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Torts: Childproofing the Gate to Landowner Liability: How Judges Misuse the Concept of Foreseeability to Keep Cases from the Jury—Foss ex rel. Foss v. Kincade

Maija Liisa Varda

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TORTS: CHILDPROOFING THE GATE TO LANDOWNER LIABILITY: HOW JUDGES MISUSE THE CONCEPT OF FORESEEABILITY TO KEEP CASES FROM THE JURY—FOSS EX REL. FOSS V. KINCADE

Maija Liisa Varda†

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† J.D. Candidate 2011, William Mitchell College of Law; B.A., Philosophy, magna cum laude, New York University, January 2007. The author would like to thank the William Mitchell Law Review staff for all of their help with this article; and also Prof. Michael K. Steenson for his wealth of knowledge on Minnesota tort law.
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I. INTRODUCTION

Look around your home and think of all the possible ways a visiting three-year-old child could possibly injure himself: those uncovered outlets, that sparkling clean glass door, the hot mug of coffee on the table, and that unsecured bookshelf. Then ask yourself this: in deciding how far to go in protecting your child guest from these dangers, would the fact that the three-year-old’s mother is right next to him affect your decision in any way?

For the Minnesota Supreme Court, the answer is “no”—at least according to its opinion in Foss v. Kincade.¹

Foss involved a three-year-old child who was injured when he tried to climb an empty, unsecured bookcase in a family friend’s home.² The boy’s mother was around the corner, just a few feet away, when the accident occurred.³ The Minnesota Supreme Court specifically rejected the court of appeals’ argument that the homeowners had no duty to protect the child due to the mother’s presence.⁴ Instead, the supreme court held that the homeowners had no duty to protect the child from the bookcase because it was clearly not reasonably foreseeable that any guest would try to climb it.⁵

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2. Id. at 319.
3. Id.
4. Id. at 322.
5. Id. The court also held that discovery sanctions against the Kincades for disposing of the bookcase before trial were inappropriate, because the Kincades had already admitted that they knew it was possible the bookcase could tip over. Id. at 323–24.
Foreseeability is a question for the jury, we are told, unless the issue “is clear.” So where a three-year-old child is left unsupervised in a room with a big, empty bookcase sitting on a carpeted floor, the issue “is clear.” Even where the homeowner is well acquainted with the child and has characterized him as being very active, the issue “is clear.” On the homeowner’s motion for summary judgment—where all facts and inferences must be taken in the light most favorable to the child—the issue “is clear.” And even when the senior justice of the state’s highest court believes it was reasonably foreseeable that the accident may occur, the issue, still, “is clear.”

The only thing that is actually clear, in a more proper sense of the word, is that the Minnesota Supreme Court—for one reason or another—absolutely did not want this case to go in front of a jury.

Courts have frequently used the term “reasonable foreseeability” in the context of duty, just as the Minnesota Supreme Court did here, to take questions of fact away from the jury. This has been recognized by legal scholars for some time, and is one of the main reasons the American Law Institute (“ALI”) specifically rejected no-duty rulings based on foreseeability in the Restatement (Third) of Torts (“Third Restatement”). When cases are decided by judges, as opposed to when they are decided by juries, precedent is created.

The case becomes law, dictating how future cases are to be decided. When judges create precedent on the basis of the undefined concept of foreseeability, they create easily misunderstood and totally unpredictable laws. More people test their luck in the courts, dockets begin to overflow, and judges feel increasing pressure to quickly dismiss cases based on the catch-all concept of foreseeability.

This article examines Foss v. Kincade and how it exemplifies the pitfalls of using foreseeability as a basis for determining duty. The history section covers the changes proposed in the Third Restatement, followed by an account of premises liability in Minnesota, with a particular focus on the duty owed to child

6. Id. at 322–23.
7. RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 8 cmt. c (Proposed Final Draft No. 1, 2005) (“A jury decision on the negligence issue is not a precedent for later cases involving different parties and is not even admissible in such later cases as a possible guide to later juries.”).
entrants. The following section gives an in-depth look at the facts of Foss v. Kincade, and recounts the reasoning of the courts at each level. The analysis section will look at the successes and failures of the supreme court’s decision, and its implications for future cases. Ultimately, this article will show why Minnesota courts should cease their use of foreseeability as a consideration in the duty element of negligence.

II. HISTORY

A. The Third Restatement of Torts on Duty and Foreseeability

The ALI takes a remarkable departure from its previous stance on duty in the Third Restatement. In both the First and Second Restatements, foreseeability was used for determining the existence of a duty. This was the view expressed by Judge Cardozo in Palsgraf v. Long Island Railroad Co., where he famously stated, “The risk reasonably to be perceived defines the duty to be obeyed.” Cordozo’s view was adopted by the First Restatement of Torts soon after the Palsgraf decision, and was subsequently adopted by many states, including Minnesota, which still adheres to the view today.

9. See RESTATEMENT (FIRST) OF TORTS § 281 (1936); RESTATEMENT (SECOND) OF TORTS § 281 (1965); Hardie, supra note 8, at 394–95 (explaining that while the Restatement (First) of Torts implied an event was foreseeable if there was “an appreciable chance” of its occurrence, the Restatement (Second) of Torts failed to quantify foreseeability at all, because such a definition would limit the court’s broad use of the term).


11. Id. at 344, 162 N.E. at 100.

12. William L. Prosser, Palsgraf Revisited, 52 MICH. L. REV. 1 (1953). In Palsgraf Revisited, Prosser points out that it was more accurately the drafters of the First Restatement who influenced Judge Cardozo’s opinion, rather than the other way around. Cardozo was an advisor to the Restatement and had already heard the drafters’ debate the lower New York court’s holding in Palsgraf. Id. at 4. When the case was appealed to New York’s highest court, Cardozo applied the view that had been argued by the majority of the Restatement drafters. Id. at 5. Soon after, the Restatement adopted the view expressed by Cardozo in Palsgraf, and even uses the facts of Palsgraf for one of its illustrations. RESTATEMENT (FIRST) OF TORTS § 281 cmt. g, illus. 3 (1936). “It is not likely that any other case in all history ever elevated itself by its own bootstraps in so remarkable a manner.” Prosser, supra, at 8.

13. Connolly v. Nicollet Hotel, 254 Minn. 373, 381, 95 N.W.2d 657, 664 (1959) (“The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.”) (quoting Palsgraf v. Long Island R. Co., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928))).
In contrast, the Third Restatement completely rejects any use of foreseeability in the determination of duty. The proposed final draft of section seven, subpart (a), reads: “[a]n actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.” As clarified in the comments, this means that a duty is assumed to exist in the vast majority of cases, and the determination of liability should start with breach. Subpart (b) states that no-duty rulings are only appropriate in “exceptional cases,” where “articulated principle or policy” supports limiting liability for a particular class of actors. The comments and notes following section seven make it explicitly clear that “foreseeability has no role under this Section and Restatement in a determination that a duty exists vel non.”

1. Problems with Duty Defined by Foreseeability

In explanation of its departure, the comments to section seven point to the myriad problems created by using foreseeability as a part of the duty determination. The comments cite the works of many legal scholars who have shared similar concerns. These concerns essentially go to three main problems with foreseeability-based no-duty rulings. First, by dismissing cases based on the lack of foreseeability, judges pass on issues of fact that are more appropriately decided by the jury. Foreseeability is a particularly fact-intensive, case-by-case

15. Id. at cmt. a; id. at reporters’ note cmt. b.
16. Id. at (b).
17. Id. at reporters’ note cmt. i. Although the position of the Third Restatement contradicts the prior restatements, it is not new in itself. Judge Andrews expressed a similar view in his dissenting opinion to Palsgraf—except Andrews believed that foreseeability should be used to determine proximate cause, while the Third Restatement argues predominantly that it should be used to consider breach. Id.; see also Palsgraf, 248 N.Y. 339, 347–56, 162 N.E. 99, 101–05.
19. Restatement (Third) of Torts: Liability for Physical Harm § 7 cmts. i–j (Proposed Final Draft No. 1, 2005) (explaining that foreseeability is a question for the jury whenever reasonable minds can differ and that judges should not substitute no duty determinations for the evaluation of the jury); John C. Goldberg & Benjamin C. Zipursky, The Restatement (Third) and the Place of Duty in
determination, and small changes in the facts can have a profound affect on what is, or is not, deemed foreseeable. Plaintiffs are short-changed when judges decide the determinative issue of foreseeability on the basis of a thin fact record in the preliminary stages of the case. In addition, by deciding foreseeability in the context of duty, judges essentially are deciding no breach, but without the no-reasonable-jury standard required for no breach limiting their discretion.

Second, basing no-duty rulings on an indeterminate concept like foreseeability creates terrible precedent and undermines the legitimacy of the law. Foreseeability is so open-ended that judges may use it to justify almost any ruling. It provides an easy escape by

Negligence Law, 54 VAND. L. REV. 657, 713 (2001) (“[T]he court is using the duty element as a platform on which it may stand in order to decide for itself the unreasonableness or breach issue, and thus surreptitiously to shrink the scope of the rule stating that the breach issue is ordinarily for the jury.”); 3 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 18.8 (3d ed. 2007) (“Reasonable foreseeability of harm is the very prototype of the question a jury must pass on in particularizing the standard of conduct in the case before it.”).

20. RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 7 cmt. j (Proposed Final Draft No. 1, 2005) (explaining that small changes in facts can have a dramatic effect on how much risk is foreseeable); John H. Marks, The Limit to Premises Liability for Harms Caused by “Known or Obvious” Dangers: Will it Trip and Fall Over the Duty-Breach Framework Emerging in the Restatement (Third) of Torts?, 38 TEX. TECH L. REV. 1, 62 (2005) (“Small differences in facts can unquantifiably alter the interaction of [the variables used to measure foreseeability] from one case to the next. The subtle, case-specific interaction of these variables is thus typically ‘for the jury to take into account in evaluating whether the [defendant] was unreasonable.’” (citations omitted)).

21. W. Jonathan Cardi, Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts, 58 VAND. L. REV. 739, 741 (2005) [hereinafter Purging Foreseeability] (“By resolving duty based on analysis of whether the risk created by a defendant’s conduct was reasonable, judges are really deciding whether the defendant’s conduct was reasonable—the essence of a jury’s determination of breach.”); Goldberg, supra note 19, at 715 (“[C]ourts sometimes trade on their authority to decide the obligation question in a manner that takes breach questions away from the jury even when the summary judgment/j.n.o.v. standard is not met.”).

22. RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 7 cmt. j (Proposed Final Draft No. 1, 2005) (explaining that no-duty holdings are purely legal determinations that liability should not be imposed, and that such rulings “should be articulated directly without obscuring references to foreseeability.”). See also Thomas C. Galligan, Jr., A Primer on the Patterns of Negligence, 53 LA L. REV. 1509, 1523 (1993) (“Judges should not rely on, or hide behind, words like... foreseeable, unforeseeable... and whatever other magic mumbo jumbo courts could use to obfuscate the policies that were really at the heart of their decisions.”); Hardie, supra note 8, at 402 (“Using foreseeability in a flexible, case-by-case analysis creates uncertainty by giving courts the power and method to decide cases without external restraint.”).
allowing judges to dispose of complex legal questions without even having to provide a single legal reason for doing so.\textsuperscript{23} The precedent created by such rulings is often so vague that it provides little, if any, guidance for later cases.\textsuperscript{24} Often these holdings are interpreted as being much broader than the court intended, causing future injustice that goes relatively unnoticed.\textsuperscript{25}

Third, case-specific, no-duty rulings based on the lack of foreseeability confuse the obligation sense of duty.\textsuperscript{26} Courts will proclaim that each person has a duty to exercise reasonable care, but in the same breath, question whether the defendant owed a duty in that particular case.\textsuperscript{27} Narrow, foreseeability based no-duty rulings that do not apply to broad categories of cases, but rather only to one very narrow set of facts, undermine the concept that every person has a duty to exercise reasonable care.

Removing foreseeability from the duty determination will force judges either to articulate the policies behind their no-duty rulings, or adhere to the no-reasonable-jury standard by dismissing cases as

\textsuperscript{23} See W. Jonathan Cardi, Reconstructing Foreseeability, 46 B.C. L. Rev. 921, 923 (2005) (explaining that no-duty rulings based on the lack of foreseeability are popular with judges because they provide an easy, yet imperfect, solution to complex legal dilemmas); Hardie, supra note 8, at 410 (“Application of the foreseeability test has become addictive because it seems to solve complex problems with apparent simplicity.”).


\textsuperscript{25} Purging Foreseeability, supra note 21, at 793 (“And what if foreseeability hides irrational or even prejudicial reasons for deciding tort liability? Because the power of foreseeability, when used in the context of duty, is so broad and so erratically defined, such injustices may go unnoticed and unchecked.”); Frank F. Vandall, Duty: The Continuing Vitality of Dean Green’s Theory, 15 Q.L.R. 343, 345 (1995) (“The problem with such an overuse of foreseeability is that the judge may get confused and make a bad decision. More importantly, the attorney may, in using the word foreseeability, fail to realize the important policy factors that the judge considers in making a decision.”).

\textsuperscript{26} Goldberg, supra note 19, at 716–17 (“[J]udicial decisions referring to matter-of-law decisions as ‘duty’ decisions necessarily confuse the distinct issue of duty in its obligation sense with the breach issue. And this confusion imposes a cost not only on legal academics and students, but also on lawyers and judges trying to litigate and resolve negligence cases.”).

\textsuperscript{27} E.g., Widlowski v. Durkee Foods, Div. of SCM Corp., 562 N.E.2d 967, 968, 970 (1990) (explaining that “every person owes a duty of ordinary care to all others . . . .” but holding, after a lengthy analysis of foreseeability, among other factors, that the defendant owed no duty).
a matter of law on the basis of no-breach. Precedent will be far more coherent, leading to greater stability and predictability in the law. And of course, judges and professors will no longer need to keep their fingers crossed behind their backs when they say that there is a universal duty on the part of every person to exercise reasonable care.

B. Premises Liability in Minnesota

Landowner liability cases make up one of the largest subcategories in negligence law. Historically, greater protection was provided for the landowner’s right to use his land freely than for the entrant’s right to safety—but times have changed. As society became more urbanized and relationships grew more complex, courts began to find landowners owed a greater duty to prevent the dangerous conditions on their land from causing injury to others. The old common law approach to premises liability, which limited landowner liability based on the categorical status of the entrant, no longer reflected societal values. Courts attempted to “fix” the categorical rules by creating various exceptions, but this only led to greater confusion. Hence, many states opted to modify or abolish the categorical approach all together.

The Minnesota Supreme Court did so in the 1972 decision of Peterson v. Balach. Although this move intended to clarify and liberalize premises liability law, the effect, if any, was short lived. Under post-Peterson law today, Judges still use the duty determination to limit landowner liability however they see fit—just without any categorical boundaries. In fact, when it comes to child entrants, liability appears to be even more limited and confusing than it had been under the categorical approach. Foreseeability—and its close cousin, the obvious danger rule—are largely to blame for this confusing inversion in Minnesota premises liability law.

29. Id.
30. Id.
31. 294 Minn. 161, 199 N.W.2d 639 (1972).
32. For a history of Minnesota premises liability law focused on adult entrants, see Mike Steenson, Peterson v. Balach, Obvious Dangers, and the Duty of Possessors of Land in Minnesota, 34 WM. MITCHELL L. REV. 1281 (2008).
I. Pre-Peterson Premises Liability in Minnesota

Prior to 1972, a landowner’s duty to an entrant on his land depended on the entrant’s status as a trespasser, licensee, or invitee. Invitees were owed the greatest duty, while trespassers were owed the least—practically none at all.

Social guests were considered licensees, not invitees. Invitees only included business visitors and members of the public on land open to the public. While landowners had a duty of reasonable care to keep their premises safe for invitees, landowners only had a duty to warn social guests of unreasonable, yet non-obvious, dangers. Landowners did not have to change or inspect their land to make it safe for social guests. Social guests took the land as they found it.

33. See id.
34. Restatement (Second) of Torts §§ 329, 330, 332 (1965). Section 329 defines “trespasser” as one who enters or remains on the land without the landowner’s consent. Id. § 329. Section 330 defines “licensee” as one who enters or remains on the land with the landowner’s consent. Id. § 330. Section 332 defines “invitee” as a member of the public upon land open to the public, or a business visitor invited on the land for reason directly or indirectly to do with business dealings with the landowner. Id. § 332. In addition, landowners owe all entrants a duty to refrain from willful or wanton injury. Id. §§ 329–32.
35. Id. § 330, cmt. h3. Explaining this categorization of social guests, the Restatement (Second) states:

Some confusion has resulted from the fact that, although a social guest normally is invited, and even urged to come, he is not an “invitee,” within the legal meaning of that term . . . . The explanation usually given by the courts for the classification of social guests as licensees is that there is a common understanding that the guest . . . does not expect and is not entitled to expect that . . . precautions will be taken for his safety, in any manner in which the possessor does not prepare or take precautions for his own safety, or that of the members of his family.

Id.
36. Id. § 332.
37. E.g., Zuercher v. Northern Jobbing Co., 243 Minn. 166, 66 N.W.2d 892 (1954) (holding that the duty of reasonable care owed to invitees included repairing known dangerous conditions and making reasonable inspections to find and repair previously unknown dangerous conditions; however, the duty did not require landowners to warn invitees about obvious dangers, unless the landowner had reason to believe the invitee would not recognize the danger despite the obviousness).
38. Restatement (Second) of Torts § 342, cmt. d (1965) (“A possessor of land owes to a licensee no duty to prepare a safe place for the licensee’s reception or to inspect the land to discover possible or even probable dangers.”).
39. Roadman v. C.E. Johnson Motor Sales, 210 Minn. 59, 64, 297 N.W. 166, 169 (1941) (“The general rule is that a mere licensee, like the trespasser, must take the premises as he finds them.”).
The status of an entrant was the determinative factor in the judge’s decision on duty.\footnote{40} Judges applied these categorical statuses very rigidly, often leading to arbitrary and unfair results.\footnote{41} Hence, courts began to develop a variety of different exceptions to temper the basic rules.\footnote{42} One of these exceptions was the notorious “open and obvious danger” rule, announced in section 343A of the Restatement (Second) of Torts.\footnote{43} Minnesota adopted this rule in 1966.\footnote{44}

As a result of these various exceptions, landowner liability became a patchwork of limited duties and exceptions to those duties, generating extreme confusion.\footnote{45} The Minnesota Supreme Court noted this as early as 1941 in Roadman v. C.E. Johnson Motor Sales.\footnote{46} Despite the confusion, however, the court explained, “we think this general principle may be gathered, that ‘the greater the chance of injury, the greater the precautions which must be taken to prevent it.’”\footnote{47}

\begin{footnotes}
\footnote{40. WEISSENBERGER & MCFARLAND, supra note 28, § 6.1 (discussing the general dissatisfaction with the common law categories).}
\footnote{41. Id.}
\footnote{42. Id.}
\footnote{43. Section 343A of the Restatement (Second) of Torts reads “A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.” RESTATEMENT (SECOND) OF TORTS § 343A (1965) (emphasis added). The ambiguity of this rule has caused a great deal of frustration. The rule can be interpreted as meaning a duty only exists when harm can be anticipated despite the obviousness; but it can also be interpreted as meaning there is no breach of duty unless harm can be anticipated despite the obviousness. John H. Marks, The Limit to Premises Liability for Harms Caused by “Known or Obvious” Dangers: Will it Trip and Fall Over the Duty-Breach Framework Emerging in the Restatement (Third) of Torts?, 38 TEX. TECH L. REV. 1, 4 (2005). The effect of the former interpretation is to make the obviousness of the danger a threshold question decided by the judge, while the effect of the later interpretation is to essentially make the rule an instruction to the jury. Id. at 34. For a discussion of the interpretation of this rule and the effect of the Third Restatement upon it, see id.}
\footnote{44. Peterson v. W.T. Rawleigh Co., 274 Minn. 495, 496–97, 144 N.W.2d 555, 557 (1966) (quoting RESTATEMENT (SECOND) OF TORTS § 343A (1965))).}
\footnote{45. Comment, Occupier of Land Held to Owe Duty of Ordinary Care to All Entrants—“Invitee,” “Licensee,” and “Trespasser” Distinctions Abolished: Rowland v. Christian, 44 N.Y.U. L. REV. 426, 427 (1969) (calling the categorical approach, as modified by the various subcategories and exceptions, a “patchwork of legal classifications, by no means uniformly interpreted by the various jurisdictions.”).}
\footnote{46. 210 Minn. 59, 297 N.W. 166 (1941).}
\footnote{47. Id. at 64, 267 N.W. at 169.}
\end{footnotes}
a. Child Entrants Pre-Peterson

Even before Peterson, the duty owed to child entrants did not depend on the status of the child. All children were subject to the same standard of care—the child trespasser standard—which in practice was the equivalent of reasonable care. 48

The child trespasser standard was articulated by the Minnesota Supreme Court in its 1935 decision of Gimmestad v. Rose Bros. 49 Often referred to as the “attractive nuisance doctrine,” 50 the theory laid out the minimum elements a trespassing child needed to meet in order to recover. 51 These elements generally accounted for children’s propensity to intermeddle and lower capacity to recognize and appreciate harm. 52

48. E.g., Leon Green, Landowners’ Responsibility to Children, 27 Tex. L. Rev. 1 (1948) (discussing how the attractive nuisance doctrine evolved into a duty of reasonable care owed to all child entrants, and correctly hypothesizing that the complexities of society would lead to the same standard of care being owed to adult entrants).

49. 194 Minn. 531, 261 N.W. 194 (1935).

50. The name “attractive nuisance doctrine” is a misnomer. The name derived from an earlier version of the standard that required the child to have been enticed onto the land by the condition that caused him harm. This requirement was put forth by the early Minnesota case Keffe v. Milwaukee & St. Paul Railway Co. 21 Minn. 207 (1875), but later abandoned in Gimmestad, 194 Minn. 531, 536, 261 N.W. 194, 196 (1935). See also Restatement (Second) of Torts § 339 cmt. b (1965) (explaining that a child no longer needs to be enticed onto the land by an attractive condition in order to recover).

51. Gimmestad, 194 Minn. 531, 536–37, 261 N.W. at 196; see also infra note 52.

52. See Restatement (Second) of Torts § 339 cmt. b (1965). Section 339 lays out the elements of the attractive nuisance doctrine as follows:

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Id. Minnesota case law frequently cites Gimmestad as the case adopting section 339, despite the fact that Gimmestad actually adopted the wording of the rule used in a
However, *Gimmestad* also pointed out that:

It should be clear by now that the phrase ‘attractive nuisance’ indicates no special departure or exception from the ordinary run of negligence cases. It is but a convenient phrase to designate one sort of case within the ordinary rule that one is liable for injury resulting to another from failure to exercise, for the protection of the injured child, the degree of care commensurate with and therefore demanded by the circumstances.  

Other cases made it clear that the child trespasser standard applied to all children, no matter whether the child was an invitee, licensee, or trespasser.  

In other words, all child entrants under the categorical approach were owed the same standard of care as was owed in ordinary cases of negligence—reasonable care under the circumstances.  

In addition, when a child was in the vicinity, “a tentative draft of the First Restatement. *Gimmestad*, 194 Minn. 531, 536, 261 N.W. 194, 196 (1935) (quoting RESTATEMENT OF TORTS § 209 (Tentative Draft No. 4, 1929)). See also Hughes v. Quarve & Anderson Co., 338 N.W.2d 422, 424 (Minn. 1983) (explaining that the Minnesota Supreme Court adopted section 339 of the Restatement (Second) of Torts in *Gimmestad*).

53. *Gimmestad*, 194 Minn. 531, 536, 261 N.W. 194, 196. See also Doren v. NW. Baptist Hosp. Ass’n, 240 Minn. 181, 186, 60 N.W.2d 361, 365 (“This court has discarded [sic] the distinction between ‘attractive nuisance’ cases and other negligence cases.”); Heitman v. Lake City, 225 Minn. 117, 30 N.W.2d 18 (1947) (noting that the distinction between attractive nuisance cases and regular negligence cases has been discarded).

54. Peterson v. Richfield Plaza, Inc., 252 Minn. 215, 221, 89 N.W.2d 712, 717 (1958) (applying Restatement section 339 to child licensee, since licensees were owed at least as much as trespassers, “and probably some more”); Meagher v. Hirt, 232 Minn. 336, 339, 45 N.W.2d 563, 565 (1951) (“Our previous decisions in cases of this kind make it clear that this duty to exercise due care to eliminate conditions on real property which are hazardous to children is the same . . . whether the child is an invitee, licensee, or trespasser.” (citing *Gimmestad*, 194 Minn. 531, 536, 261 N.W. 194, 196 (1935))).

55. *Gimmestad*, 194 Minn. 531, 536, 261 N.W. 194; *Meagher*, 232 Minn. 336, 45 N.W.2d 563. The Minnesota Supreme Court further explained this in *Hocking v. Duluth, Missabe & Iron Range Railway Company*.

We think [the *Gimmestad* rule] results in a more equitable division of community interests and adopts a standard by which this court can measure and determine the extent of the landowner’s liability. Since particular facts more determinative than others constantly vary predictions as to liability generally, the most that can be done in good conscience by this court is to lay down a rule of law that in good judgment and common sense will aid in determining what fact situation comes within the presently adopted rule.

263 Minn. 483, 490, 117 N.W.2d 304, 309 (1962).
degree of vigilance commensurate with the greater hazards created by his presence [was] required of a person to measure up to the standard of what the law requires as reasonable care.”\textsuperscript{56} Essentially, then, child entrants were afforded a greater degree of care than any other class of entrants.

For example, in \textit{Paulson v. Jarmulowicz},\textsuperscript{57} decided in 1964, the supreme court affirmed a jury’s finding of negligence where a child guest was seriously burned by hot coffee.\textsuperscript{58} The two-and-a-half year-old child had been “helping” set the table for dinner when he fell off a chair and onto a coffee percolator’s cord, which had been precariously strung across an empty area next to the chair.\textsuperscript{59} The coffee percolator fell onto the child, spilling its scalding contents upon him.\textsuperscript{60} The trial court had instructed the jury that the applicable standard of care was reasonable care, not the standard owed to adult licensees.\textsuperscript{61}

The supreme court found there was no absence of actionable negligence—meaning there was no breach of duty—as a matter of law.\textsuperscript{62} The case had been properly submitted to, and decided by, the jury.\textsuperscript{63} Although the court believed negligence could not be based on “a duty of care inconsistent with accepted patterns of behavior in the home,”\textsuperscript{64} the court found that the particular facts of \textit{Jarmulowicz} were enough to support the jury’s finding of negligence.

Thus, the duty owed to child entrants under \textit{pre-Peterson} premises liability law was not limited, as it was with respect to adult entrants, by the categories of trespasser, licensee, and invitee. All

\begin{itemize}
  \item 57. \textit{Id.}
  \item 58. \textit{Id.}
  \item 59. \textit{Id.} at 281, 128 N.W.2d at 764.
  \item 60. \textit{Id.}
  \item 61. \textit{Id.} In declining to use the obviousness of the danger as a basis for dismissing an action against such a young child, the court noted “[t]he words of the [adult] instruction relating to the knowledge of the licensee and to the possible efficacy of a warning are obviously inapplicable where the licensee, as here, is only 2 1/2 years of age.” \textit{Id.} at 281, 128 N.W.2d at 764.
  \item 62. \textit{Id.}
  \item 63. \textit{Id.} at 284, 128 N.W.2d at 765.
  \item 64. \textit{Id.} at 282, 128 N.W.2d at 765.
  \item 65. \textit{Id.} The characteristics supporting a finding of negligence included the fact that the grandmother knew the percolator was full of hot coffee, \textit{that she knew the grandson’s parents were in another part of the apartment}, that she knew the cord was near where the grandson was standing on a chair, and that the accident was easily preventable. \textit{Id.} at 283, 128 N.W.2d at 765.
\end{itemize}
child entrants were owed the same child trespasser standard of care, which was equivalent to the regular negligence standard of reasonable care.

2. Peterson v. Balach

In 1958, California became the first state to abolish the categorical approach to premises liability in the seminal case of Rowland v. Christian. The California Supreme Court opted instead to treat landowner liability under the principles of ordinary negligence law.

In 1972, Minnesota abolished the distinction between licensees and invitees in Peterson v. Balach. In explaining its decision, the court noted how it had to continually “twist the rules in order to arrive at a just result” and that tempering the rigid categories by creating exceptions was hardly any better, “because it create[d] a rigid system which [was] at the same time complex, confusing, inequitable, and, paradoxically, nonuniform.”

The court held that from then on, the duty owed to all licensees and invitees was “no more and no less than that of any other alleged tortfeasor, and that duty is to use reasonable care for the safety of all such persons invited upon the premises, regardless of the status of the individuals.” The court listed a number of

66. 443 P.2d 561 (Cal. 1968).
67. Id. at 568. Explaining its reasoning behind abolishing the common law categories, the court stated:
   A man’s life or limb does not become less worthy of protection by the law nor a loss [sic] less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. . . . The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.

68. 294 Minn. 161, 199 N.W.2d 639 (1972). The court, however, retained the trespasser category, noting that there is “good reason” for this distinction and eliminating it would be a “drastic step.” Id. at 165, 199 N.W.2d at 642.
69. Id. at 168, 199 N.W.2d at 644.
70. Id.
71. Id. at 174, 199 N.W.2d at 647. The court further noted that the status of the injured person might well be a factor which the factfinders could consider. The principal issue, however, will not be “in what category shall we place the injured person” but, rather, “did the owner (or the person responsible) act as a reasonable person in view of the probability of injury to persons entering upon the property” whether they be licensees of [sic] invitees.

Id.
factors that might be taken into account when determining liability, which included “the circumstances under which the entrant enters the land (licensee or invitee); foreseeability or possibility of harm; duty to inspect, repair, or warn; reasonableness of inspection or repair; and opportunity and ease of repair or correction.”

Although some statements in Peterson may somewhat ambiguously imply that the judge must make an initial determination as to whether a duty exists at all, elsewhere in the decision, as well as in cases decided soon after Peterson, it was clarified that a duty exists solely in virtue of the landowner-entrant relationship. The analysis of premises liability cases, then, was normally to start with breach.

3. Post-Peterson Premises Liability in Minnesota

Peterson may have attempted to clarify premises liability law—but this was hardly the result. Before Peterson, Minnesota courts usually assumed the existence of a duty, and quickly went on to discuss whether the landowner had breached his duty (or “was negligent”). Likewise, just after Peterson, courts deciding premises

72. Id. at 175, 199 N.W.2d at 648.

73. The most ambiguous statement may have been the following: “After all pertinent factors are considered, depending upon the circumstances of each case, the factfinders will be asked to determine if liability exists for damages sustained by an entrant.” Id. at 174, 199 N.W.2d at 648. This statement does not say who considers all of the pertinent factors, but other parts of the decision indicate it meant the jury. See id. The indication of a subsequent determination as to liability may refer to the jury’s determination on causation.

74. E.g. Adec v. Evanson, 281 N.W.2d 177, 180 (Minn. 1979) (listing the factors from Peterson as factors for determining whether the defendant met the duty of reasonable care).

75. Id.

76. Landowner liability cases decided before Peterson tended to analyze cases in terms of breach (“actionable negligence” or “negligence”), rather than in terms of duty, indicating a duty was generally assumed to exist. E.g., Dempsey v. Jaroschak, 290 Minn. 405, 188 N.W.2d 779 (1971) (reversing trial court’s finding of no actionable negligence as a matter of law); Peterson v. W. T. Rawleigh Co., 274 Minn. 495, 144 N.W.2d 555 (1966) (upholding jury’s finding of negligence); Paulson v. Jarmulowicz, 268 Minn. 280, 128 N.W.2d 763 (1964) (upholding jury’s finding of negligence); Sandstrom v. AAD Temple Bldg. Ass’n, 267 Minn. 407, 127 N.W.2d 173 (1964) (affirming trial court’s finding of no negligence as a matter of law); Behrendt v. Ahlstrand, 264 Minn. 10, 118 N.W.2d 27 (1962) (affirming jury’s finding of negligence); Hanson v. Bailey, 249 Minn. 495, 83 N.W.2d 252 (1957) (finding no negligence as a matter of law); Johnson v. Evanski, 221 Minn. 323, 22 N.W.2d 213 (1946) (upholding jury’s finding of negligence).
liability cases continued to assume the existence of the landowner’s duty to exercise reasonable care.\textsuperscript{77}

By the 1990s, however, the courts had begun to treat landowners the same as “any other alleged tortfeasor” in Minnesota—by initially launching a full scale inquiry into whether the landowner owed any duty in the first place.\textsuperscript{78} The definitive turning point in this metamorphosis was\textit{ Barber v. Dill,}\textsuperscript{79} decided by the Minnesota Supreme Court in 1995.\textsuperscript{80} Failing to even cite\textit{ Peterson}, the supreme court in\textit{ Barber} declared that the “[a]nalysis of a cause of action against a landowner for negligence begins with an inquiry into whether the landowner, Dill, owed the invitee, William Barber, a duty.”\textsuperscript{81} By allowing for a distinct duty inquiry in every case,\textit{ Barber} restored much of the gate-keeping power that judges had lost after\textit{ Peterson}. In fact, because they were not even restrained by the common law categories,\textit{ Barber} probably gave judges even more gate-keeping power than they had under the categorical approach. Unsurprisingly,\textit{ Barber} quickly became one of the most cited cases in Minnesota premises liability law.\textsuperscript{82}

After\textit{ Barber} was decided, the main standard for determining the existence of a duty on the part of a landowner became the open and obvious danger rule—a close cousin of foreseeability.\textsuperscript{83}

\textsuperscript{77}Cases decided just after\textit{ Peterson} continued to determine liability on the basis of breach of duty, assuming that a general duty of reasonable care existed on the part of the landowner.\textit{ E.g.}, Bisher v. Homart Dev. Co., 528 N.W.2d 731 (Minn. 1983) (holding no actionable negligence as a matter of law); Adee v. Evanson, 281 N.W.2d 177 (Minn. 1979) (holding that the trial court erred in instructing the jury that a store owner has no duty to warn a customer of risks about which the customer had present knowledge and present realization); Gaston v. Fazendin Const., Inc., 262 N.W.2d 434 (Minn. 1978) (holding that construction company had continuing duty to keep construction premises safe for business visitors).

\textsuperscript{78}The view that landowner liability cases start with an inquiry into whether any duty existed in the first place is the settled view of the Minnesota Supreme Court today. Barber v. Dill, 531 N.W.2d 493, 495 (Minn. 1995). See also Louis v. Louis, 636 N.W.2d 314, 318 (Minn. 2001) (holding that premises liability cases start with an inquiry into whether the landowner owed the entrant a duty); Sutherland v. Barton, 570 N.W.2d 1, 7 (Minn. 1997) (holding landowner had no duty to warn about obvious dangers).

\textsuperscript{79}531 N.W.2d 493, 495 (Minn. 1995); see also Steenson, supra note 32, at 1304, 1316 (explaining the line of analysis in Minnesota premises liability cases after\textit{ Barber}).

\textsuperscript{80}Barber, 531 N.W.2d at 495.

\textsuperscript{81}Id.

\textsuperscript{82}Steenson, supra note 32, at 1305.

\textsuperscript{83}Barber, 531 N.W.2d at 495. See also Marks, supra note 20, at 4 (noting that the open and obvious danger rule was “historically premised on the
In addition, the factors which Peterson had listed for determining breach became factors for the judge to use when determining duty. Thus, the court’s initial inquiry into the duty now considered: (1) whether the landowner owed the entrant a duty of reasonable care, in light of the factors listed in Peterson; (2) whether the danger was known or obvious to any person exercising ordinary perception, intelligence, and judgment; (3) if the danger was known or obvious, whether the landowner could foresee harm to the entrant despite the obviousness.

Duty—which Peterson had intended to be practically a non-question—now swallows the majority of the analysis in premises liability cases.

a. Child Entrants Post-Peterson

Although there have only been a limited number of cases involving child entrants decided since Peterson, it does not appear that children have been immune to the curious gate-keeping frenzy that adult entrants have been subjected to. For example, courts have used the open and obvious danger rule to limit liability for injuries to children, but generally only older children.

One notable limitation on liability to child entrants came in Sirek v. State Department of Natural Resources, decided in 1993. There, a young girl was hit by a van while crossing a freeway adjoining a state park. Statutory immunity explicitly limited the state’s duty to park entrants to the duty owed to trespassers.

unforeseeability of any risk of harm . . . ”).

84. Louis v. Louis, 636 N.W.2d 314, 319 n.4 (Minn. 2001) (citing Peterson v. Balach, 294 Minn. 161, 174 n.7, 199 N.W.2d 639, 648 n.7 (1972)) (“Other factors to consider in assessing the duty owed include (1) the foreseeability or possibility of harm; (2) the duty to inspect, repair, or warn; (3) the reasonableness of inspection or repair; and (4) the opportunity and ease of repair or correction.”). See also Steenson, supra note 32, at 1310 (noting that the court in Louis curiously appears to make the factors listed in Peterson relevant to the duty determination, rather than the breach determination).

85. For an even more detailed account of the principles governing premises liability law in Minnesota after Barber, see Mike Steenson, Peterson v. Balach, Obvious Dangers, and the Duty of Possessors of Land in Minnesota, 34 WM. MITCHELL L. REV. 1281 (2008).

86. E.g., Sperr v. Ramsey County, 429 N.W.2d 315 (Minn. Ct. App. 1988) (denying recovery to an eleven-year-old child who was injured when he ran into a low hanging tree due to the obviousness of the danger).

87. 496 N.W.2d 807 (Minn. 1993).

88. Id. at 808.

89. Id. The relevant part of this statute reads:
issue, then, was whether the child trespasser standard or the adult trespasser standard applied to the child injured in Sirek.\textsuperscript{90}

The supreme court found that the adult trespasser standard applied.\textsuperscript{91} Because the park was only accessible by car, children were not expected to be in the park unsupervised; and “[w]hen small children are being watched by their parents, or entrusted persons in supervision, landowners may be relieved of a duty to warn them of or remove dangerous instrumentality [sic] the danger from which is apparent;”\textsuperscript{92} and in addition, “if a child is too young chronologically or mentally to be ‘at large,’ the duty to supervise that child as to obvious risks lies primarily with the accompanying parent.”\textsuperscript{95} Holding otherwise would be against public policy, the court explained, because it “would require the ‘childproofing’ of vast areas of state parks,” and thereby destroying the parks’ naturalness.\textsuperscript{94}

In Johnson v. Washington County,\textsuperscript{95} the supreme court found Sirek applicable to a child who drowned in a man-made swimming pond in a county park, despite the fact children were known to be at the pond unsupervised.\textsuperscript{96} The court found that Sirek still barred the application of the child trespasser standard because the child in Johnson was, in-fact, under the supervision of adults when the accident occurred.\textsuperscript{97}

\subsection*{1. The Minnesota Court of Appeals’ Broad Use of Sirek v. State Department of Natural Resources}

The court of appeals read the holding in Sirek much more

\begin{itemize}
  \item \textsuperscript{90} Sirek, 496 N.W.2d at 809.
  \item \textsuperscript{91} Id. at 811.
  \item \textsuperscript{92} Id. (quoting Strode v. Becker, 564 N.E.2d 875 (Ill. App. Ct. 1991)).
  \item \textsuperscript{95} Id. (quoting Salinas v. Chicago Park Dist., 545 N.E.2d 184, 188 (Ill. App. Ct. 1989)).
  \item \textsuperscript{94} Id. at 811.
  \item \textsuperscript{95} 518 N.W.2d 594 (Minn. 1994).
  \item \textsuperscript{96} Id. The court found that the principle in Sirek also applied to county parks, because “the immunity statutes are essentially identical and the policy considerations are the same.” Id. at 599.
  \item \textsuperscript{97} Id.
\end{itemize}
broadly than the supreme court had intended it to be. The court even stretched it so far as to support practically contradicting holdings.

For example, in *Bredvick ex rel. Bredvick v. City of Morris,* the court of appeals used *Sirek* to deny application of the child trespasser standard where a child who was *not* accompanied by adults drowned in a man-made swimming pond. The court noted the outcome in *Johnson,* but found that because government-employed lifeguards had been on duty when the accident occurred, the child trespasser standard was likewise inapplicable.

Yet, in *Fear v. Independent School District 911,* the court of appeals found that the child trespasser standard *did* apply when a child was injured while under the supervision of a government-employed school teacher.

The court of appeals came up with a number of other curious holdings using *Sirek.* In *Habeck v. Ouverson,* the court found the child trespasser standard applied where a child was run over by a tractor at a county fair, since the child’s parents were elsewhere on the fairgrounds and were not actually supervising their child when the accident occurred.

99. Id.
100. Id. As government employees, the lifeguards enjoyed discretionary immunity for any accidents that occurred while performing their prescribed duties. This created a wonderful loophole for the state: by simply employing people to supervise, the state could relieve itself from any possible liability under the child trespasser standard—no matter how well those employees carried out their prescribed duties. *See id.*
102. Id. at 214. The court of appeals explained the wonderfully circular reasoning behind this decision as follows:

[T]he children were allowed to play on the snow piles during recess with school district employees present, and therefore the children arguably would not have realized the risk of injury involved. While there was supervision during recess, similar to cases applying [the adult trespasser standard], the facts of this case are more directly analogous to [the child trespasser standard], the successor to the attractive nuisance doctrine. We have children playing during recess on a playground that has snow piles that attract their attention, and they are not prohibited from playing on them. The supreme court has stated that school districts have a duty of reasonable care to their students. Absent case law applying [the adult trespasser standard] to school settings, we conclude that [the child trespasser standard] is more appropriate and shall be applied at trial. *Id.* (citation omitted). Liability was not dismissed in this case on the basis of official immunity, due to insufficient evidence. *Id.* at 216.
103. 669 N.W.2d 907, 911 (Minn. Ct. App. 2003).
the court of appeals found the child trespasser standard did not apply to a child injured in a city park, because any child allowed to be “at large” was expected to recognize the danger in that case. In *Warman v. Gaber*, the court found the child trespasser standard inapplicable where a child guest was injured jumping on a family friend’s trampoline, because the child’s mother was present when the injury occurred. All of these cases cited *Sirek* as the primary support for their holdings.

The Minnesota Supreme Court had not intended *Sirek* to be read so broadly. However, it had not corrected the court of appeals’ sporadic misuse of *Sirek* either—at least not until 2009.

III. *FOSS V. KINCADE*

A. Facts

On October 15, 2003, Peggy Foss went to visit the new home of her close friend, Stephanie Kincade. Accompanying Peggy was her nine-year-old daughter and three-year-old son, David Foss, Jr.—an active boy with a history of climbing furniture. Peggy had caught David climbing a bookcase in her home a few months earlier, and she and her husband had to warn David not to climb furniture on many other occasions. Stephanie knew about David’s activity level, and characterized him as even more active than her own active young son.

The Kincades had just moved into their new home two weeks earlier, and were still in the process of unpacking. Many rooms
were empty of furniture and the house was strewn with boxes. 112 During the visit, Stephanie and Peggy were talking in the kitchen when David, his older sister, and one of the Kincade children went into a side bedroom a few feet away. 113 In the side bedroom, on a carpeted floor, was a six-foot tall, three-foot wide, empty, unsecured bookcase. 114

A minute or so later, the mothers heard a loud bang. 115 They quickly went to the side bedroom and saw the bookcase on the floor and two of the children standing there—but David was nowhere to be seen. 116 The two mothers picked the bookcase up and found David underneath it. 117 He was bleeding and turning blue. 118 An ambulance rushed David to the hospital where he underwent several invasive surgical procedures. 119 He suffered serious head injuries, permanent disfiguration to the left side of his face, and a possibility of future eye complications. 120

Peggy had not been aware of the bookcase or its unsecured condition. 121 Although Stephanie knew that David was an active boy, no one had ever told her about his specific propensity to climb bookcases. 122 Stephanie had not considered the bookcase a hazard to her own three children. 123

David’s father brought an action against the Kincades in September 2005, claiming that their negligent failure to secure the bookcase caused David’s injuries. 124 The Kincades argued that they had no duty to prevent the accident in the first place.

112 Foss, 766 N.W.2d at 319.
113 Respondents’ Brief and Appendix at 2, Foss, 746 N.W.2d 912 (No. A07-0313). Notably, neither the court of appeals nor the supreme court mentioned how close the side bedroom was in relation to where the mothers were when the accident occurred. Foss, 766 N.W.2d at 319; Foss, 746 N.W.2d at 913.
114 Foss, 766 N.W.2d at 319.
115 Respondents’ Brief and Appendix at 2, Foss, 746 N.W.2d. 912 (No. A07-0313).
116 Appellant’s Brief and Appendix at 1, Foss, 746 N.W.2d 912 (No. A07-0313).
117 Foss, 766 N.W.2d at 319.
118 Id.
119 Id.
120 Id.
121 Respondents’ Brief and Appendix at 2, Foss, 746 N.W.2d 912 (No. A07-0313).
122 Id.
123 Foss, 766 N.W.2d at 319.
124 Id. at 320.
125 Id.
B. The Trial Court: No Duty Because the Danger was Open and Obvious to Peggy Foss

The trial court granted summary judgment in favor of the Kincades, holding that they owed no duty to secure the bookcase because the danger was open and obvious to Peggy Foss, and the accident was therefore not reasonably foreseeable.\(^\text{126}\)

Foss appealed.

C. Court of Appeals: No Duty Because the Accident was Not Reasonably Foreseeable—Particularly Because of Mother’s Presence

The court of appeals affirmed summary judgment for the Kincades, but rejected the application of the open and obvious danger rule.\(^\text{127}\) The fact that the danger was open and obvious to Peggy Foss was irrelevant; the real issue was whether the Kincades owed a duty directly to David.\(^\text{128}\)

The court went on to make two more holdings. First, the court of appeals held that the child trespasser standard did not apply in this case, based on \textit{Sirek ex rel. Beaumaster v. Department of Natural Resources}.\(^\text{129}\) In \textit{Sirek}, the child trespasser standard was inapplicable because children were not expected to be in the park unsupervised.\(^\text{130}\) Because David was not expected to be in the Kincade home unsupervised, the child trespasser standard was likewise inapplicable.\(^\text{131}\)

Second, the court of appeals held that the Kincades were not liable because the accident was not reasonably foreseeable.\(^\text{132}\) The presence of Peggy Foss was central to the court’s holding, because “the paramount duty to provide for a child’s safety rests with that child’s parents and cannot be delegated merely by entering the

\(^{126}\) Appellant’s Brief and Appendix at 3–4, \textit{Foss}, 746 N.W.2d 912 (No. A07-0313).

\(^{127}\) \textit{Foss}, 746 N.W.2d at 913.

\(^{128}\) \textit{Id.}

\(^{129}\) 496 N.W.2d 807 (Minn. 1993).

\(^{130}\) \textit{Id.} at 811.

\(^{131}\) \textit{Foss}, 746 N.W.2d at 914–15 (“[T]he supreme court has also held that the Restatement standard does not apply to children injured while in the company of their parents in areas where one would not expect to find unaccompanied children.”) (citing Sirek v. Dep’t of Natural Res., 496 N.W.2d 807, 811 (Minn. 1993).) The court found that “at three years of age, David could not be expected to enter the Kincades’ home on his own, nor was he of an age ‘to be allowed at large.’” \textit{Id.} (quoting \textit{Sirek}, 496 N.W.2d at 811).

\(^{132}\) \textit{Id.} at 917.
home of another.”

This principle was also borrowed from Sirek. Hence, under all the circumstances—but particularly because of the presence of Peggy Foss—the court of appeals found that the accident was just “too remote to impose liability as a matter of public policy.”

Foss appealed.

D. The Supreme Court: No Duty Because It Was Not Reasonably Foreseeable that Any Guest Would Attempt to Climb the Bookcase

The supreme court affirmed summary judgment for the Kincades—but specifically rejected any application of Sirek or any argument based on the presence of Peggy Foss.

First, the court pointed out that David was not a trespasser, and in light of the decision in Peterson v. Balach, was owed a greater duty than that owed to a trespasser. “[A]lthough the child trespasser standard may set the minimum standard of care,” the court stated, “the standard of care applicable to a child injured on a landowner’s premises is the general duty of reasonable care.”

Next, the court turned to the separate issue, framed with a quotation from Peterson v. Balach, of “whether the harm to David implicated the Kincades’ duty ‘to use reasonable care for the safety of all such persons invited upon the premises, regardless of the status of the individuals.”

The supreme court rejected the court of appeals’ use of Sirek to limit the Kincades’ duty based on the presence of Peggy Foss. Sirek involved a child injured in a state park—it presented issues dealing with the state’s statutory immunity and the duty owed to a trespasser. Here, there was no issue of statutory immunity, and David was not a trespasser.

133. Id.
134. Id.
135. Id. at 917 (quoting Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922, 924 (Minn. 1986)).
137. Id. at 321 (citing Szynlinski ex rel. Szynlinski v. Midwest Mobile Home Supply Co., 308 Minn. 152, 155–156, 241 N.W.2d 306, 309 (1976)). But see infra note 163.
138. Id.
139. Id. (quoting Peterson ex rel. Peterson v. Balach, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972)).
140. Sirek v. Dep’t of Natural Res., 496 N.W.2d 807 (Minn. 1993).
141. Foss, 766 N.W.2d at 322. Although these reasons may seem somewhat arbitrary for not extending the basic premise that parent’s have the paramount
The supreme court stressed that the Kincades’ duty to provide reasonably safe premises was completely independent from Peggy Foss’s duty to supervise David.\(^{142}\) These duties were owed directly to David, and one duty could not extinguish the other.\(^{143}\) Instead, how much each person was at fault in causing the accident was to be decided under the rules of comparative negligence.\(^{144}\)

Ultimately, the supreme court held that the Kincades had no duty to protect David from the bookshelf because it was not reasonably foreseeable that anyone would attempt to climb it.\(^{145}\) Although foreseeability is usually decided by a jury, the issue can be decided by the court if it “is clear”—and in this case, the issue was “clear.”\(^{146}\)

The court explained that reasonably foreseeable meant “objectively reasonable to expect,” and “objectively reasonable to expect” meant the accident was not “too remote to create liability.”\(^{147}\) Therefore, the Kincades had no duty to secure the bookcase because expecting that guests would try to climb it was “too remote to create liability.”\(^{148}\) Bookcases are common household items just like lamps.\(^{149}\) Even though a three-year-old child may conceivably pull a lamp onto himself and sustain injury, the Minnesota Supreme Court would not expect a homeowner to bolt down every lamp in her home before inviting a child in to visit.\(^{150}\)

Hence, even though the Kincades knew it was possible for the unsecured bookcase to fall over, the fact that a child might try to climb the bookcase and thus cause it to fall over was still “too

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\(^{142}\) Foss, 766 N.W.2d at 322.

\(^{143}\) Id. (citing Canada \emph{ex rel.} Landy v. McCarthy, 567 N.W.2d 496, 504-05 (Minn. 1997)).

\(^{144}\) Id.

\(^{145}\) Id.

\(^{146}\) \textit{See id.} at 322-23.

\(^{147}\) Id. at 322.

\(^{148}\) \textit{See id.}

\(^{149}\) \textit{See id.} at 323.

\(^{150}\) Id.
remote to create liability.”

However, the court noted that it was “not difficult to imagine a different set of facts in which a jury question as to foreseeability would arise.” Had the Kincades known of David’s tendency to climb bookcases, they may have had a duty to secure the bookcase, “or at least . . . warn Peggy Foss of its unsecured condition.”

1. Dissent of Justice Alan Page: Children Have a Well-Recognized Propensity to Climb

Justice Page dissented, arguing that it was reasonably foreseeable as a matter of law that David might attempt to climb the bookcase. Justice Page noted the widely recognized propensity of young children to climb and intermeddle, which had been recognized by courts in several other jurisdictions. It had been recognized by Internet websites discussing child safety. It had been recognized by Justice Page himself—a father and a grandfather. “[T]he court is simply wrong in holding that it was not ‘reasonably foreseeable that David would try to climb on the bookcase.’” Justice Page argued that the case should be reversed and remanded for further proceedings at the trial court level.

IV. ANALYSIS

While the supreme court’s decision in Foss v. Kincade clarifies

151. See id.
152. Id.
153. Id.
154. Id. at 324.
155. Id.
158. Foss, 766 N.W.2d at 324.
159. Id.
160. Id.
the narrowness of the holding in *Sirek v. Department of Natural Resources*, it clarifies little else. After explaining why *Sirek* is not applicable, the court simply disposes of the case based on the magical concept of reasonable foreseeability. The court’s four-paragraph analysis of this issue cites only one other case, and only then to “define” the meaning of reasonably foreseeable. Indeed, there is not much legal precedent to cite to when what the court is actually doing is deciding a question of fact. Instead of relying on clear legal principles, the court uses broad social policy arguments to support what dicta indicates is actually a very narrow holding. This will surely cause the case to be interpreted as standing for much more than intended. After all, this is exactly what happened when the court used similar broad arguments of social policy for its narrow holding in *Sirek*.

A. A Return to *Peterson v. Balach*?

The supreme court’s decision gives centralized treatment to *Peterson v. Balach*. In fact, it gives more discussion to *Peterson* than any premises liability case in recent history, and perhaps even any case decided in the post-*Peterson* era. The court even seems to rely entirely on post-*Peterson* precedent, which is somewhat remarkable among recent premises liability cases in Minnesota.

However, it is still not yet the time to break out the confetti

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161. *Id.* at 322 (citing Whiteford ex rel. Whiteford v. Yamaha Motor Corp. U.S.A., 582 N.W.2d 916, 918 (Minn. 1998)).
162. *See id.* at 323 (“It is not difficult to imagine a different set of facts in which a jury question as to foreseeability would arise.”).
163. 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972).
164. As of the date of this writing, *Foss* is the only case to have examined the *Peterson* holding to such an extensive degree (shown by Westlaw’s “four star” symbol, the highest level, indicating relevance and degree of discussion within the case).
165. *See discussion supra* Part II.C. As a notable exception to relying on post-*Peterson* precedent, the court cites *Szyplinski ex rel. Szyplinski v. Midwest Mobile Home Supply Co.*, 308 Minn. 152, 155, 241 N.W.2d 306, 308 (1976), for the proposition that cases decided after *Peterson* clarified child licensees and invitees were owed greater care than child trespassers. *Foss v. Kincade*, 766 N.W.2d 317, 321 (Minn. 2009). Although Szyplinski was decided after *Peterson*, its cause of action arose before *Peterson*, and it was therefore decided under the old categorical rules. *Szyplinski*, 308 Minn. at 155, 241 N.W.2d at 308. It is also worth noting that despite not relying on pre-*Peterson* cases, most of the cases cited in *Foss* rest on other pre-*Peterson* limitations to liability. *E.g.* Barber v. Dill, 531 N.W.2d 493, 495 (Minn. 1995).
and declare a return to the clarity originally intended by *Peterson*. A closer look reveals that the supreme court is in fact still relying on its own conception of landowner liability, a much more conservative conception, and falsely imputing it to *Peterson*.

**B. What Foss Clearly Says: Two Points**

Foss clearly holds two things: first, the threshold for liability for injuries to child guests is reasonable foreseeability, not the child trespasser standard; and second, a landowner’s duty to child guests is not affected by the presence of a child’s parent. Both of these points work to overturn the court of appeals’ overly-broad reading of *Sirek*, and to retain the judge’s role as the ultimate gate-keeper to the court.

1. **The Threshold for Liability is Reasonable Foreseeability—Not the Child Trespasser Standard of Care**

Foss’s lawyers tried to argue that because David met all the elements for recovery under the child trespasser standard, and David was in fact entitled to an *even greater* duty than a trespasser, the Kincades must have owed him some duty. The supreme court conceded that the minimum standard of care was the child trespasser standard—but the question of whether any duty existed at all was an entirely separate matter, and it preceded any question about the standard of care.

Foss’s lawyers were apparently operating under the belief that *Peterson* had created an existing duty of reasonable care solely in virtue of the landowner-entrant relationship. This is what *Peterson* had originally intended, but obviously that is not how the Minnesota Supreme Court interprets *Peterson* now.

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166. See discussion *supra* Part II.B.2.
167. See *supra* note 139 and accompanying text.
171. See *Foss*, 766 N.W.2d at 321.
172. Appellants’ Reply Brief at 7, Foss v. Kincade, 766 N.W.2d 317 (Minn. 2009) (No. A07-0313) (“Appellant is not seeking the expansion of Minnesota tort law. He simply seeks the ordinary application of that law, a body under which landowners owe an entrant a duty of care to act reasonably in making their premises safe.”).
court even used words quoted from *Peterson* to frame the issue of whether there was a duty in the first place—a proposition from *Barber v. Dill*, not *Peterson*.  

It is worth pointing out that inquiring into whether a landowner owed any duty to a child guest would make no sense under the intended view of *Peterson*, the Third Restatement, or even under pre-*Peterson* landowner liability law. Under each of these views, the court would have assumed the Kincades owed David a duty of reasonable care. The main question would be whether the Kincades had breached that duty—a question of fact normally for the jury. In *Foss*, however, the Minnesota Supreme Court instead reaffirmed the judge’s position as the ultimate gatekeeper to liability by retaining a separate and antecedent inquiry into the existence of a duty in the first place.

2. A Landowner’s Duty to a Child Guest is Not Negated by the Presence of the Child’s Parent

Perhaps *Foss*’s broadest holding is in the clarification that a landowner’s duty to child guests is not affected by the presence of the child’s parent. This point is backed by sound reasoning. Relieving the landowner of her duty because the child’s parent is present not only smacks of contributory negligence, but also imputes the negligence of the parent to the child. These are two

174. *Id.* at 321.
175. 531 N.W.2d 493, 495 (Minn. 1995).
176. *Peterson v. Balach*, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972). *Peterson* explicitly stated “the principal issue, however, will not be ‘in what category shall we place the injured person’ but, rather, ‘did the owner (or the person responsible) act as a reasonable person in view of the probability of injury to persons entering upon the property . . . .’” *Id.*
177. See discussion supra Part II.A–B.
178. *Id.*
179. See discussion supra Part III.D.
180. *Foss*, 766 N.W.2d at 322.
181. Under the long abandoned doctrine of contributory negligence, plaintiffs who had acted negligently in helping to cause their injury, no matter how slight in comparison to the defendant, were barred from all recovery. See 4 FOWLER V. HARPER, ET AL., HARPER, JAMES AND GRAY ON TORTS § 22.1 (3d ed. 2007). The harshness of this rule led jurisdictions to adopt comparative fault, where the plaintiff’s recovery was only reduced by his percentage of fault in causing the injury that as determined by the jury. *Id.* § 22.15. Minnesota adopted comparative fault by statute in 1969. 1969 Minn. Laws 1069. See also MINN. STAT. § 604.01 (2009).
182. Mattson v. Minn. & N. Wis. R. Co., 95 Minn. 477, 488, 104 N.W. 443, 448 (1905) (“[A child] is entitled to the protection of the law equally with persons who
big “no-no’s” under contemporary torts law. 183  
You may ask, “is it not common sense that a landowner would  
be less precautious if a child was visiting with his mother as  
opposed to visiting without his mother?” This may be true—but  
the affect of the mother’s presence is for the jury to consider in the  
context of breach or proximate cause—not for the judge to  
consider himself in the context of duty. 184 The existence of a duty  
is a purely legal question. Landowners owe an independent duty of  
reasonable care to any child guest on their land, no matter if that  
child is an orphan or accompanied by his entire extended family.  
The presence of other supervising adults only affects the  
circumstances—that is, the surrounding facts of the case which the  
jury must evaluate to determine if the landowner acted reasonably.  
Although the court of appeals had the right intentions, its  
position could not work simply because it used the fact of the  
parent’s presence in as a basis for denying the existence of a legal  
duty. It’s reliance on Sirek was misplaced—the supreme court only  
used the principle of the parents’ paramount duty to help justify  
not extending the state’s liability past what the legislature had  
intended it to be. 185 Sirek did not extinguish any existing duty on

have attained their majority, and to refuse him relief on the ground of his parents’  
indifference or negligence would be to deny [his right] to him. To impute to him  
negligence of others is harsh in the extreme, whether the negligence so imputed  
be that of his parents, their servants, or his guardian.”) (overruling Fitzgerald v. St.  
Paul, Minneapolis & Manitoba Ry. Co., 29 Minn. 336, 13 N.W. 168 (1882)).  
(holding that parents’ negligence may not be imputed to her child); Peterson v.  
Richfield Plaza, Inc., 252 Minn. 215, 89 N.W.2d 712 (1958) (holding that mother’s  
negligent supervision could not bar child’s recovery for injuries sustained when the  
child fell off a store’s ill-guarded balcony); Restatement (Third) of Torts:  
Apportionment Liab. § 5 cmt. a (2000) (“Correlatively, when a party would not be  
responsible as a defendant for the negligence of a third person, the negligence of  
the third person is not imputed to the party as a plaintiff. Thus, . . . [t]he  
negligence of a parent is not, on that basis alone, imputed to a child.”); 4 Michael  
K. Steenson & Peter B. Knapp, Minnesota Practice: Jury Instruction Guides §  
28.15 (5th ed. 2009) (“The negligence of a parent is not imputed to the parent’s  
child and will not bar a child from recovering for injuries sustained through the  
negligence of a third party.”).  
(“The factfinder assigns comparative percentages of ‘responsibility’ to parties and  
other relevant persons whose negligence or other legally culpable conduct was a  
legal cause of the plaintiff’s injury.”).  
185. One of the basic principles of the United States’ system of checks and  
balances is that the judicial system must pay full deference to the legislature,  
except in cases where it would be unconstitutional. United States v. Locke, 471  
U.S. 84, 95 (1985). Hence, the supreme court had to be very careful not to extend
the part of the state. There was no duty to begin with. The limited use of the principle in Sirek may seem somewhat arbitrary in light of the case it was borrowed from—Strode v. Becker. Decided by the Illinois court of appeals, Strode involved a child guest who, while visiting a friend’s home with his father, stuck his fingers into the rotating spokes of a common household exercycle. The court stated that landowners are generally relieved from a duty to protect children from such obvious dangers when the child’s parent is present—but only when the parent is actually with the child, actively supervising him. Hence, the Illinois Court of Appeals reversed and remanded Strode in order to determine whether the father knew of the existence of the exercycle, or was in the same room when the child stuck his fingers into the exercycle’s rotating spokes.

The principle in Strode is problematic for the same reason the Minnesota Court of Appeals’ use of it in Foss was—both used the argument based on the parent’s presence in the context of duty. As the Minnesota Supreme Court correctly pointed out, the presence of other people is totally irrelevant to the question of what the landowner’s duty to a specific entrant may be.

C. What Foss Not-So-Clearly Says: The Issue of Reasonable Foreseeability “is Clear”

The supreme court’s ultimate determination based on the lack of reasonable foreseeability raises more than a few eyebrows. Reasonable foreseeability, we are told, is a question for the jury unless the issue “is clear”; and where a very active, three-year-old child, well known to the homeowner, injures himself attempting to climb a latently tippy bookcase, the issue “is clear”. Yet, even Justice Page thinks it was reasonably foreseeable that David would

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186. See Sirek v. State Dep’t of Natural Res., 496 N.W.2d 807 (Minn. 1993).
188. Id. at 876.
189. Id. at 880.
190. Id.
191. Id. at 880; see also Foss ex rel. Foss v. Kincade, 766 N.W.2d 317, 324 (Minn. 2009).
192. Foss, 766 N.W.2d at 322.
193. Id. at 323.
194. Id.
try to climb the bookcase. 195 This begs the question: what standard is the court using to decide whether the issue “is clear?” It cannot be the no-reasonable-jury standard required for finding no-breach as a matter of law—unless the court wanted to imply that twelve Justice Pages would make an unreasonable jury.

The short answer seems to be that the issue of reasonable foreseeability “is clear” whenever the court believes that it is. In reality, negligence issues are hardly ever so clear. By relying on the term “is clear,” judges make it seem as if they are adhering to some settled legal standard for determining foreseeability as a matter of law, when in fact they are not adhering to any standard at all. Dismissing negligence cases because the issue of reasonable foreseeability “is clear” is really just smoke in mirrors: it sounds warranted enough to get past most scrutiny, but really is just a cover for judges closing the gate to the jury without articulating more concrete reasons for doing so.

This begs the question: what standard is the court using to decide whether the issue “is clear?” It cannot be the no-reasonable-jury standard required for finding no-breach as a matter of law—unless the court wanted to imply that twelve Justice Pages would make an unreasonable jury.

The no duty determination in Foss exemplifies why basing no-duty rulings on foreseeability can be so problematic. The supreme court was adamant about deciding the case in the context of duty, but was also adamant about Peggy Foss’s presence being irrelevant to the question of duty. 196 Thus, the supreme court backed itself into a corner where it had to determine foreseeability in a make-believe world where Peggy Foss did not exist. In other words, it had to determine foreseeability based on a fact pattern other than the one actually at hand.

This is exactly why judges should not use a fact-dependent question like foreseeability to determine the abstract, legal question of duty. When they do so, they must either be determining foreseeability in an intellectual vacuum, where clearly relevant facts must be ignored, or deciding questions of fact that are properly reserved for a jury. In most cases, it is impossible to even tell which, if any, of the specific facts of the case the judge took into consideration when determining foreseeability. Worst of all, these confusing and counter-intuitive determinations become precedent that future judges and lawyers are expected to follow.

When a case cannot be dismissed based on broad, articulated legal rules, the issue is not clear, and a jury determination is appropriate. Juries may be unpredictable, but their determinations

195. Id. at 324 (Page, J., dissenting); see also discussion supra Part III.D.1.
196. Id. at 322.
do not create law. Furthermore, recent studies show that juries usually reach the same conclusion in particular cases as the judge would have had he decided the case himself.  One study found that judges would have ruled the same as juries in 78% of trials, and where the two differed, it was usually because the judge would have imposed liability where the jury did not. If the jury is so likely to come to the same factual conclusion as a judge, why should judges have to circumvent the jury by creating empty, confused precedent with no-duty rulings based on the lack of foreseeability?

These observations are nothing new. These are exactly the reasons why the Third Restatement rejects the use of no-duty rulings based on the lack of foreseeability. These are exactly the reasons why the Minnesota Supreme Court should do so as well. Doing so will create greater clarity and stability to Minnesota law, while at the same time, force judges to articulate the reasoning behind their decisions, and ultimately lend greater legitimacy to the law.

V. CONCLUSION

No-duty rulings due to the lack of foreseeability create precedent that is worthless at best, and downright unintelligible at worst. The determination in Foss v. Kincade is no exception. Indeed, the Minnesota Supreme Court’s decision raises many more questions than it answers: How big is the realm of reasonably foreseeable harm when a three-year-old is present? Is it the same

197. DAN B. DOBBS, THE LAW OF TORTS 34 (2000) (pointing out that despite some views that the jury is a lawless threat, actual studies show juries tend to reach the same result the judge would have reached in a particular case). See also Theodore Eisenberg, TRIAL BY JURY OR JUDGE: TRANSCEENDING EMPIRICISM, 77 CORNELL L. REV. 1124 (1992); Michael J. Sakes, PUBLIC OPINION ABOUT THE CIVIL JURY: CAN REALTY BE FOUND IN THE ILLUSIONS?, 48 DEPAUL L. REV. 221 (1998); LEON GREEN, JUDGE AND JURY 406 (1930); Valerie P. Hans, THE ILLUSIONS AND REALITIES OF JURORS’ TREATMENT OF CORPORATE DEFENDANTS, 48 DEPAUL L. REV. 327 (1998).


199. See discussion supra Part II.A.1.


201. FOSS v. KINCADE, 766 N.W.2d 317, 323 (Minn. 2009). The court states “[w]hen dealing with a three-year-old child, the realm of possible harm is much larger than the realm of reasonably foreseeable harm.” Id. One would think that if the realm of possible harm was so large, the realm of reasonably foreseeable harm would also be rather large—but it does not seem this was the supreme
size as it is for an older child, or for an adult? Will the common tendencies of three-year-olds ever be enough to create liability?

The court indicated in dicta that the Kincades would have had a duty if they had actual knowledge of David’s specific propensity to climb bookshelves.\(^{202}\) So what if David had a tendency to pull lamps onto himself, as the court used in another illustration?\(^{203}\) If Peggy then told Stephanie, “Hey, David has a tendency to pull lamps onto himself,” would Stephanie have a duty to bolt down all the lamps in her house? Would Stephanie have to warn Peggy, “Watch out—I have lamps in almost every room in my home?”\(^{204}\)

Articulating an acceptable, guiding rule that would provide a reliable answer to all of these questions would be difficult. In fact, it may very well be impossible—but this does not mean that drawing the invisible line of “not reasonably foreseeable” is all that is left. In fact, there is already a specific mechanism for deciding unclear cases just like Foss. It involves an examination of the all the facts, done on a case-by-case basis, with input from a valid source on societal norms. Best of all, it does not require the state’s supreme court to create confusing, vague, and counter-intuitive precedent.

That mechanism is called the jury.

court’s position in light of the outcome reached.

202. Id.

203. Id.

204. Compare id. (“For example, we would not expect homeowners to bolt down their table lamps before inviting a three-year-old into their house, even though it is possible that such a child could be injured by pulling the lamp onto himself.”) with id. (“[I]f the Kincades had actual knowledge that David had a tendency to climb bookcases, the Kincades may have had a duty to secure the bookcase or at least warn Peggy Foss of its unsecured condition.”)(emphasis added)).