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TORTS: THE FAILINGS OF THE
MISFEASANCE/NONFEASANCE DISTINCTION AND THE
SPECIAL RELATIONSHIP REQUIREMENT IN THE
CRIMINAL ACTS OF THIRD PERSONS—STATE V. BACK

Brian D. Bender†

I. INTRODUCTION .............................................................. 391
II. HISTORY ........................................................................... 393
   A. The Origins of the Misfeasance/Nonfeasance Distinction and Its Use in the Duty Analysis ........................................... 393
   B. Minnesota’s Move to a General Duty of Reasonable Care and Its Influence on Recognizing a Duty for the Harms Caused by the Criminal Acts of Others .............................................. 400
   C. The Special Circumstances Doctrine in Minnesota and Abroad ........................................................................ 403
III. THE BACK DECISION ...................................................... 407
   A. The Facts ...................................................................... 407
   B. The Lower Courts’ Holdings ............................................ 409
   C. The Supreme Court’s Holding in Back .................................... 410
IV. ANALYSIS OF THE BACK DECISION .................................. 411
   A. The Back Decision in View of the Misfeasance/Nonfeasance Distinction ................................................................. 4112
   B. The Back Decision and the Court’s View of the Special Relationship Requirement .................................................. 126
V. CONCLUSION ........................................................................ 419

† J.D. Candidate 2012, William Mitchell College of Law; M.S., Computer Science, University of Minnesota, July 2002; B.A., Computer Science, University of Pennsylvania, May 1999. The author would like to dedicate this article to my late wife Meredith. While you were unable to finish the journey with me, your unyielding faith in me gave me the courage to embark on an amazing adventure. And to my daughter Samantha whose smile keeps me going. The author would also like to thank the William Mitchell Law Review staff and Profs. Michael K. Steenson, Mary Patricia Byrn, and Ted Sampsell-Jones for their effort and dedication. The author would also like to recognize his friends and family, and in particular Leah, whose love and support has made navigating the complexities of being a law student as a widower with a young child possible.
I. INTRODUCTION

What is in a word? Judges and attorneys are taught that the English language—full of subtleties and layers—can be wielded deftly and with the surgical precision necessary to navigate complicated legal concepts. Yet, some legal concepts are so haphazardly constructed that their usage creates a bludgeoning effect akin to pounding a square peg into a round hole.¹

One such concept is the difference between misfeasance and nonfeasance.² Misfeasance has been defined as “an act which a reasonably prudent person would not do, or failing to do something which a reasonably prudent person would do.”³ Nonfeasance has been defined as “not performing voluntary tasks . . . where there is no duty to act.”⁴ While demarcating the line between misfeasance and nonfeasance may appear merely as an academic consideration, the distinction carries real legal consequences in the application of our negligence law.⁵

The distinction between misfeasance and nonfeasance is particularly important in negligence law because the misfeasance/nonfeasance distinction has weighty implications as it relates to the duty to protect others from the criminal acts of third persons.⁶ If the defendant’s act is characterized as misfeasance, a

¹. For rationale as to why the misfeasance/nonfeasance distinction is not well-suited for duty determinations, see infra notes 2, 12.
². See generally John M. Adler, Relying Upon The Reasonableness of Strangers: Some Observations About The Current State of Common Law Affirmative Duties to Aid or Protect Others, 1991 W IS. L. REV. 867 (1991) (suggesting that the misfeasance/nonfeasance distinction is antithetical to the aims of the tort system. “The more fundamental problem with the no-duty-to-rescue framework, however, is substantive. All of the exceptions to the rule are made necessary by a distinction between misfeasance and nonfeasance that is itself fundamentally misguided. In many situations, it is difficult to see how the distinction is more than semantic play. But even assuming that a difference between misfeasance and nonfeasance can be defined (or at least that a difference will continue to be recognized), that difference is given far too much significance within the traditional legal framework. As a result, the rules and exceptions based on the distinction often fail to focus properly on any pronounced or imaginable aims of tort law. Whether one views the goals of tort law to be the deterrence of unreasonably risky conduct, the compensation of victims through loss distribution, the imposition of values of fairness, or some combination of these goals, the focus of the common law rule based upon the misfeasance-nonfeasance distinction will often undercut those aims.” Id. at 877–78 (citations omitted)).
⁵. See infra Part II.
⁶. See infra Part II.
duty generally attaches to prevent the harm caused by those actions.\textsuperscript{7} If the defendant’s act is characterized as nonfeasance, there is typically no duty to prevent the harm caused by the third person absent some special relationship.\textsuperscript{8}

The Minnesota Supreme Court recently revisited this subject in \textit{State v. Back}.\textsuperscript{9} In \textit{Back}, the defendant asked her violent and jealous ex-boyfriend, Nicholas Super, for a ride to the house of another ex-boyfriend, Daniel Holliday, with whom she was trying to reconcile.\textsuperscript{10} Very soon after arriving, Back slapped a guest and threw at least one beer bottle down the stairs.\textsuperscript{11} Holliday then escorted Back outside where an argument ensued, during which Super shot and killed Holliday.\textsuperscript{12} The Minnesota Supreme Court held that as a matter of law, there was no duty on the part of Back vis-à-vis the altercation absent a special relationship,\textsuperscript{13} at least implying a nonfeasance character to Back’s actions.\textsuperscript{14} How would you characterize Back’s action of asking for a ride and inciting an altercation with full knowledge of the danger that Super represented: a) an actionable affirmative act giving rise to a duty to prevent foreseeable injury, or b) an inactionable omission absent a special relationship imposing a duty to protect? The decision in \textit{Back} shows the difficulty in applying the misfeasance/nonfeasance distinction. The difficulty in using the misfeasance/nonfeasance distinction as a paradigm for adjudicating duty determinations\textsuperscript{15} should be a motivating factor in developing other standards by which we make duty determinations. One set of standards that attempts to mitigate the confusion inherent in the misfeasance/nonfeasance distinction is the

\textsuperscript{7} See infra Part II.
\textsuperscript{8} See infra Part II.
\textsuperscript{9} 775 N.W.2d 866 (Minn. 2009).
\textsuperscript{10} \textit{Id.} at 867.
\textsuperscript{11} \textit{Id.} at 868.
\textsuperscript{12} \textit{Id.}
\textsuperscript{13} \textit{Id.} at 872. The court explained that “under common law principles, there is generally no duty to protect strangers from the criminal actions of a third party.” \textit{Id.} at 870 (citing Delgado v. Lohmar, 289 N.W.2d 479, 483 (Minn. 1979)).
\textsuperscript{14} See infra Part IV. The court never specially discusses misfeasance or nonfeasance in the decision.
\textsuperscript{15} See, e.g., Adler, supra note 2, at 878 (“Two fundamental problems plague the distinction between misfeasance and nonfeasance: (1) in many cases it is impossible to distinguish the two; and, (2) in cases where intuitively there is a clear distinction, that distinction does not always coincide with generally accepted notions about whether liability should attach.”).
Restatement (Third) of Torts. Adopting the concepts contained in the Restatement would go far in reducing potential confusion surrounding duty determinations.

This note will discuss the murky distinction between misfeasance and nonfeasance, and how it affects the duty analysis in negligence law. Part II of this note examines the history of the misfeasance/nonfeasance distinction, and duty analysis in light of this distinction. Part III presents the facts and discusses the supreme court’s holding in Back. Part IV analyzes the court’s decision in Back and its implications for the misfeasance/nonfeasance distinction in the duty element of negligence. Finally, this note concludes that if Minnesota wants to free itself from the shackles of the misfeasance/nonfeasance distinction, it should adopt a general duty of reasonable care.

II. HISTORY

The distinction between misfeasance and nonfeasance has played an important role in our application of negligence law even though the meaning of the words misfeasance and nonfeasance can be confusing at best. To help understand the confusion that this distinction represents, this section will discuss the origins of the distinction, the duty element of negligence, and some of the approaches the courts have used to try and navigate situations where the misfeasance/nonfeasance determination is not clear-cut.

A. The Origins of the Misfeasance/Nonfeasance Distinction and Its Use in the Duty Analysis

At early common law, there was no distinction between nonfeasance and misfeasance. Not until the 1800s did the

16. See infra note 88.
17. See infra note 87.
18. See infra Part II.
19. See infra Part II.
20. See infra Part III.
21. See infra Part IV.
22. See infra Part V.
23. For a thorough treatment of the origins of misfeasance and nonfeasance, see Jean Elting Rowe & Theodore Silver, The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance From the Fifteenth Through the Twentieth Centuries, 33 DUQ. L. REV. 807, 827 (1995) ("In sum, the record reveals that wherever they appeared in decisions between 1400 and 1800, the words nonfeasance and misfeasance lacked any true conceptual legitimacy.
distinction begin to crystallize, some say in error. In American jurisprudence, the maturation of this idea has been traditionally traced to Justice Cardozo. However, even at the time of Cardozo’s
decisions, confusion regarding the misfeasance/nonfeasance distinction was already apparent. Cardozo himself characterized the formulation as “[i]ncomplete . . . and so at times misleading.”\textsuperscript{26} Nevertheless, many jurisdictions—including Minnesota—have utilized the misfeasance/nonfeasance distinction.\textsuperscript{27} Still, courts

but (2) that an individual is generally exculpated if his behavior were characterized as nonfeasance.” (citations omitted)).  
26. \textit{Moch}, 159 N.E. at 898 (citations omitted). This incomplete formulation is further illustrated by a disconnect between scholarly work of that era and contemporaneous judicial decisions. \textit{See generally} Rowe & Silver, \textit{supra} note 23 at 841–44 (illustrating that the perspective of Professor Bohlen in Francis H. Bolen, \textit{The Moral Duty to Aid Others as a Basis of Tort Liability}, 56 U. PA. L. REV. 217 (1908) does not adequately explain decisions of the courts:

[Bohlen] maintains, “nonfeasance” simply refers to that situation in which a defendant does no “positive” harm, and “misfeasance” to the situation in which by “interference” with the plaintiff, the defendant does “positive” harm . . . . Bohlen’s perspective on misfeasance and nonfeasance seems palpably inadequate to explain the jurisprudential phenomenon at issue. It fails to explain \textit{Thorne v. Deas}, allegedly the first American case in which the matter arose. The \textit{Thorne} case involved a loss for which the plaintiff was uninsured. The defendant had promised, without consideration, to procure insurance, but failed to keep his word. The report indicated that the plaintiff would have procured insurance on his own absent the defendant’s promise. Therefore, the defendant did subject the plaintiff to a “positive” loss; the plaintiff’s position was genuinely worsened by the defendant’s inaction. If the defendant had not made his promise, the plaintiff would have had his insurance and the loss would have been compensated. Yet, the court ruled that the case involved only inactionable nonfeasance; Bohlen’s formulation does not explain the result.

(citations omitted)). \textit{See also} Harold F. McNiece & John V. Thornton, \textit{Affirmative Duties in Tort}, 58 YALE L.J. 1272, 1272–73 (1949) (suggesting that Bohlen’s formulation does not work because most nonfeasance is a sort of pseudo-nonfeasance).

27. \textit{See}, e.g., Depue v. Flateau, 100 Minn. 299, 303, 111 N.W. 1, 2 (1907) (holding the defendant liable for breaching his duty when he created a risk of harm to the plaintiff by turning him out into a blizzard: “The facts of this case bring it within the more comprehensive principle that whenever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger; and a negligent failure to perform the duty renders him liable for the consequences of his neglect.”); \textit{see also} Gilbertson v. Leininger, 599 N.W.2d 127 (Minn. 1999) (holding that homeowners owed no duty to the plaintiff to take precautions to avoid aggravating an injury to a house guest); Donaldson v. Young Women’s Christian Ass’n of Duluth, 539 N.W.2d 789, 792–93 (Minn. 1995) (holding that association owed no duty to prevent the suicide of a resident:

Courts have traditionally shown reluctance to impose liability on others for self-inflicted harm. Certain special relationships, however, do create a legal duty to protect another from self-inflicted harm. That duty has most
have noted the difficulties present in these determinations, at one point noting that the distinction between misfeasance and nonfeasance was "fanciful." 

Notwithstanding confusion surrounding its application, the use of the misfeasance/nonfeasance distinction is deeply rooted in the jurisprudence of tort law. As a general proposition, courts recognize that one owes a duty "to avoid affirmatively causing physical harm to others." In other words, courts will generally hold a person accountable for their misfeasance or "affirmative actions," when such actions expose others to an unreasonable risk of harm. This accountability generally does not depend on whether that harm arises from an act—criminal or otherwise—of a third person.

often been found where an institution such as a hospital or jail has physical custody and control of the person to be protected.  

28. As early as 1910, the Minnesota Supreme Court held, from the facts stated in the complaint it satisfactorily appears that appellant undertook the execution of the duty of replacing the gauge, and that he performed it negligently; hence his act was one of misfeasance, and not one of nonfeasance. This fact distinguishes the case from Drake v. Hagen, 108 Tenn. 265, 67 S.W. 470, and Van Antwerp v. Linton, 89 Hun, 417, 35 N.Y. Supp. 318. Strictly speaking, the act of the engineer in failing to put on the guard, was nonfeasance—that is, in not doing an act which he was required to perform; but the distinction between misfeasance and nonfeasance is sometimes fanciful.


29. See generally Rowe & Silver, supra note 23.


31. See, e.g., RESTATEMENT (SECOND) OF TORTS § 302 cmt. a (1965) ("In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act."); RESTATEMENT (SECOND) OF TORTS § 302B (1965) ("An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal."); see also id., cmt. e ("There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or where the actor’s own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account." (emphasis added)).

32. Id. See also McIntyre v. United States, 447 F. Supp. 2d 54, 106-07 (D. Mass. 2006) ("The question of duty, on the present record, is much simpler,
Conversely, courts generally recognize that there is no duty to prevent harm caused by one’s nonfeasance—meaning there is no “duty to warn, protect, or rescue a person from risks created by another source.” This distinction reflects the maturation of tort law generally.

An excellent illustration of an application of both aspects of the misfeasance/nonfeasance distinction can be found in Touchette v. Ganal. In Touchette, defendant Mrs. Ganal and Mr. Touchette were involved in an extra-marital affair. As her relationship with her husband deteriorated, Ganal moved into her parents’ house. Allegedly, during her time at her parent’s house, she taunted her husband by flaunting her affair with Touchette. This caused her husband to go on a violent rampage, killing Ganal’s parents, burning Touchette’s home to the ground, and causing the death of

because it is to be determined not on the basis of what the relevant actor . . . failed to do, but on his commission of an act. ‘Speaking in terms of classical tort principle, when one claims that negligence lies in the commission of an act, a defendant’s duty not to behave negligently typically extends to include all those whom the defendant might reasonably have foreseen to be potential victims of the negligence.’ . . . This duty does not depend on any special relationship between employees of the [defendant] and [the third party] or between employees of the [defendant] and [the plaintiff]. Indeed it does not depend on . . . any . . . person’s, status as [a defendant]. It is simply the duty that one person owes to another to act with care when he knows or should know that his action poses an unreasonable risk of harm to the other through the intentional conduct of a third person.” (quoting Carrier v. Riddell, Inc., 721 F.2d 867, 868 (1st Cir. 1983)) (emphasis in original)).

33. Cardi, supra note 30, at 751. Said another way, “[t]he duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty.” RESTATEMENT (SECOND) OF TORTS § 302 cmt. a (1965).

34. See RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (1965).

In the early law one who injured another by a positive affirmative act was held liable without any great regard even for his fault. But the courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his omission to act. Hence liability for non-feasance was slow to receive any recognition in the law. It appeared first in, and is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff.

Id.

36. Id. at 348.
37. Id.
38. Id. at 349.
Touchette’s infant child.\textsuperscript{39} In analyzing whether summary judgment was appropriate, the Hawaii Supreme Court in \textit{Touchette} first determined—as a matter of law—if Ganal’s acts were to be characterized as nonfeasance, a marital relationship was not a special relationship that gave rise to a duty to protect persons from the acts of another.\textsuperscript{40} But the supreme court did not stop there.\textsuperscript{41} It went on to analyze the duty requirement with regard to whether the defendant’s acts should be considered misfeasance on the basis of whether her actions created an unreasonable risk of harm, and thus her actions created a duty under sections 302, 302A, and/or 302B of the Restatement (Second) of Torts.\textsuperscript{42} The court determined that Ganal’s actions did create an unreasonable risk of harm, and therefore, she owed Touchette a duty.\textsuperscript{43}

In Minnesota, the early cases seem to pay deference to both aspects of the misfeasance/nonfeasance distinction,\textsuperscript{44} even when the cases before the court involved the criminal acts of others.\textsuperscript{45} Minnesota has upheld a jury verdict that found a defendant liable for the damage caused by a thief who stole the defendant’s car,\textsuperscript{46} and has remanded a case in which summary judgment was granted under similar circumstances.\textsuperscript{47} One argument for an imposition of duty was that this class of cases fell under a city ordinance, and

\begin{itemize}
\item \textsuperscript{39} Id. at 348–49.
\item \textsuperscript{40} Id. at 352–55.
\item \textsuperscript{41} Id. at 355–57.
\item \textsuperscript{42} Id. at 357 (“Although the circuit court’s holding, as previously discussed, was correct regarding the question of [Ganal]’s duty to [Touchette] to affirmatively warn or to control [her husband] pursuant to sections 315 and 314A [requiring a special relationship], the circuit court failed to determine if [Ganal] owed a duty to [Touchette] pursuant to other authority, especially in view of appellant’s counsel’s many attempts to direct the circuit court’s attention to the potential viability of appellant’s claims against [Ganal] based on the breach of the duty set out in sections 302, 302A[,] and/or 302B.”).
\item \textsuperscript{43} Id. at 357–58.
\item \textsuperscript{44} See supra notes 27–28.
\item \textsuperscript{45} See Garceau v. Engel, 169 Minn. 62, 210 N.W. 608 (1926) (upholding ruling in favor of the plaintiff for the cost of goods stolen when the defendant negligently left the keys in the door and allowed a thief to gain access to the premises).
\item \textsuperscript{47} See, e.g., Illinois Farmers Ins. Co. v. Tapemark Co., 273 N.W.2d 630 (Minn. 1978) (remanded to allow a jury to determine if the duty was breached).
\end{itemize}
there was negligence (or duty) per se. However, later rulings by the supreme court seem to have invalidated this position.

In *Lundgren v. Fultz*, the supreme court reversed a finding by the lower courts that no duty existed to protect against the criminal acts of others when a defendant psychiatrist allowed his patient to come into possession of some firearms. *Lundgren* is interesting because it seems to blur the distinction between misfeasance and nonfeasance. On the one hand, the supreme court set out to show that the defendant may have had a duty according to some special relationship. On the other hand, the supreme court indicated that foreseeability of the risk of harm, by itself, may give rise to a duty. In essence, the supreme court in *Lundgren* said that a reasonable jury may find a duty under either the special relationship requirement or foreseeability of the risk of harm arising out of the same set of facts. That is, the supreme court seems to be implying that the defendant’s actions could reasonably be characterized as either nonfeasance or misfeasance, respectively.

So, while it appears that Minnesota has strong inclinations towards nonfeasance determinations in applying the nonfeasance/misfeasance distinction, in limited situations,
Minnesota courts have found reason to blur the distinction between misfeasance and nonfeasance.\textsuperscript{55} Minnesota courts have also found an existence of a duty to protect another from the harm resulting from criminal acts of third persons when misfeasance gives rise or otherwise creates an opportunity for the commission of the criminal act.\textsuperscript{56}

B. Minnesota’s Move to a General Duty of Reasonable Care and Its Influence on Recognizing a Duty for the Harms Caused by the Criminal Acts of Others

Since at least the 1970s, an articulative adherence to both aspects of the misfeasance/nonfeasance distinction seems to have waned,\textsuperscript{57} causing an apparent atrophy in the application of misfeasance in Minnesota law.\textsuperscript{58} Such an approach is in opposition does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.” Restatement (Second) of Torts § 302 cmt. a (1965).

\textsuperscript{55} See supra notes 50–53 and accompanying text.

\textsuperscript{56} See supra notes 45–47.

\textsuperscript{57} See, e.g., Delgado v. Lohmar, 289 N.W.2d 479, 483–84 (Minn. 1979). In Delgado, the court articulates that “[o]rdinarily there is no duty to control the conduct of a third person to prevent him from causing physical harm to another unless a special relationship exists.” Id. at 483. Such language is consistent with the nonfeasance aspect of the misfeasance/nonfeasance distinction. However, without specifically enumerating what constitutes the misfeasance aspect of the distinction, the court holds there is a duty because the defendants were engaged in an extremely dangerous activity, and thus, “created an unreasonable risk of harm.” Id. at 484. This imposition of a duty is consistent with the misfeasance aspect of the distinction. Because the court did not articulate the general misfeasance principle, future court decisions are seemingly untethered from it.

\textsuperscript{58} See, e.g., Sarau v. Oliver, No. C1-00-223, 2000 WL 1052143, at *2 (Minn. Ct. App. Aug. 1, 2000). In Sarau, the court stated,

[a]ppellant cites Restatement of Torts (Second) § 302 as support for the argument that respondent owed a duty to protect appellant from the actions of her son. But this provision concerns only the character of a failure to act and does not address the existence of a duty. See Restatement (Second) of Torts § 302 cmt. a (1965). If there is no duty to act, a failure to act does not subject the actor to liability. Restatement (Second) of Torts §§ 302 cmt. a; 302B cmt. a. And there is no duty to act to protect another unless there is a special relationship that gives rise to such a duty. Donaldson, 539 N.W.2d at 792; Restatement (Second) of Torts § 302 cmt. a.

Id. The court of appeals seems intently focused on the nonfeasance aspect of the distinction, apparently ignoring misfeasance in the determination of duty. Comment a to the Restatement (Second) of Torts section 302 states that “[i]n general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to
with the march to a general duty of reasonable care,\textsuperscript{59} which Minnesota embarked on when it embraced a general duty of reasonable care in the context of entrants on land.\textsuperscript{60} The transition to a general duty of reasonable care for tortious conduct has been slow to gain traction. In 1968, California abolished the categorical approach to landowner duty in favor of a general duty of reasonable care to all entrants.\textsuperscript{61} In 1972, Minnesota joined other jurisdictions and moved closer to a general duty of reasonable care to entrants on land.\textsuperscript{62} Under the standard articulated in \textit{Roland} there is a general duty of reasonable care for entrants on land regardless of whether the entrant is a business-invitee, licensee, or trespasser.\textsuperscript{63} This notion of a general duty of reasonable care is in accord with the idea that we should be held accountable for the risk of harm that we create.\textsuperscript{64}

them arising out of the act.” \textit{RESTATEMENT \text{(SECOND) OF TORTS} § 302 cmt. a (1965)} (emphasis added). Thus, section 302 does seem to address the existence of a duty. In combination with section 302B, the Restatement seems to hold that such a duty is not extinguished just because the risk of harm is “through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.” \textit{RESTATEMENT \text{(SECOND) OF TORTS} § 302B (1965)}. This is further articulated in Restatement (Second) of Torts section 302B comment e:

There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or where the actor’s own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account.

\textit{Id.} (emphasis added).

59. \textit{See Pietila v. Congdon}, 362 N.W.2d 328, 334 (Minn. 1985) (Yetka, J., dissenting) (dissenting from the majority’s holding that the landowner owed no duty because landowners owe entrants a duty “\textit{to use reasonable care for the safety of all such persons invited upon the premises regardless of the status of the individuals.}” (quoting Peterson v. Balach, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972)) (emphasis added)); \textit{see also Adler, supra note 2, at 902–04 (advocating Wisconsin’s approach to negligence, in which a duty exists for both nonfeasance and misfeasance).}

60. \textit{See Peterson v. Balach}, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972) (abolishing the limited, categorical duties landowners owed to licensees and invitees in favor of a general duty of reasonable care to all invited entrants).

61. \textit{Roland v. Christian}, 443 P.2d 561, 568 (Cal. 1968) (“\textit{To focus upon the status of the injured party . . . in order to determine the question whether the [defendant] has a duty of care, is contrary to our modern social mores and humanitarian values.”).

62. \textit{See Peterson}, 199 N.W.2d at 647.


64. \textit{Id.} at 564 (“Whenever one person is by circumstances placed in such a
However, in Minnesota, other aspects of negligence law—such as the duty to protect others from the criminal acts of another—have yet to fully embrace the notion of a general duty of reasonable care. In Minnesota, “[i]f the law is to impose a duty on A to protect B from C’s criminal acts, the law usually looks for a special relationship between A and B.” This language has a strong correlation to the nonfeasance formulation presented by Cardozo. In particular, if there is no conduct, then a duty only attaches if “there exists a relation out of which arises a duty [to protect].”

Minnesota courts generally have found a special relationship to exist between common carriers with their passengers, innkeepers with their patrons, possessors of land that hold their position with regard to another that every one of ordinary sense who did think would at once recognise [sic] that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.” (quoting Heaven v. Pender (1883) 11 Q.B.D. 503, 509).

65. As a general proposition, there is no duty to protect others from the criminal actions of a third party.

Ordinarily, there is no duty to control the conduct of a third person to prevent him from causing physical harm to another unless a special relationship exists, either between the actor and the third person which imposes a duty to control, or between the actor and the other which gives the other the right of protection.

Delgado v. Lohmar, 289 N.W.2d 479, 483 (Minn. 1979).

66. Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 168 (Minn. 1989) (emphasis added). The court in Erickson went on to say that such a relationship exists when “B has in some way entrusted his or her safety to A and A has accepted that entrustment.” Id. Compare Bjerke v. Johnson, 742 N.W.2d 660, 667 (Minn. 2007) (holding that a homeowner had a special relationship with a minor child she invited to live in her home, and therefore had a duty to protect the child from being sexually assaulted by another resident) with H.B. ex rel. Clark v. Whittemore, 552 N.W.2d 705, 707–10 (Minn. 1996) (stating that a special relationship did not exist between a mobile park manager and the resident children and therefore no duty existed to protect the children from sexual abuse) and Pietila v. Congdon, 362 N.W.2d 328, 334 (Minn. 1985) (Yetka, J., dissenting) (holding that a special relationship did not exist between a homeowner and a person invited on the premises, and therefore the homeowner had no duty to protect the person from the criminal actions of a third person).

67. In other words, nonfeasance.

68. R.H. Moch Inc. v. Rensselaer Water Co., 159 N.E. 896, 899 (N.Y. 1928); see also RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (1965). Comment c states: Hence liability for non-feasance was slow to receive any recognition in the law. It appeared first in, and is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff.

Id. (emphasis added).
premises open to the public with those who are lawfully on the premises, employers with their employees, schools with their students, and custodians with those for whom they are responsible.69

The rationale articulated by the court for limiting a duty to protect against the criminal actions of third persons is that it would not be fair to hold one accountable for the criminal acts of another.70 In Pietila, the Minnesota Supreme Court stated,

[h]ow can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and the psychotic? Must the owner prevent all crime? Inasmuch as no police force has ever achieved that goal, the plaintiff cannot intend the imposition of an absolute obligation to prevent all crime.71

Even with this articulated public policy limitation, Minnesota has found reasons to blur the bright-line rule that there is no duty to prevent the acts of third persons.

C. The Special Circumstances Doctrine in Minnesota and Abroad

One way in which Minnesota has softened this bright-line rule is through the adoption of the special circumstances doctrine, which allows a court to impose a duty if the criminal act is foreseeable or if the defendant’s preventative action is not overly burdensome.72 Minnesota adopted the special circumstances doctrine in State Farm Mutual Auto Insurance Co. v. Grain Belt Breweries, Inc.73 Under the special circumstances doctrine, courts—as a matter of law—can create exceptions to the no-duty to prevent

69. See, e.g., Johnson v. State, 553 N.W.2d 40, 49 (Minn. 1996) (“[S]pecial relationships exist between parents and children, masters and servants, possessors of land and licensees, common carriers and their customers, or people who have custody of a person with dangerous propensities.” (quoting Delgado v. Lohmar, 289 N.W.2d 479, 483–84 (Minn. 1979) (emphasis removed))). These special relationships mirror the exceptions enumerated in the RESTATEMENT (SECOND) OF TORTS §§ 314A, 314B (1965).

70. Pietila, 362 N.W.2d at 333.

71. Id. (quoting Goldberg v. Hous. Auth. of Newark, 186 A.2d 291, 297 (N.J. 1962)).

72. Felty v. City of Lawton, 578 P.2d 757, 761 (Okla. 1977)

73. 309 Minn. 376, 380, 245 N.W.2d 186, 189 (1976) (“Special circumstances which impose a greater potentiality of foreseeable risk or more serious injury, or require a lesser burden of preventative action, may be deemed to impose an unreasonable risk on, and a legal duty to, third persons.” (quoting Hergenrether v. East, 393 P.2d 164, 166 (Cal. 1964))).
the acts of third persons rule when a special circumstance exists.\textsuperscript{74} “[I]n some ‘special circumstances’, the neglig[ent] acts of a third person are so foreseeable that such acts cannot properly be viewed as independent intervening causes. Accordingly . . . under certain ‘special circumstances’, a special duty to prevent the actions of a third person arises.”\textsuperscript{75}

The special circumstances doctrine is broader than the special relationship requirement in that a special circumstance is analyzed according to the foreseeability of an act and does not rely on traditional notions of a special relationship.\textsuperscript{76} It could also be argued that the special circumstances doctrine has more limited applications than the special relationship requirement because the analysis has typically been limited to the class of cases involving car theft in general, and key-in-ignition cases more specifically.\textsuperscript{77}

However, the courts have used language that would allow additional classes of cases to take advantage of the special circumstances doctrine. For example, one court noted that, [m]any jurisdictions have held that under “special” or “unusual” circumstances, a duty may exist where a defendant should reasonably anticipate that its conduct will create an unreasonably enhanced danger to one in the position of the injured plaintiff. If such danger is foreseeable, then a duty arises to exercise reasonable care.

\textsuperscript{74} See Felty, 578 P.2d at 762 (concluding that the theft of a car with keys in the ignition and injury to another can be foreseeable in special circumstances, but affirming the defendant’s general demurrer because no special circumstances were pleaded); see also Hergenrether, 393 P.2d at 167–68 (holding that leaving a vehicle unlocked with the keys in the ignition was a special circumstance that created a duty to protect against the injuries caused when the vehicle was stolen and involved in a head-on automobile accident); Cruz v. Middlekauff Lincoln-Mercury, Inc., 909 P.2d 1252, 1256 (Utah 1996) (finding upon interlocutory review that a duty not to leave keys in the ignition of unlocked cars at an auto dealership may have arisen upon special circumstances).

\textsuperscript{75} Felty, 578 P.2d at 761.

\textsuperscript{76} An act may also be analyzed according to the gravity of the harm or the burden of preventive action. See State Farm Mut. Auto. Ins. Co., 309 Minn. at 380, 245 N.W.2d at 189 (describing how the facts of each case must be considered to determine whether the defendant had a duty). Regardless, the special circumstances doctrine provides a broader scope of liability for defendants when the harm results from the criminal acts because there is no requisite showing of a special relationship needed to impose a duty.

\textsuperscript{77} See, e.g., Ill. Farmers Ins. Co. v. Tapemark Co., 273 N.W.2d 630 (Minn. 1978) (reaffirming State Farm Mut. Auto. Ins. Co., 309 Minn. 376 (holding that a special circumstance existed giving rise to duty when the defendant’s employees left their keys in the car and damage to the plaintiff’s insured was caused by a thief of said car)); see also supra note 74.
When the weight of the foreseeability is great, it would seem that—as a matter of public policy—these courts impose a duty to protect those at risk.

There are potential pitfalls with the special circumstances doctrine. In particular, legal scholars have illustrated that folding the foreseeability determination into the duty analysis may have a harmful effect on the law. For example, if a court decides—as a matter of law—that a special circumstance exists, there is at least an implication that the court has also decided that there was sufficient foreseeability as a matter of law. Because foreseeability plays a role in determining the breach issue, the court has at least impliedly decided that issue as well. When the court is making a duty determination based on foreseeability, they are in effect weighing the sufficiency of the evidence regarding the breach issue—a task

78. Cruz, 909 P.2d at 1255.
79. See id. (“Each case must be considered on its own facts to determine whether they result in a foreseeable risk of harm to third persons in the class of plaintiffs and thus create a duty to refrain from subjecting them to such risk.”); see also Hergenrether, 393 P.2d at 167 (“[E]ach case must be considered on its own facts to determine whether the joint effect of them in toto justifies the conclusion that the foreseeable risk of harm imposed is unreasonable, and that the defendant... has a duty to third persons in the class of the plaintiffs to refrain from subjecting them to such risk.”).
80. See, e.g., Cardi, supra note 30. W. Jonathan Cardi states: At the very least, foreseeability’s indeterminacy leads judges to treat like cases differently and different cases alike. . . . [Foreseeability] may be little more than a surrogate for unbound judicial discretion. Furthermore, to the extent that reference to foreseeability masks the actual reasons for a judge’s decision to impose or deny negligence liability, foreseeability obscures the judicial process and likely undermines its perceived legitimacy.
Id. at 740–41; John C.P. Goldberg & Benjamin C. Zipursky, The Moral of MacPherson, 146 U. Pa. L. Rev. 1733 (1998). The article claims: The courts’ uncertainty about what to do with duty is displayed in their uneven use of the concept of foreseeability. Sometimes foreseeability is deemed part of the issue of breach and thus left to the jury. Other times it is deemed the essence of duty and kept for the courts. Still other times it is left for the jury under the heading of proximate cause. What one court finds unforeseeable as a matter of law, another court will find foreseeable as a matter of law. Foreseeability is sometimes a necessary condition of liability, sometimes a sufficient condition, and sometimes merely a factor. Far from cleaning up duty-analysis, the concept of foreseeability illustrates the confusion courts currently experience dealing with the duty element.
Id. at 1776.
81. See, e.g., Cardi, supra note 30, at 744–45 nn.17–24.
82. A.W. v. Lancaster Cnty. Sch. Dist. 0001, 784 N.W.2d 907 (Neb. 2010)
which is generally regarded as being the providence of the jury.83

The Restatement (Third) of Torts has attempted to address this particular issue by presuming a duty if the actor’s conduct creates a risk of physical harm.84 Conversely, there is a no-duty presumption if the risk of harm is created by another source.85

However, the Third Restatement’s approach is not without its critics.86 While it is beyond the scope of this note to weigh in on the merits of the Restatement (Third) of Torts’ approach, for the purposes of this note it is sufficient to recognize at least a potential

(“While we purported to be discussing duty, we were in fact assuming the conclusion we claimed to be proving, and we were actually evaluating the sufficiency of the evidence . . . .”).

83. See, e.g., Cardi, supra note 30. The article states that:
The second problem with foreseeability’s role in duty is that it operates as a vehicle by which judges decide questions traditionally reserved for the jury. Specifically, by resolving duty based on an analysis of whether the risk created by a defendant’s conduct was foreseeable, judges are really deciding whether the defendant’s conduct was reasonable—the essence of a jury’s determination of breach.

Id. at 741.

84. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARMS § 7 (2010). Section 7(b) does give the courts the ability to make no-duty rules to support different policies. But only “[i]n exception cases, when an articulated countervailing principle or policy warrants denying or limiting liability.” Id. § 7(b).


86. See Cardi, supra note 30, at 742 (discussing courts’ utilization of foreseeability to determine duty in negligence cases and the implications of recent installments to the Restatement (Third) of Torts on that process). In a generally favorable treatment of the approach adopted by the Restatement (Third) of Torts, Cardi mentions that

[o]ne might argue that it is not the place of a Restatement to effect such drastic reform in negligence law and in courts’ ability to administer that law . . . . The proper reach of a Restatement is a valid concern . . . . however, the proposed Restatement will, if adopted by the courts, likely affect the substantive outcome of negligence cases only at the margins.

Id: John C. Goldberg & Benjamin C. Zipursky, The Restatement (Third) and the Place of Duty in Negligence Law, 54 VAND. L. REV. 657, 724 (2001) (finding that the drafted approach does not fairly and helpfully restate the law and advocating that negligence without duty is ill-conceived); see, e.g., Jane Stapleton, The Risk Architecture of the Restatement (Third) of Torts, 44 WAKE FOREST L. REV. 1309, 1332 (2009) (“[T]he ‘risk architecture’ of the Restatement (Third) could have been presented with far greater clarity. Key ‘risk’ notions have not been explicitly defined. Terminology has not been deployed consistently. Obscuring synonyms have been used with no attempt made to explain their relation to other risk notions in the Restatement (Third). All this threatens to undermine the user-friendliness of the end product.”).
ideological shift to a presumed duty,\textsuperscript{87} a move away from the misfeasance/nonfeasance distinction,\textsuperscript{88} and internalize the possible benefits of that approach.\textsuperscript{89}

III. THE BACK DECISION

A. The Facts

Danna Back and Daniel Holliday “had been dating off and on for several years.”\textsuperscript{90} Their relationship initially deteriorated in 2003 when Back and Holliday moved in together, and by the summer of 2006, Back moved out.\textsuperscript{91}

During the summer of 2006, Back also dated Nicholas Super,\textsuperscript{92} causing escalated tensions between Holliday and Super.\textsuperscript{93} Back knew of threats made by Super against Holliday and told police

\textsuperscript{87}. Compare \textit{Restatement (Third) of Torts: Law of Torts} § 7 (Proposed Final Draft No. 1, 2005) (illustrating that a presumed duty for the creation of risk would put the foreseeability question into the hands of the jury as a breach determination), and Cardi, supra note 30, at 739 (illustrating the benefits of removing foreseeability from the duty determination), with Goldberg, supra note 86, at 663 (suggesting that the confusion surrounding the concept of duty does not warrant a wholesale change to the negligence doctrine).

\textsuperscript{88}. See \textit{Restatement (Third) of Torts: Law of Torts} § 37 cmt. c (Proposed Final Draft No. 1, 2005).

Misfeasance and nonfeasance have a long history as concepts that explain the distinction between affirmatively creating risk and merely failing to prevent harm. However, this distinction can be misleading. The proper question is not whether an actor’s specific failure to exercise reasonable care is an error of commission or omission. Instead, it is whether the actor’s entire conduct created a risk of physical harm. For example, a failure to employ an automobile’s brakes or a failure to warn about a latent danger is not a case of nonfeasance governed by the rules in this Chapter, because in those cases the entirety of the actor’s conduct (driving an automobile or selling a product) created a risk of harm. This is so even though the specific conduct alleged to be a breach of the duty of reasonable care was itself an omission.

\textit{Id.}

\textsuperscript{89}. As it relates to foreseeability see, for example, Cardi, supra note 30, at 767–804 (noting a shift in power from judge to jury and restraining erosions in the rule of law due to foreseeability’s malleability, e.g., the lack of transparency inherent in foreseeability-based determinations obscuring potential abuses of judicial power). Similar arguments could be made regarding the malleability of the misfeasance/nonfeasance distinction.

\textsuperscript{90}. \textit{State v. Back}, 775 N.W.2d 866, 867 (Minn. 2009).

\textsuperscript{91}. \textit{Id.}

\textsuperscript{92}. \textit{Id.}

\textsuperscript{93}. \textit{Id.}
that “Super threatened Holliday with a gun several times.”\textsuperscript{94} In one incident, Super “[drove] over to Holliday’s... and point[ed] his gun at [Holliday].”\textsuperscript{95} In another incident, Super fired shots at Holliday’s home while Back was there spending the night.\textsuperscript{96} Back stated that she “believed that Super fired those shots because he was jealous of Back being with Holliday,”\textsuperscript{97} and even noted on the night of the incident that “it was probably Nick trying to send a message because he knew that she was over there that night.”\textsuperscript{98}

In the early morning hours of January 1, 2007, Back called Holliday around 3:00 a.m., after being out with other friends to celebrate New Year’s Eve.\textsuperscript{99} She apparently intended to renew her relationship with Holliday, but was angered when she heard women’s voices in the background.\textsuperscript{100} Holliday asked Back to come over and Back called Super who agreed to drive her to Holliday’s house.\textsuperscript{101}

Back intended to start an altercation with Holliday and those at the party.\textsuperscript{102} In particular, Back intended “to go over there and fight the girls.”\textsuperscript{103} Once she arrived, Back slapped one of Holliday’s friends “because [she could],”\textsuperscript{104} then grabbed a beer bottle and threw it down the stairs.\textsuperscript{105} Shortly after her theatrics, Back and Holliday began to argue.\textsuperscript{106} After Back did not heed Holliday’s requests to leave, Holliday grabbed Back by the arm and escorted her outside.\textsuperscript{107}

\textsuperscript{94} Id. “Back did not testify at trial, but the police conducted a videotaped interview with her after the shooting. This interview was played for the jury during trial.” Id. at n.3.
\textsuperscript{95} Brief of Respondent, \textit{Back}, 775 N.W.2d at 866, (No. A08-17), 2009 WL 4917088 at *3 (citations to the trial transcript omitted).
\textsuperscript{96} Id. (citations to the trial transcript omitted).
\textsuperscript{97} \textit{Back}, 775 N.W.2d at 867.
\textsuperscript{98} Brief of Respondent, \textit{supra} note 95, at *3 (citations to the trial transcript omitted).
\textsuperscript{99} \textit{Back}, 775 N.W.2d at 867.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} See Brief of Respondent, \textit{supra} note 95, at *3.
\textsuperscript{103} Id. (citations to the trial transcript omitted).
\textsuperscript{104} Id. (citations to the trial transcript omitted).
\textsuperscript{105} Id. (citations to the trial transcript omitted).
\textsuperscript{106} \textit{Back}, 775 N.W.2d at 868.
\textsuperscript{107} Id.
Once outside, Holliday noticed that Super was there and the two began to argue. As the argument escalated, “Holliday extended his arm, apparently in an effort to push Super off the stairs leading from the yard to the deck.” In response, Super pulled a gun out and shot Holliday. Super fled, but Back stayed to perform CPR until the police arrived. In addition, “after the police were called but before they arrived, the phone rang at Holliday’s house and, when Brandon Senescall answered it, Nick Super said ‘That’s what you get when you [expletive deleted] with me, bitch.’” Despite Back’s efforts, Holliday died at the scene.

In the police interview following the shooting, Back stated that she did not know that Super had a gun that night, but she did mention that Super was known to keep a gun under the seat of his car. She also mentioned that Super was “known to pull his gun out on anybody.”

B. The Lower Courts’ Holdings

Following Holliday’s death, Back was indicted by a grand jury for first-degree premeditated murder, first-degree domestic abuse murder, and second-degree intentional murder. At the
sentencing, the trial judge stated

I think this was a situation where, in truth, Ms. Back, you enjoyed and got some satisfaction out of having the young men involved here respond to you and react to you . . . it was foreseeable, I believe, to you that this could have happened. I don’t believe you set out intending that Danny be shot, but you acted in disregard of the obvious risk that that could happen, and that’s why you are here today being convicted—having been convicted by the jury.120

The court of appeals affirmed the trial court’s decision.121

C. The Supreme Court’s Holding in Back

The Minnesota Supreme Court granted Back’s petition for review and unanimously reversed the court of appeals’ decision.122 Instead of focusing on whether there was evidentiary support for culpable negligence beyond a reasonable doubt, the supreme court focused on whether Back owed Holliday a duty.123 Using the duty determination as a threshold question for the finding of culpable negligence, the supreme court reversed the decision, because “[t]he State did not introduce any evidence to support the conclusion that Back had a relationship with Holliday suggesting she would protect Holliday or that Holliday assumed she would protect him”124 and “there was no evidence to support the conclusion that Back had an obligation to direct or control Super in any way.”125

domestic abuse charge and the second-degree intentional murder charge. Id. at 868–69. The court also granted the State’s motion to amend its complaint to include the offense of second-degree manslaughter under Minnesota Statute section 609.205(1) (2008). Id. at 869. The State also moved to dismiss the first-degree premeditated murder charge. Id. Upon completion of the trial, the jury found Back guilty of second-degree manslaughter based on culpable negligence. Id. Thereafter, Back’s motion for a new trial was denied. Id. at 867.

120. Brief of Respondent, supra note 95, at *4–5 (emphasis added) (citations to the trial transcript omitted).
121. Back, 775 N.W.2d at 867.
122. Id.
123. Id. at 869 n.5 (“While Back did not specifically argue in her briefs that she did not owe a duty to Holliday, lack of a duty is implicit in Back’s argument that she did not breach a duty.”).
124. Id. at 872.
125. Id. The court also stated that,

[b]ecause the State seeks to hold Back criminally responsible for the criminal action of a third party, our cases require that the State prove
IV. ANALYSIS OF THE BACK DECISION

The supreme court’s analysis in Back is interesting because it seemingly fails to consider whether Back’s actions constituted misfeasance or nonfeasance. This omission may have had an important impact on the outcome.

A. The Back Decision in View of the Misfeasance/Nonfeasance Distinction

The supreme court first sets out to determine whether a duty is owed and uses the common law civil standard as its guide. Instead of focusing on characterizing Back’s actions, the supreme court instead seems to focus on the acts of Super. In so doing, the court illustrates some of the confusion that an application of the misfeasance/nonfeasance distinction may cause.

For example, under a common law standard, such as the one articulated by Cardozo, one would first determine whether an act “positively or actively [worked] an injury.” If so, then there exists a duty. Conversely, if the act instead “merely [withheld] a benefit,” one would then determine whether there was a relationship that gave rise to a duty.

The Restatement (Second) of Torts is in accord with this approach when it articulates that the general operative principle is a duty to protect against unreasonable risk of harm originating that Back had a special relationship with either Super or with Holliday that gave rise to a duty to control Super or to a duty to protect Holliday against the actions of Super.

126. See, e.g., Back, 775 N.W.2d at 869 (“A defendant cannot be negligent, culpably or otherwise, unless the defendant has a duty that he or she breached.”).
127. See supra Part II. If the question of duty for a showing of culpable negligence is answered using the civil standard, then the criminal act is only relevant if the act is nonfeasance. Focusing on the criminal act is at best misplaced until the act is characterized under the misfeasance/nonfeasance distinction.
128. See supra Part II. If the question of duty for a showing of culpable negligence is answered using the civil standard, then the criminal act is only relevant if the act is nonfeasance. Focusing on the criminal act is at best misplaced until the act is characterized under the misfeasance/nonfeasance distinction.
130. Id.
131. Id.
from one’s own affirmative act. Only if the act is an act of omission is the duty determination more restrictive. Because the supreme court is applying the more restrictive special relationship requirement, it seems fair to assume that the court characterizes Back’s behavior as nonfeasance. However, Back asked Super for a ride to a party hosted by someone she knew Super had pointed a gun at and whose house he had previously shot at; had knowledge that Super stored his gun in his car and would pull his gun out on anyone with little provocation; and once there, instigated a confrontation with Holliday by slapping a guest and throwing at least one beer bottle down the stairs. In essence, by bringing Super to the party, she provided the gasoline, and by instigating a confrontation, she struck the match. Yet, despite all of these elements under the control of Back that “positively or actively [worked] an injury” to Holliday, the supreme court held that there is no duty absent a special relationship.

The supreme court based its decision on precedent whereby the criminal act is allowed to occur because of nonfeasance on the part of the defendant. Where there is precedent of an affirmative act leading to a finding of culpable negligence, the court does

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132. See Restatement (Second) of Torts § 302 cmt. a (1965) (“In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.”).
133. See id. (“The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty.”).
134. See supra Part III.
136. See supra Part III.
137. See State v. Back, 775 N.W.2d 866, 870 (Minn. 2009) (citing Pietila v. Congdon, 362 N.W.2d 328, 333 (Minn. 1985) (Yetka, J., dissenting) (reversing a wrongful death action based in-part on the nonfeasance of the landowner)); Clark v. Whitemore, 552 N.W.2d 705, 707–10 (Minn. 1996) (holding that the nonfeasance of a property manager did not ripen into a duty to protect children from sexual assault by another resident).
138. See Back, 775 N.W.2d at 871 n.8 (citing State v. Schaub, 231 Minn. 512, 513–15, 44 N.W.2d 61, 62–63 (1950) (remanding the case after determining that there could be culpable negligence on the part of the defendant when he, trying to kill himself, flooded his apartment with natural gas, which ignited when the landlord turned off the light in his apartment, causing an explosion and the death of the landlord’s wife)); State v. Cantrell, 220 Minn. 13, 20–21, 18 N.W.2d 681, 684–85 (1945) (justifying a conviction of culpable negligence where the defendant left a fumigation job knowing that the chemicals were dangerous, and, by a combination of his failure to secure the door or leave a guard on-site, a child was allowed to sneak into the building and died).
not apply it because those cases do not involve criminal actions.\textsuperscript{139} In focusing on the criminal act and not the act of the defendant, the court has taken a seemingly misguided view regarding the misfeasance/nonfeasance distinction.

For example, in \textit{Back}, the court notes that “[\textit{State v. Schaub}]\textsuperscript{140} and [\textit{State v. Cantrell}]\textsuperscript{141} are inapposite to the culpable negligence issue presented in this case because, unlike this case, they do not involve the criminal activity of a third person.”\textsuperscript{142} Yet, the culpable negligence/duty issue\textsuperscript{143} is not defined—and should not be framed—by the criminal activity of others.\textsuperscript{144} Under a determination using the misfeasance/nonfeasance distinction, \textit{Schaub} or \textit{Cantrell} are suitable because they deal with misfeasance of the defendant instead of nonfeasance and, in that way, are arguably more on point.\textsuperscript{145}

The court stated that “[t]his is the rule outside Minnesota as well. In the few cases from other jurisdictions in which the defendant was convicted of second-degree manslaughter for the criminal actions of a third party, the courts have found a special relationship exists as a predicate for a finding of criminal negligence.”\textsuperscript{146} It is true that a duty to prevent the harm arising from the criminal acts of another because of nonfeasance on the part of defendant generally requires a special relationship.\textsuperscript{147}

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139. \textit{Back}, 775 N.W.2d at 871 n.8.
140. 231 Minn. 512, 44 N.W.2d 61 (1950).
141. 220 Minn. 13, 18 N.W.2d 681 (1945).
142. \textit{Back}, 775 N.W.2d at 871 n.8.
143. \textit{See}, e.g., id. at 869 (“A defendant cannot be negligent, culpably or otherwise, unless the defendant has a duty that he or she breached.”).
144. \textit{See supra} Part II.
145. \textit{See supra} Part II.
146. \textit{Back}, 775 N.W.2d at 870 n.6 (citing Palmer v. State, 164 A.2d 467 (Md. 1960) and State v. Zobel, 134 N.W.2d 101 (S.D. 1965)). Both cases appear to be nonfeasance cases. The court stated that the court in \textit{Palmer} “[held that] evidence sufficient to support a conviction for second-degree manslaughter in a case in which the defendant mother allowed her live-in boyfriend to beat her child brutally and repeatedly, eventually resulting in the child’s death” and that the court in \textit{Zobel} “[upheld a] conviction for second-degree manslaughter where the defendant father knew of his wife’s extensive abuse of their children \textit{but did nothing to stop her}.” \textit{Back}, 775 N.W.2d at 870 n.6 (emphasis added).
147. \textit{See supra} Part II.
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Again, however, Back does not appear to be a case of nonfeasance on the part of the defendant. In particular, the court of appeals noted that,

[t]o sustain a manslaughter conviction the defendant’s act must be the “proximate cause [of death] without the intervention of an efficient independent force in which defendant did not participate or which he could not have reasonably foreseen.” . . . The original negligence here was appellant asking Super to drive her to [Holliday]’s house.

Because the supreme court did not endeavor to make a distinction between misfeasance and nonfeasance, we are left to divine how the court characterized Back’s behavior. Reasonable questions regarding Back’s actions may include: Was it misfeasance on the part of Back up to the point that Super pulled the gun and was thereafter nonfeasance to try and stop him? And what would have been required to characterize Back’s actions as misfeasance?

Because of this uncertainty, it would appear that the court is implying that the conduct—criminal or otherwise—of the third party is more dispositive than the act of the defendant when establishing the existence of a common law duty. Other jurisdictions are not in accord with this position. Minnesota itself has upheld a jury’s finding of liability under a negligence theory when the defendant’s action created a risk of harm to the plaintiffs by the criminal act of another.

Delgado v. Lohmar—which the court points to for the rule that “[u]nder common law principles, there is generally no duty to protect strangers from the criminal acts of a third party”—was remanded because the court determined that there was a duty. In Delgado, some hunters were “engaged in an extremely dangerous activity, hunting with high-powered guns.” The notion that

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149. Id. at *4–5 (emphasis added) (quoting Schaub v. Schaub, 231 Minn., 517, 517, 44 N.W.2d 61, 64) (1950)).

150. See, e.g., McIntyre, 447 F. Supp. 2d at 106–07.

151. See, e.g., supra notes 45–47.

152. 289 N.W.2d 479, 484 (Minn. 1979).

153. State v. Back, 775 N.W.2d 866, 870 (Minn. 2009).

154. See Delgado, 289 N.W.2d at 484 (“[D]ue care requires that each hunter be mindful of the danger created by their entry to the occupants of the property”).

155. Id. (emphasis added).
extremely dangerous activities may impose a duty was also articulated in Back when the court stated that “[t]he theory underlying these deadly weapons cases is that individuals handling dangerous weapons have a duty of care not to handle them in such a way so to harm others, and if they do, they have breached their duty of care.”  

However, such a statement does not take into consideration why someone handling a dangerous weapon has a duty of care. One rationale is handling a dangerous weapon is an affirmative act and not an act of omission. Another rationale is that the risk of injury is so foreseeable or that the harm so grave, that a duty is imposed as a matter of law. Thus, one could argue that the stringent application of the special relationship requirement allows the supreme court to completely ignore the magnitude of Back’s reckless actions when she affirmatively acted as the catalyst in creating a very combustible situation.

B. The Back Decision and the Court’s View of the Special Relationship Requirement

Assuming that Back’s acts were nonfeasance, by reversing the decision, the Minnesota Supreme Court seemingly takes a very narrow view of what constitutes a special relationship. The court seems to ignore the fact that Back had a brief intimate relationship with Super. Similarly, the court apparently ignored the fact that Back had a long-term intimate relationship with Holliday and that

156. Back, 775 N.W.2d at 871 n.7.
157. This would be consistent with the misfeasance/nonfeasance distinction, supra Part II.
158. This would be consistent with the special circumstances doctrine, supra Part II.
159. See supra Part III.
160. Back, 775 N.W.2d at 867. This determination was a foundation of the court of appeal’s determination that the jury’s finding that Back was guilty of second-degree manslaughter:

To support its case for second-degree manslaughter here, the state introduced evidence of: (1) the prior intimate relationship between appellant and Super; (2) appellant’s knowledge that Super previously fired a gun into the victim’s garage; (3) appellant’s knowledge of the past conflicts between Super and the victim; and (4) appellant’s knowledge that Super carried a gun.

161. Back, 775 N.W.2d at 867.
Back considered Holliday the “‘love of [her] life.’”

Back at one time had been in a committed relationship with Holliday, and had designs to resume a relationship with him. While one or more persons in a failed relationship may be skeptical of each other, it is not fair to say, as the supreme court has, that there is generally no expectation to protect the other from harm, much less no expectation to protect the other from harm that one has affirmatively brought to the other’s doorstep. While special relationships are not predicated on love and affection, common sense dictates that a reasonable person would try to protect the “love of [their] life” from harm.

Had Super instead been a dangerous instrumentality, such as a weapon, or a dangerous animal, the outcome may have been different. For example, most would agree that the foreseeable risk of harm resulting from bringing a time-bomb or a grizzly bear to the party would give rise to a duty to protect others from those risks associated with their arrival. Yet, Super’s actions are very similar to those of a dangerous instrumentality or even a dangerous animal. Furthermore, this is not a situation where Holliday was

162. Id.
163. See id.
164. See id.
165. See id. at 872.
167. Back, 775 N.W.2d at 867.
168. See, e.g., Minn. Stat. § 609.205 (2008). In particular, in State v. Frost, 342 N.W.2d 317 (Minn. 1983), the court held that firing a gun was consistent with the creation of an unreasonable risk created as articulated by Minnesota Statute section 609.205(1). Id. at 319–20. Also, under Minnesota Statute section 609.205(4), if Super arguendo had been an animal instead of a human, one could make a showing that Back knew the animal had “vicious propensities or to have caused great or substantial bodily harm in the past, [and allowed the animal] to run uncontrolled off the owner’s premises, or negligently [failed] to keep it properly confined.” Minn. Stat. § 609.205(4) (2008).
169. See Back, 775 N.W.2d at 868. In similar fashion to a dangerous instrumentality, Super was known to have a very volatile disposition and would “‘pull his gun out on anybody.’” Id. In fact, the court of appeals analogized Super to a dangerous instrumentality when it stated that “‘[i]ust as the appellant in Frost should have known that the dangerous weapon she possessed was capable of being discharged in a struggle, the jury could have reasonably concluded that appellant should have known that Super was capable of shooting [Holliday].’” State v. Back, No. A08-0017, 2009 WL 910756, at *4 (Minn. Ct. App. Apr. 7, 2009).
170. While it may not be palatable to consider a human an animal, we are part of the animal kingdom and just because we have self-determination and the capacity for rational thought does not mean that we are immune from
fortuitously or randomly injured by the criminal acts of any third person. Super and Holliday knew each other and had a very tumultuous relationship. The facts indicate that Back was aware of the tumult, and the trial court believed that she fed off of the drama she instigated.

For at least the reasons articulated above, one could make the argument that an expansion of the special relationship requirement is warranted. Such an expansion would not toll the death knell for judicial efficiency. As some of the cases note, even where a duty does exist, there still may be causation issues that would mitigate the number of cases tried by the courts. While causation poses its own challenges, the trial court judge, jury, and court of appeals were all satisfied that the causation element was met.

succumbing to our baser—more animalistic—instincts. See Back, 775 N.W.2d at 868 (noting that Super shot Holliday even though Back was screaming “[s]top, Nicky, stop. Stop, Nicky, stop.”).

171. See, e.g., Pietila v. Congdon, 362 N.W.2d 328, 330 (Minn. 1985) (decedent was assailed by unknown perpetrators while on the defendant’s premises). See also Back, 775 N.W.2d at 870 (“[u]nder common law principles, there is generally no duty to protect strangers from the criminal actions of a third party.”) (emphasis added).

172. See supra Part III.

173. See supra Part III.

174. But see infra note 177 for reasons why an expansion may be against public policy.

175. See, e.g., Pietila, 362 N.W.2d at 333 (“[E]ven if a duty to provide protection were recognized, the question of causation would remain unanswered.”).

176. See State v. Back, No. A08-0017, 2009 WL 910756, at *4 (Minn. Ct. App. Apr. 7, 2009). It should also be noted that the jury returned a verdict finding Back guilty and that the court of appeals did not determine that this verdict was unreasonable. See Back, 2009 WL 910756, at *1.

In considering a claim of insufficient evidence, this court’s review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. The reviewing court must assume “the jury believed the state's witnesses and disbelieved any evidence to the contrary.” And the reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.

Id. at *1 (citations omitted). Had there been a causation issue, any of the trial judge’s actions, jury verdict, or court of appeals decision would have likely reflected that fact.
There are a number of arguments to be made that a finding of duty under these circumstances would contravene public policy—such as judicial inefficiency because of the increased focus on the use of standards, instead of no-duty rules. However, arguments directed to judicial inefficiency exist regardless of whether the act is characterized as misfeasance or nonfeasance, because judicial resources are necessarily consumed when determining whether an act should be characterized as misfeasance or nonfeasance. In addition, some of these same policy concerns seem to fall away when the court is dealing with misfeasance.

In *Greater Houston Transportation Co. v. Phillips*, where the defendant’s employee shot and seriously injured another driver with whom the employee had gotten into an accident, Justice Doggett’s dissent touched on the difficulty that these no-duty decisions create in establishing precedent when he stated:

> Id. at 911 (citations omitted)).

The argument could also be made that a general standard is more comprehensible than a no-duty rule with a collection of duty exceptions and that any judicial inefficiency may be worth it to that end. *Id.* at 920. In particular,

> [p]eople can understand a rule that says, "generally, you are expected to conduct yourself reasonably" more easily than they can understand the common law rule with its various exceptions or, perhaps even a rule that requires one to rescue or protect, but only where to do so would be "easy." *Id.*

In other words, because the misfeasance/nonfeasance determination is a threshold question, the court must always characterize the action of the defendant in order to determine whether a no-duty rule is appropriate (and must expend judicial resources in the determination). *See supra* Part II.

The three primary substantive arguments seem to be specifically targeted to situations whereby we attempt to hold people accountable for their nonfeasance.

*801 S.W.2d 523 (Tex. 1990) (Doggett, J., dissenting).*
[o]n another day we may learn how many more shootings are required before a jury can be permitted to evaluate the reasonableness of this [defendant]’s decision. A dozen people killed or maimed? Perhaps not; under its narrow holding, today’s opinion may itself be sufficient additional notice for a court to impose a duty on the [defendant] to avert injury to third persons. 181

Perhaps here, too, the opinion in *Back* will provide “sufficient additional notice for a court to impose a duty on the [defendant] to avert injury to third persons.”182 Because, “[w]hen [the] ghosts of the past stand in the path of justice[,] clanking their medieval chains[,] the proper course for the judge is to pass through them undeterred.”183

V. CONCLUSION

In *Back*,184 the Minnesota Supreme Court failed to offer a compelling reason explaining why Back’s actions should be considered nonfeasance. If Back’s actions were considered misfeasance instead, then the court failed to explain why the special relationship requirement was required to find the existence of a duty. In addition, the court seemed to ignore other policy considerations that may have warranted an extension of the special relationship requirement.

For example, the court could have held, as the court of appeals seemed to imply,185 that the previous intimate relationships between Back and Holliday or Back and Super were sufficient to create a duty to protect Holliday from Super.”186 In the alternative, the supreme court could have broadened an application of the special circumstances doctrine to hold that Back’s actions constituted a special circumstance that created a duty to protect Holliday against the foreseeable danger that she created, based in part on the knowledge she had at her disposal regarding the danger that Super represented.187

181. *Id.* at 528.
182. *Id.*
186. *See supra* Part IV.
187. *See supra* Part III.
Regardless of the approach, the supreme court’s decision in Back illustrates the problems in duty determinations under the misfeasance/nonfeasance rubric. A more sensible holding would be that “an actor is always under the duty to see that other persons are not immediately exposed to an unreasonable risk from [their] acts.” Such a concept is succinctly captured by section seven of the Restatement (Third) of Torts. Back’s actions foreseeably, unreasonably, and immediately created a risk of harm for Holliday when she arrived with Super. Once there, her behavior only served to magnify the risk of harm.

If we endeavor to create jurisprudence that reflects an incorporation of a greater deference to a general duty of reasonable care, the misfeasance/nonfeasance distinction in the duty analysis should be put to rest. In its misapplication, the distinction allows courts to hold that “‘criminal acts of third parties . . . relieve the original negligent party from liability.’” But as a general proposition, “[t]his archaic doctrine has been rejected everywhere.”

Unfortunately, it seems this “archaic doctrine” has not been rejected in Minnesota.

189. See supra Part II and note 84.
190. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 7 (Proposed Final Draft No. 1, 2005) (discussing when “duty to exercise reasonable care” attaches). See generally supra Part II (explaining Minnesota’s move to a general duty of reasonable care).
191. Britton v. Wooten, 817 S.W.2d 443, 449 (Ky. 1991) (alteration in original) (holding that defendant was liable for the damage caused by a fire because its handling of refuse created an opportunity for an unknown arsonist to allegedly start the fire).
192. Id.
193. Id.