowa 2014) ("Not only is [the plaintiff] unable to satisfy [the] causation requirement, she cannot establish that the brand defendants owed her a duty."); Hill v. Damm, 804 N.W.2d 95, 99 (Iowa Ct. App. 2011) (summarizing the elements of a negligence claim post-Thompson, the first of which is the plaintiff's requirement to prove the existence of a duty); Bonney v. United States, No. 4:13-cv-00415-HCA, 2015 WL 11117318, at *6 (S.D. Iowa Mar. 25, 2015) (same) (quoting McCormick v. Nikkel & Assocs., Inc., 819 N.W.2d 368, 371 (Iowa 2012)).

171. *Hill*, 804 N.W.2d at 99; *Bonney*, 2015 WL 11117318, at *6 (quoting *McCormick*, 819 N.W.2d at 371).

172. *Bonney*, 2015 WL 11117318, at *6.

173. *Bonney* says that, as the first element of a negligence claim, "[a plaintiff] must prove 'the existence of a duty.'" *Id.* (quoting *McCormick*, 819 N.W.2d at 371). However, *McCormick* does not say that *a plaintiff* must prove the existence of a duty; it says a "negligence claim requires 'the existence of a duty.'" *McCormick*, 819 N.W.2d at 371 (quoting Thompson v. Kaczinski, 774 N.W.2d 829, 834 (Iowa 2009)). Since the court did not explicitly say that the defendant must prove the absence of a duty, the confusion in lower courts is understandable.

174. *See generally supra* Part III.

the separation of the judge and the jury.[175] As Justice Appel has noted, Iowa's current patchwork approach has led to a "slicing and dicing" of duty in a way that limits the role of the jury and leads to "necessarily antidemocratic" results.[176] If the court does not adopt a more principled approach to its duty analysis, its new conception of duty will continue to be a contradictory amalgamation of exceptions rooted in the Restatement (Second), doctrines invoking mixed questions of fact and law, and vague notions of public policy that belong in other elements of a negligence claim.[177]

This Part proposes three guiding principles for the court to adopt when considering a no-duty determination. First, it should minimize its reliance on pre-*Thompson* precedent and other jurisdictions to justify the determination. Second, it should clearly justify any no-duty determination using one of the five reasons listed and explained in the Restatement (Third). Third, if a court does create a no-duty determination, that court should also clearly explain if any part of that doctrine requires special jury instructions to resolve a question of fact. These three guidelines will ensure that the court develops a clear and consistent body of duty common law that adheres to its own precedent in *Thompson*.

*A. MINIMIZING RELIANCE ON PRE-*THOMPSON *PRECEDENT AND THE LAW OF OTHER JURISDICTIONS*

The court must minimize its reliance on pre-*Thompson* precedent and on other jurisdictions when considering issues of duty. Before adopting the Restatement (Third), Iowa's test for duty included the relationship between the two parties, foreseeability of the harm, and public policy considerations.[178] Under the Restatement's (Third) general conception of duty, none of these three factors are relevant.[179] Therefore, relying on pre-*Thompson* cases will

175. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §§ 7, 8 (AM. L. INST. 2010).

176. Gries v. Ames Ecumenical Hous., Inc., 944 N.W.2d 626, 635 (Iowa 2020) (Appel, J., concurring in part and dissenting in part).

177. *See* MacDougall, *supra* note 56, at 24 (describing how, in a jurisdiction that has adopted the Restatement (Third), the "application of various factors could be manipulated or obscure explanations just as easily as the concept of foreseeability. Clarity could remain elusive, and transparency stay an unrealized dream."); John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 334 (2006) (explaining how excessive reliance on public policy factors leads to courts "treating the duty element as but an occasion for judges to ask the open-ended, policy-driven question of whether there are any reasons to deny juries the ability to impose liability. So defined, duty simultaneously becomes the only hook that judges need to set matter-of-law limits on negligence liability *and* loses all of its texture and shape, thereby functioning as a blank check . . . .").

178. *See supra* Section II.A.

179. Arguably, the five justifications for a no-duty holding in the Restatement (Third) could count as public policy factors. However, the court has not tied its public policy analysis to these factors in any way.

oftentimes lead to results that are inconsistent with the Restatement (Third) because the underlying principles do not align.[180] Also, most other jurisdictions have not adopted the Restatement (Third),[181] and thus, justifying a no-duty holding by looking to other jurisdictions relies on analyses that may be inconsistent with the Restatement (Third).[182] This result is problematic because it offers plaintiffs, defendants, and lower courts no guidance to follow when addressing the duty element of a negligence claim. Depending on a given judge's understanding, a general presumption of duty may or may not exist, a pre-*Thompson* no-duty doctrine may or may not still be relevant, and abstract notions of public policy may or may not be enough to justify applying such a no-duty doctrine. The Iowa Supreme Court can provide more clarity and transparency to lower courts and to parties to a case if it reconsiders its pre-*Thompson* no-duty doctrines using the language of the Restatement (Third).

Since one of the Restatement's (Third) five reasons for a no-duty holding is a "[c]onflict[] with social norms about responsibility[,]"[183] adhering to this Section does not require a complete erasure of prior case law or refusal to rely on case law from other jurisdictions. It simply reminds courts that "longstanding precedent" by itself is not a binding reason to reaffirm a no-duty doctrine. When relying on precedent as justification for a no-duty doctrine, the court should summarize the rationale underlying that doctrine and explain why it is consistent with the Restatement (Third). Additionally, the court may look to other sources to support a no-duty doctrine's reaffirmation, such as an industry-wide contractual allocation of risk between two parties,[184] criminal laws that give insight into the community's viewpoint

180. The court noted in *Gries* that "[s]tare decisis alone dictates continued adherence to our precedent absent a compelling reason to change the law." Gries v. Ames Ecumenical Hous., Inc., 944 N.W.2d 626, 631 (Iowa 2020) (quoting Book v. Doublestar Dongfeng Tyre Co., 860 N.W.2d 576, 594 (Iowa 2015)). While its adoption of the Restatement (Third) did not instantly overturn all of the earlier cases, it did significantly change the law of duty. The court should recognize that there is a more nuanced option than uncritically relying on pre-*Thompson* precedent or overturning all negligence cases from before 2009.

181. *See supra* note 80 and accompanying text.

182. In 2013, the Iowa Supreme Court explicitly recognized that relying on cases in other jurisdictions may not be helpful due to Iowa's unique definition of duty; it is unclear why the court recognized the possibility in one case but continued looking to other jurisdictions for guidance before and after this statement. Mitchell v. Cedar Rapids Cmty. Sch. Dist., 832 N.W.2d 689, 702 (Iowa 2013) ("[O]ther jurisdictions, using the old duty framework of the Restatement (Second), have rejected the possibility of liability . . . after concluding the injuries were unforeseeable. These authorities, however, are inapposite for several reasons. First, as we have previously explained, we have adopted the duty principles of the Restatement (Third) and will not consider foreseeability, or lack thereof, in making duty determinations.").

183. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. c (AM. L. INST. 2010).

184. *See* Esper & Keating, *supra* note 6, at 284 (explaining that one function of duty includes "defining and coordinating shared responsibility for a single harm. The rules of learned intermediary doctrine are a case in point. Those rules divide the labor of warning about the risks of prescription drugs between pharmaceutical firms and prescribing physicians.").

on the behavior,[185] or widely-held beliefs in a community about the behavior. In conclusion, while pre-*Thompson* precedent can be one factor in the court's no-duty analysis under the social norm exception, it should not be given determinative weight. This will lead to more predictable and consistent case law.

B. CONCRETE JUSTIFICATIONS FOR A NO-DUTY DETERMINATION

The Iowa Supreme Court should structure its analyses in ways that clearly illustrate the underlying rationale for its decision. Since its current approach varies widely from case to case, lower courts and parties to a case will struggle to find any meaningful or rational way to apply the current duty case law. The Restatement's (Third) justifications for a no-duty holding provide a clear and straightforward solution to this problem. In each opinion where the court considers duty, the court should list each of the five potential justifications for a no-duty holding. These five justifications include: (1) "[c]onflicts with social norms about responsibility," (2) "[c]onflicts with another domain of law," (3) "relational limitations," (4) "institutional competence" to hear a case, and (5) "[d]eference to discretionary decisions of another branch of government."[186] Then, depending on the defendant's arguments, the court should clearly explain why a given rationale does or does justify the doctrine. This approach would strengthen the body of common law duty by giving parties to a case and lower courts a consistent set of principles to apply.

At times, the Iowa Supreme Court has come close to this approach, but it has then gone on to muddle the elements by mixing the Restatement (Third) with other sources of law. For example, in both *McCormick* and *Gries*, the court stated that it would look at "the relationship between the parties or public considerations" when analyzing duty.[187] However, in both of those opinions, the court then diverged from this test by citing pre-*Thompson* precedent, case law in other jurisdictions, and opaque public policy

185. James Edwards, *Theories of Criminal Law*, STAN. ENCYCLOPEDIA PHIL. (Aug. 6, 2018), https://plato.stanford.edu/entries/criminal-law [https://perma.cc/H2UN-E597] ("One source of criminal law's value, on this alternative view, is its ability to help alter social morality . . . . Where this is successful, criminal law can largely disappear from members' motivational horizons: we come to refrain from conduct for the moral reasons that make it wrong . . . ."); Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635, 639 (2000) ("Modern retributivist approaches often do value 'community values' or 'lay opinions,' but they do so in many different ways, depending on the relationship of the retributivist approach to political theory and to private moral norms, and, more fundamentally, on how the retributivist principle is justified.").

186. RESTATEMENT (THIRD) § 7 cmts. c.–g.

187. McCormick v. Nikkel & Assocs., Inc., 819 N.W.2d 368, 371 (Iowa 2012); Gries v. Ames Ecumenical Hous., Inc., 944 N.W.2d 626, 630 (Iowa 2020) (quoting *McCormick*, 819 N.W.2d at 371). When referring to the relationship between the parties, the Restatement (Third) referred specifically to relationships between one person and a class of others. For example, this could include a landowner's various duties in premise liability. Importantly, this exception *does not* justify a relational, individualized analysis of the duty that actor A owes to victim B. RESTATEMENT (THIRD) § 7 cmt. e.

justifications instead of more closely adhering to the justifications outlined in the Restatement (Third). Furthermore, those two considerations look more like Iowa's pre-*Thompson* duty analysis than the one adopted in *Thompson*. This approach of mixing and matching definitions of duty creates confusing and inconsistent law that is difficult to apply.

The court's reliance on public policy has been particularly detrimental to Iowa's duty analysis and has no basis in the Restatement (Third). The public policy analysis has taken the form of concerns about limitless liability,[188] the imposition of excessively high standards of care,[189] and the proper allocation of risk.[190] Although this third justification may fall under the "social norms" standard, the first two do not belong in a duty analysis. By adopting the Restatement (Third), the court agreed with Judge Andrews in *Palsgraf* that duty is not the proper place for concerns about limitless liability; instead, assessment of that concern belongs to the jury in their scope of liability analysis (scope of liability is the Restatement's (Third) new proximate cause test). Additionally, the court's concern about excessively high standards of care belongs in the breach element of negligence, not the duty element. By blending the separate elements of a negligence claim together, the court once again provides lower courts, plaintiffs, and defendants with no clear guidance on how to bring (or adjudicate) a negligence claim. The court can resolve this problem by consistently explaining and applying the Restatement's (Third) concrete justifications when those justifications support a no-duty determination.

C. *Respecting the Proper Role of the Jury*

Finally, even if it affirms or creates a no-duty doctrine, the court should carefully consider whether any aspect of that doctrine properly belongs with the jury. The court emphasized the importance of separating the role of the judge and jury in negligence claims when it adopted the Restatement (Third) in *Thompson*.[191] When the court answers questions of fact under a duty analysis, it contradicts its intentions in *Thompson* by expanding its own power at the expense

188. Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689, 698–99 (Iowa 2009) ("If employers of independent contractors were to bear an unlimited general duty to exercise reasonable care, as Van Fossen urges, when their contractors' work involves asbestos, the universe of potential persons to whom the duty might be owed is unlimited.").

189. *McCormick*, 819 N.W.2d at 373 ("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.").

190. *Gries*, 944 N.W.2d at 630 ("The continuing storm doctrine recognizes a land possessor is not a de facto insurer responsible for all accidents occurring on its property.").

191. RESTATEMENT (THIRD) § 8 cmt. a. ("In tort cases involving physical or emotional harm, trial by jury is almost always requested by one of the parties. Many of the rules in this Restatement concern, explicitly or implicitly, the respective roles of judge and jury . . . .").

of the jury.[192] As applied to the contact sports doctrine in *Feld*, for example, there is no reason why judges are better situated than juries to hold that softball is a contact sport as a matter of law. Similarly, as applied to the continuing storm doctrine in *Gries*, a jury is perfectly able to determine when a storm is severe enough to make shoveling unreasonable. For the sake of convenience and efficiency, the court may prefer to classify these disputes as issues of law. However, the Restatement (Third) acknowledges that, even though "there can be important advantages in having the negligence issue decided once and for all by the court[,] . . . the advantages of allowing courts to decide the negligence issue in cases of this sort do not justify removing the issue from the jury."[193] Similarly, when it adopted the Restatement (Third) in *Thompson*, the Iowa Supreme Court stated that one of its goals was "to protect the traditional function of the jury as factfinder."[194] To remain consistent with this goal, the court must avoid reaffirming no-duty doctrines that hinge on questions of fact better left to the jury.

If a no-duty determination involves an issue of fact, courts should delegate that analysis to the jury via a special jury verdict form or some other type of explicit jury instructions. In the case of *Gries*, the first step of those instructions would likely include a question such as: Based on the facts presented in this trial, was there a continuing storm at the time of the injury to the plaintiff? If the answer is yes, there can be no liability for the defendant. A special jury verdict form would resolve the court's concerns related to the proper allocation of risk between a landlord and defendant during a storm; after all, if the jury found that there was an ongoing storm, the landlord would face no liability as a matter of law.[195] Additionally, the verdict form would stop the court from answering clear questions of fact—such as what qualifies as a storm—in the duty element of negligence.

V. CONCLUSION

After issuing its *Thompson* opinion in 2009, the Iowa Supreme Court became one of the first jurisdictions to adopt the Restatement's (Third) conception of duty. Given the general skepticism of the Restatement's (Third) formulation of duty[196] and its divergence from negligence common

192. *See* Esper & Keating, *supra* note 6, at 269 ("Articulation of the law is for judges; application of the law is for juries. But when duty is a live issue in every case it is impossible to draw a principled line between the provinces of judge and jury.").

193. RESTATEMENT (THIRD) § 8 cmt. c.

194. Thompson v. Kaczinski, 774 N.W.2d 829, 835 (Iowa 2009) (quoting RESTATEMENT (THIRD) §7 cmt. j).

195. *Gries*, 944 N.W.2d at 630–31 ("The continuing storm doctrine recognizes a land possessor is not a de facto insurer responsible for all accidents occurring on its property.").

196. *See, e.g.*, Goldberg & Zipursky, *supra* note 51, at 678 ("[The Restatement (Third)] and its neglect of duty still suffer from serious defects as a restatement of negligence law."); W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 671 (2008) ("The Restatement (Third) of Torts . . . confronts the duty question head on, but has received stinging

law, Iowa has the opportunity to shape the direction of negligence law in the United States by serving as a model of how to apply the new conception of duty. Unfortunately, Iowa's application of the principles it adopted in *Thompson* has been inconsistent and muddled. Instead of critically analyzing its no-duty doctrines, the court has clung to pre-*Thompson* precedent to reaffirm these doctrines without thinking about their place in this new definition of duty. Additionally, it has relied too much on vague notions of public policy to justify these decisions instead of using the five concrete justifications in the Restatement (Third). Finally, the court's inconsistent treatment of duty has led to confusion about whether a general duty of care exists at all, or whether the plaintiff must still show that a duty exists.

Since the Iowa Supreme Court has only applied its new duty formulation for ten years, it still has time to reorient its growing post-*Thompson* body of duty law. To do so, it should follow three principles that will help anchor its opinions to the text of the Restatement (Third) and to the rationale in *Thompson*. First, it must reduce its reliance on case law decided under a different definition of duty when analyzing duty questions post-*Thompson*. Second, it must clearly justify any no-duty determination using one of the reasons in the Restatement (Third). Finally, it must protect the role of the jury even when finding that no duty exists.

If the court follows these recommendations when analyzing future questions of duty, its body of negligence law under the Restatement (Third) will rely on principled, transparent rationale instead of opaque public policy decisions and outdated precedent. This practice would help plaintiffs, defendants, and lower courts structure their claims, defenses, and opinions. Furthermore, it would protect the role of the jury as the ultimate finder of fact. However, if the court continues along its current path, Iowa's duty law could further devolve into "a series of judge-made exceptions" that would make this element even more convoluted than it was pre-*Thompson*.[197] Thus, Iowa's negligence law currently stands at a crossroads. If the Court does not adopt a more structured approach to its duty analyses, Iowa's negligence law will soon solidify into a murky blend of the ideas from the Second and Third Restatements, doctrines from other jurisdictions, and public policy exceptions.

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criticism for failing to restate the law."); Alani Golanski, *A New Look at Duty in Tort Law: Rehabilitating Foreseeability and Related Themes*, 75 ALB. L. REV. 227, 272 (2011) (criticizing "the conceptual incoherence inhering in the Third Restatement's and Cardi and Green's notion of duty").

197. Feld v. Borkowski, 790 N.W.2d 72, 89 (Iowa 2010) (Appel, J., concurring in part and dissenting in part).