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CLARIFICATIONS ON THE DUTY TO EXERCISE CARE

Larry S. Stewart[†]

I. DUTY UNDER SECTION 7.....	1493
II. SOCIAL NORMS.....	1496
III. COST-BENEFIT ANALYSES	1500
IV. RELATIONALITY.....	1502
V. GOVERNMENT DISCRETION.....	1503
VI. A HIERARCHICAL STRUCTURE	1504

The Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) (Third Restatement)¹ seeks to synthesize, clarify, and rationalize the law of negligence by restating its elements and basic rules in progressive, modern terms. Prominent among its provisions is section 7, which contains the presumption of a duty to exercise reasonable care that is applicable in most cases and rules for what should be rare instances of “no-duty” determinations.²

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1. The Restatement (Third) of Torts: Liability for Physical & Emotional Harm is not yet finished. See *Current Projects, Restatement Third, Torts: Liability for Physical and Emotional Harm*, AMERICAN LAW INSTITUTE, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=16 (last visited Jan. 3, 2011). Chapters one through six, which cover definitions, negligence, duty, strict liability, factual cause, and scope of liability were published in 2010 as Volume 1. *Id.* Volume 2, covering affirmative duties, emotional harm, and landowner liability also have been approved but await the drafting of a final chapter on the liability of actors who retain independent contractors. *Id.*

2. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 (2010). Courts are already embracing key provisions of section 7. See *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 696 (Iowa 2009) (discussing the new

There is much to applaud in this treatment of duty, although, in some respects, the Third Restatement could have gone further and provided more clarity. This comment explores the rules provided, how those rules could be clarified, and provides suggestions for how the analytical process could be improved. Specifically, this comment makes five points: (1) “social norms,” as distinguished from public policy, are antithetical to the core rationale for duty and should play no role in duty determinations;³ (2) cost-benefit analyses should also play no role in duty determinations;⁴ (3) the Third Restatement has it right on the role of relationality;⁵ (4) the role of discretionary government authority could be better explained in terms of an affirmative duty analysis;⁶ and (5) further guidance could be provided for the duty analysis process.⁷

I. DUTY UNDER SECTION 7

The role of duty in modern tort law has not been without controversy. At times it served as a means to expand tort law; in more recent times, it has been increasingly applied regressively to roll back tort liability.⁸ Commentators have disagreed on its proper role.⁹ Decisions have been confusing with some declaring that duty

no-duty framework and finding that “summary judgment was . . . proper under [the court’s] newly adopted analytical principles”); *Thompson v. Kaczinski*, 774 N.W.2d 829, 835 (Iowa 2009) (“We find the drafters’ clarification of the duty analysis in the Restatement (Third) compelling, and we now, therefore, adopt it.”); *A.W. v. Lancaster Cnty. Sch. Dist.* 0001, 784 N.W.2d 907, 917 (Neb. 2010) (considering the new duty rules and finding “the reasoning of the Restatement (Third), and . . . fellow courts that have endorsed it, to be persuasive”); *see also* *Gipson v. Kasey*, 150 P.3d 228, 235 (Ariz. 2007) (Hurwitz, J., concurring) (noting that while it made no difference which version of the duty rule was adopted in the present case, there are “advantages of the Third Restatement approach to duty” and suggesting the court adopt that approach in the future).

3. *See infra* Part II.

4. *See infra* Part III.

5. *See infra* Part IV.

6. *See infra* Part V.

7. *See infra* Part VI.

8. W. Johnathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 672 (2008) (discussing California’s important role in the “development of the modern law of duty” and noting that the California Supreme Court “first swe[pt] aside a variety of no-duty impediments to liability and then reinvigorat[ed] duty (more accurately, no-duty) as an instrument for limiting liability as the expansion of tort law ground to a halt and reversed course in the 1980s and 1990s”).

9. *Id.* at 671 (“Academics . . . continue to battle over the proper role for duty in contemporary tort law.”).

is categorical and others treating duty as fact-specific or grounded in foreseeability concepts.¹⁰

The duty rules delineated in section 7 of the Third Restatement bring clarity to the law by restating the general rule that all actors have a duty to exercise care to prevent injury to others “when the actor’s conduct creates a risk of physical harm.”¹¹ As the Third Restatement makes clear, this presumption of duty is the default rule that applies in the vast majority of cases and circumstances and trial courts generally need not concern themselves with the existence of a duty.¹²

Under section 7, the obligation is on one claiming that a duty should not exist to raise and prevail on that claim.¹³ In that sense, it is section 7(b) that does the duty determination work but section 7(a) provides the basis of an analytical framework by grounding duty in the presumption that a duty exists. Section 7 also constrains duty determinations by making clear that foreseeability is a matter of causation, not duty, and foreseeability concepts play no role in duty determination.¹⁴ Likewise, section 7 comments make clear that the duty rubric should not be used to invade the province of the jury.¹⁵ Hence, determinations based on a lack of evidence (where reasonable minds can differ) are matters of liability, not duty, and the two should not be conflated.¹⁶

To ensure the limited scope of no-duty determinations and to preserve the integrity of trial by jury, section 7(b) provides that only in “exceptional cases, when an articulated principle or policy warrants denying or limiting [duty] in a particular class of cases” should courts adopt a no-duty rule.¹⁷ Comments to section 7

10. *Id.* at 671–78.

11. Compare RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(a) (2010) (stating that an actor has a duty when his “conduct creates a risk of physical harm”), with RESTATEMENT (SECOND) OF TORTS § 302 (1965) (describing a negligent act as one that involves an “unreasonable risk of harm to another”). The duty to exercise care applies to both acts and omissions. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 cmts. c, k (2010). It also applies to situations where the actor has an affirmative duty to act. *Id.* §§ 37–44 (Proposed Final Draft No. 1, 2005).

12. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 6 cmt. f, 7 cmt. a.

13. *Id.* § 7 cmt. b.

14. *Id.* § 7 cmt. j.

15. *Id.*

16. *Id.* § 7 cmt. i.

17. Duty determinations include limitations on duty short of a complete no-duty determination. *Id.* § 7(b) (“[A] court may decide that the defendant has no

emphasize that any such rulings should be categorical, bright-line rulings that are not fact-specific and admonish courts “to articulate . . . the policy or principle” on which they are acting.¹⁸

This formulation will, in large part, bring much needed clarity to the law. Requiring courts to articulate their reasoning allows transparency that will foster understanding or allow others to challenge the basis for the decision. Limiting no-duty rules to exceptional categories of cases protects the long-standing right of parties to trial by jury. Additionally, bright-line rules avoid the confusion of decisions that mask factual determinations with a duty rubric.

But, for all it has accomplished, the Third Restatement could have brought more clarity. While duty issues arise only at the margin in a very small number of cases, in making duty determinations courts sometimes use inappropriate case-specific “factors” and/or rely on “factors” that conflict with the fundamental rights that are the core of section 7 duty.¹⁹ That should not happen in a well-ordered regime. While public policy, conflicts with other domains of law, and institutional competence are undisputed bases on which courts determine that no tort duty exists,²⁰ social norms, cost-benefit considerations, and the relationship between the parties should not be the basis of a no-duty determination. Even though courts correctly decide that governmental entities have no duty to exercise their discretionary functions,²¹ those decisions could be better grounded. Finally, more guidance could be provided for how courts should navigate the process of duty determination. The balance of this comment explores those subjects.

duty or that the ordinary duty of reasonable care requires modification.”) (emphasis added). In the interest of brevity, “no duty” will be used herein to encompass the full range of possible duty rulings.

18. *Id.* § 7 cmts. a, i, j.

19. *See, e.g.*, *Great Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) (“In determining whether the defendant was under a duty, the court will consider several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor’s conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant.”).

20. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) cmts. d, f (2010).

21. *See id.* § 7 cmt. g.

II. SOCIAL NORMS

Comment “c” to section 7 endorses “articulating general social norms of responsibility as the basis for [a no-duty] determination.”²² To properly examine the role this factor should play, it must first be distinguished from public policy. “Public policy” and “social norms” have, at times, been used interchangeably.²³ While public policy implicates moral judgments, social norms are different. Although difficult to define, public policy is grounded on a common or community judgment about what is inherently just and right for public health, safety, and welfare, sometimes but not necessarily as declared by constitution, statute, or judicial decision.²⁴ By definition, social norms on the other hand can, but do not necessarily, involve a moral component.²⁵ They are commonly understood as describing conduct that is typical of specific groups.²⁶ Often they follow or mirror public opinion and are therefore subject to change with the whims of popular opinion.²⁷

22. *Id.* § 7 cmt. c.

23. *See, e.g.,* Noye v. Hoffmann-La Roche, Inc., 570 A.2d 12, 14 (N.J. Super. Ct. App. Div. 1990) (discussing tort damages in a breach of contract context and stating that “[t]he tort lay not in the breach of contract but in the violation of valuable social norms-denominated by the court as clear mandates of public policy”).

24. *E.g.,* Bell Care Nurses Registry, Inc. v. Cont’l Cas. Co., 25 So. 3d 13, 18 (Fla. Dist. Ct. App. 2009) (discussing the meaning of public policy when interpreting certain provisions of an insurance policy); Mullins v. N. Ky. Inspections, Inc., No. 2009-CA-000067-MR., 2010 WL 3447630, at *4 (Ky. Ct. App. Sept. 3, 2010) (discussing this definition of public policy when considering a liability limiting provision in a home inspector’s contract); Skutt v. Grand Rapids, 266 N.W. 344, 346 (Mich. 1936) (considering “the rule of public policy” when determining the enforceability of a contract).

25. *See* Scott R. Belhorn, Note, *Settling Beyond the Shadow of the Law: How Mediation Can Make the Most of Social Norms*, 20 OHIO ST. J. ON DISP. RESOL. 981, 985 n.10 (2005) (“Normative standards encompass a wide range of socially conditioned information, ranging from moral judgments (do not lie), to community norms (do not smoke near others), to shared values within a discrete nuclear family . . . to industry-wide practices . . .”).

26. *Id.* at 984 (“When a group encourages some behavior, either by providing incentives for conformity or else sanctioning deviants, then that behavior qualifies as a social norm.”).

27. *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 959 (1996) (discussing the relationship between the law and social norms and noting that “[p]eople may actually reject existing norms but fail to state their opposition publicly, and once public opposition becomes less costly, new norms may rapidly come into place”).

The issue of social host liability illustrates these differences and exploring those cases exposes the conceptual flaws inherent in relying on social norms as a factor for duty determinations. It can be the social norm for a host to provide alcoholic drinks to guests, even though it can be dangerous or harmful to others and can induce conduct that is contrary to public policy. Because it is foreseeable that social guests who over-consume alcohol will, on leaving the host's premises, operate their vehicles in ways that risk harm to others, social host liability cannot be causally limited. Courts expressly or impliedly recognize this social norm by treating these cases as involving duty issues.

Most, if not all, jurisdictions have strong public policies against driving under the influence of alcohol.²⁸ Some courts cite those policies as reasons for imposing a duty of reasonable care on social hosts. This reasoning is at odds with the section 7 presumption of duty but nonetheless reaches a result that is consistent with section 7's duty presumption, and which reflects the lack of policy reasons for denying a duty.²⁹ In doing so, these courts recognize that it is public policy, not social norms, that are determinative.

Other courts (and dissenting opinions in duty jurisdictions) couple concerns about the difficulties posed by the range of circumstances that could exist in such cases—the widely varying nature of social entertaining, the difficulty of discerning guest intoxication, and the uncertainty of what actions the host should take—and disruption in the norms of social behavior as grounds

28. See, e.g., *Kelly v. Gwinnell*, 476 A.2d 1219, 1226 (N.J. 1984) (“[W]e assume that our decisions are found to be consonant with the strong legislative policy against drunken driving.”), *superseded by statute*, N.J. STAT. ANN. 2A:15-5.7 (2000).

29. See, e.g., *Clark v. Mincks*, 364 N.W.2d 226, 230 (Iowa 1985) (imposing a duty on a social host who provided alcohol to an intoxicated person where the host knew that person would be driving and finding public policy reasons supportive of its decision); *Koback v. Crook*, 366 N.W.2d 857, 865 (Wis. 1985) (imposing a duty on a social host and citing the reasoning in *Gwinnell*). When it is minors who have consumed the alcohol, different public policy considerations may be invoked. See, e.g., *DiOssi v. Maroney*, 548 A.2d 1361, 1367 (Del. 1988) (noting that there are “special hazards” and public policy concerns implicated in serving alcoholic beverages to minors); *Sutter v. Hutchings*, 327 S.E.2d 716, 720 (Ga. 1985) (“Finally, we pose this question: Which is the more valuable right, the right to serve alcohol to one’s underage high school friends, or the right not to be killed by an intoxicated underage driver? There is no right to serve alcohol to one’s underage high school friends.”), *superseded by statute*, GA. CODE ANN. § 51-1-40 (2000); *Longstreth v. Gensel*, 377 N.W.2d 804, 815 (Mich. 1985) (“The dangers and policy considerations related to serving intoxicants are especially significant when underage persons are involved.”).

for denying a host duty.³⁰ This reasoning, however, does not survive analysis as is demonstrated by examining those bases separately.

Hypothesizing factual difficulties injects case-specific concerns into the calculus that are not capable of categorical characterization. Thus, for example, a hypothetical difficulty in controlling the serving of alcohol would not be present in a case where the host provided a bartender. Likewise, a hypothetical difficulty in discerning guest intoxication would not be present in a case where the guest was staggering and slurring speech. To the extent relevant, those kinds of factual issues bear on the reasonableness or causality of the host's conduct, not duty, and can support rulings as a matter of law only where reasonable minds cannot differ on the specific facts of the individual case.³¹

Stripping the social norm of serving alcohol at social gatherings from case-specific issues focuses the inquiry on whether social norms are an appropriate factor for duty determinations. For example, would courts still find no duty in a case where a host engaged in binge drinking with guests to the point of obvious "knee walking" intoxication and a guest staggered to his car, drove a short distance, and crashed into another car causing horrible injuries and deaths? Under those circumstances negligence and causation would be obvious. Would then the social norm of serving alcohol alone be sufficient to justify a no-duty determination? Or would a court find that while it is the social norm to serve alcohol, it is not the social norm to serve alcohol to the point of clear and obvious intoxication? If identifying social norms is fact-specific or norms require parsing, categorical treatment unravels and courts are back to making inappropriate fact-specific duty determinations.

30. *E.g.*, *Johnston v. KFC Nat'l Mgmt. Co.*, 788 P.2d 159 (Haw. 1990); *Settlemyer v. Wilmington Veterans Post No. 49*, 464 N.E.2d 521 (Ohio 1984); *Graff v. Beard*, 858 S.W.2d 918 (Tex. 1993); *Burkhart v. Harrod*, 755 P.2d 759 (Wash. 1988).

31. *E.g.*, *McGuiggan v. New England Tele. & Tele. Co.*, 496 N.E.2d 141, 146 (Mass. 1986) (holding as a matter of law that the defendant homeowners were not negligent because they did not serve alcohol to the guest nor were they aware of the guest's intoxication); *Sacci v. Metaxas*, 810 A.2d 1119, 1126 (N.J. 2002) (holding that even if wife had a duty to warn third party of potential danger to the third party by her intoxicated husband, the wife's purchase of alcohol for her husband was not a "proximate cause" of third party's death because the husband's actions were not the result of drinking but rather a systematic and deliberative process and wife had no knowledge of his activities).

More important, using a social norm (of serving alcohol at social gatherings) to trump public policies (against driving under the influence of alcohol) undermines core rationales of modern tort law. Public policy is at the foundation of duty.³² The definition of duty has been notably stated as “the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”³³

Justifying no-duty on a basis that allows risky behavior contrary to public policy to trump the presumptive duty to exercise care to prevent harm to others is antithetical to the core rationale of tort duty. In recognizing a presumptive duty to exercise care to prevent harm to others, the Third Restatement aligned itself with a rights-based theory of tort law anchored in the fundamental right of individuals to be free from risks created by others or, put another way, in the right to individual autonomy and personal security.³⁴ In such a regime, duty should not be dependent on a social norm inquiry. That is because fundamental individual rights to autonomy and security should not be compromised or eliminated merely to conform tort law to some social norm, especially where that norm has no moral value. It is only morally based public policy that should compel individual rights to give way to the welfare or well being of the community as a whole.

Returning to the social host liability issue, it is the host’s conduct—in supplying alcohol, not monitoring its consumption, or allowing the intoxicated guest to drive—that creates a risk of harm to others. The duty analysis should therefore begin with a presumption that the host had a duty to exercise reasonable care and the outcome should be based on sound public policies, not social norms.

32. See, e.g., W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 358 (5th ed. 1984).

33. *Id.*

34. Mark A. Geistfeld, *Social Value as a Policy-Based Limitation of the Ordinary Duty to Exercise Reasonable Care*, 44 WAKE FOREST L. REV. 899, 906 (2009). Geistfeld concludes that rights-based theory requires consideration of social values, a point that does not necessarily follow. *Id.* at 922. To the extent that social values conflicted with individual autonomy and personal security, they would limit, not support those objectives. *Id.* at 906. Rights-based concepts also underlie intentional tort rules, which protect against intentional invasion of individual autonomy and personal security. *Id.* Thus, whether conduct is merely negligent or even intentional, tort law recognizes a universal right to individual autonomy and personal security. *Id.* See, however, *infra* note 42 for a different view in the case of product liability design defect claims.

III. COST-BENEFIT ANALYSES

Cost-benefit analyses are a means to evaluate the reasonableness of conduct.³⁵ They are at the core of efficiency rationales that seek to limit liability whenever the supposed costs of liability exceed its social benefits. At a more functional level, they can be used to argue that an actor need not take actions that would be more costly than any benefit that could be realized.³⁶ As such, cost-benefit analysis is part of the breach calculus, not a duty factor.³⁷ Section 7 is, however, silent on their inapplicability in duty determination even though some courts cite cost-benefit analyses as a duty factor. For example, in determining whether handgun manufacturers owe a marketing duty of care to the public, the court in *Hamilton v. Beretta U.S.A. Corp.* noted that duty “must be tailored to reflect accurately the extent that its social benefits outweigh its costs.”³⁸

When courts so reason, they conflate breach and duty, masking a no-breach decision or an inability to articulate the real principles that are driving the decision. At other times, courts are simply citing “factors” that have no real relation to the decision-making process.³⁹ These are the type of results that the Third Restatement seeks to prevent by calling for clearly articulated,

35. See generally Paul R. Portney, *Benefit-Cost Analysis*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, <http://www.econlib.org/library/Enc/BenefitCostAnalysis.html> (last visited Jan. 3, 2011) (discussing the use of cost-benefit economic analysis in the context of government policy-making).

36. Mark A. Geistfeld, *Efficiency, Fairness and the Economic Analysis of Tort Law*, in *Theoretical Foundations of Law and Economics* 45–46 (N.Y. Univ. Law & Econ., Working Paper No. 184, 2009), available at http://lsr.nellco.org/nyu_lewp/184/.

37. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 cmt. e (2010); see also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998) (adopting a risk-benefit theory as part of a new negligence standard for design defect cases). While highly controversial, it illustrates that risk-benefit analyses go to breach, not duty. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998); Symposium, *The Products Liability Restatement: Was It a Success?: Strict Liability for Defective Product Design: The Quest for a Well-Ordered Regime*, 74 BROOKLYN L. REV. 1039, 1039 (2009).

38. 750 N.E.2d 1055, 1060–61 (N.Y. 2001); see also *Burkhart v. Harrod*, 755 P.2d 759, 761 (Wash. 1988) (“Evaluating the overall merits of social host liability . . . requires a balancing of the costs and benefits for society as a whole.”).

39. E.g., *Johnston v. KFC Nat’l Mgmt. Co.*, 788 P.2d 159, 163–64 (Haw. 1990) (citing *Burkhart v. Harrod*, 755 P.2d 759, 761 (Wash. 1988) for the need for consideration of costs and benefits but not doing so); *Hamilton*, 750 N.E.2d at 1060–61 (citing a cost-benefit analysis but then basing its decision on whether there was a duty to control third parties to prevent them from harming others).

principled duty decisions.⁴⁰

Courts should recognize that in making duty decisions, cost-benefit analyses should play no role. It is not just because doing so would conflate breach and duty. As with the case of social norms, if cost-benefit analyses were used as a duty factor, it would sanction limiting individual rights to achieve net social values for the community at large—a result that would be antithetical to the core rationale for negligence liability.⁴¹ In other words, bending duty to efficiency would mean that whenever the costs of action outweigh its benefits, there would be no duty to undertake that action and individual rights would be required to give way. Such a result would be repugnant to the individual rights of autonomy and personal security which lie at the core of tort duty.⁴²

There is also a serious question about the competence of courts to assess costs and benefits. While the cost of adding components or features to a product is subject to ascertainment and proof, in many instances there is no ready way to measure the cost of conduct in exercising care. Likewise, while there is some data on the cost of injuries which would be eliminated if harm was avoided, there is no other ready way to measure the benefits that could result from eliminating risky behavior. Without empirical databases or case-specific evidence from a trial on the merits, the evaluation of costs and benefits would be left to the undisciplined speculation of individual judges. In either event, these are fact-specific inquiries that relate to negligence, not duty. It may be for those reasons that even though the *Hamilton* court articulated a cost-benefit approach it avoided undertaking any cost-benefit analysis as a basis for its decision.

40. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmts. a, i, j (2010).

41. *Id.* § 6 cmt. d.

42. One aspect of tort law takes a contrary view. Section 2(b) of Restatement (Third) of Torts: Products Liability adopts a rule under which manufacturers would not be liable for defects in the design of their products unless the product is not reasonably safe, measured by whether the product's risks are greater than its benefits (and whether there was an alternative design). Rather than strict liability or a presumptive duty of care, from a design standpoint, products would be presumptively safe—even if they failed to perform as safely as an ordinary consumer would expect—unless the injured consumer could establish a sufficient quantum of risk. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (2009). That rule would subjugate individual rights to a cost-benefit analysis. It has not been without controversy. See Symposium, *supra* note 37, at 1044–48.

Returning again to the issue of social host liability illustrates the flaw of cost-benefit analyses as a basis for categorical decisions. Because of the many varying circumstances of social entertaining, the costs and benefits of exercising care will vary widely—a point implicitly made in many of the no-duty cases.⁴³ Under such circumstances, whether costs or benefits predominate (or what might constitute reasonable care) in one case does not mean that the same result will follow in other cases. That is a case-specific decision that cannot be extrapolated into a categorical rule and a clear admonition that cost-benefit analyses should not play any role in duty determination would help clarify the Third Restatement.

IV. RELATIONALITY

The Third Restatement correctly adopts the view that relationships between parties should not be a determinative duty factor except in the context of affirmative duties where certain “special” relationships give rise to a duty to act or control the conduct of third parties.⁴⁴ Insofar as no-duty determinations under section 7(b) are concerned, inter-party relationships are relevant only to the extent that they implicate policy reasons for modifying the presumed duty of care.⁴⁵

This is so because in a rights-based regime, the presumptive duty to exercise care must apply to all persons, even complete strangers to the actor. Allowing that duty to be attenuated by relationality concerns would necessarily mean that individual interests of some would be subjugated to a right of the actor to engage in risky behavior. It would also require inquiry into many non-categorical, fact-specific, nuances of relationships that are the province of breach and causation. It is for those reasons that relationality issues do not constitute a separate or independent basis for no-duty determinations but rather a reason for invoking public policy.⁴⁶ Thus, the relationship between landowners and those on their property may be a basis for invoking public policies concerning the rights of property owners, but it is the public policies, not the relationship, which is the operating principle.

43. See, e.g., *Graff v. Beard*, 858 S.W.2d 918, 921 (Tex. 1993) (hypothesizing on the myriad of circumstances of social entertaining).

44. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 39 (2010).

45. *Id.* § 7 cmt. e.

46. *Id.* § 7 cmts. e, g reporters' note.

Stated another way, the relationship between parties is not a *per se* duty “limitation.”

V. GOVERNMENT DISCRETION

Comment “g” to section 7 notes deference to the discretion of other branches of government as a factor for no-duty determinations in the so-called “public duty” class of cases. When not prohibited by sovereign immunity, these cases typically involve police or fire agencies and arise when the agencies fail to act to protect an individual or group of individuals, usually as a result of a conscious allocation of resources.⁴⁷ Often these decisions are based on a lack of a duty to the “public at large” and/or concerns over the competence of courts to adjudicate the appropriateness of conduct of other branches of government.⁴⁸ But that avoids a more obvious and principled basis for decision.

There is nothing inherently wrong with treating these cases as a unique set of section 7 no-duty decisions. Because of the strong reluctance of courts to “second guess” discretionary decisions of other branches of government,⁴⁹ they could also be treated as a subset of institutional competence. But those alternatives create a certain conceptual awkwardness since the discretionary nature of the government’s authority and institutional competence does not eliminate a duty to exercise care once the government entity undertakes to act in relation to an individual or specific group of individuals.⁵⁰ Stripping away the discretionary nature of the conduct and the reluctance of courts to second-guess decisions of other branches of government leaves a decision not to act, which forms the basis for a more coherent and principled reason for these no-duty decisions.

47. *Id.* § 7 cmt. f reporters’ note.

48. *E.g.*, *Wong v. City of Miami*, 237 So. 2d 132, 133–34 (Fla. 1970) (holding that after initially providing police protection during the course of a riot, no private duty to continue that protection existed).

49. *E.g.*, *id.* at 134 (stating that “[t]he sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence”).

50. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 41 (2010). Thus, for example, governmental agencies can be liable for the use of excessive force. *See City of Miami v. Simpson*, 172 So. 2d 435 (Fla. 1965) (finding a police officer committed assault in effecting arrest); *Jaworski v. City of Opa Locka*, 170 So. 2d 484 (Fla. Dist. Ct. App. 1964) (explaining the failure to exercise care for the protection of someone in custody when a police officer assaulted a prisoner in custody in the city’s jail).

Under section 7 there is no affirmative duty of reasonable care when the actor's conduct has not created the risk of harm.⁵¹ The failure of government agencies to exercise discretion and act does not create the risk of harm but only fails to protect against that harm. This is a classic section 7 case. Thus, it can be reasoned that government agencies have no duty to come to the aid or rescue of specific individuals or groups of individuals but, once they do undertake action involving a specific individual, they have a duty to exercise care to avoid causing harm. It is only the former situation where courts do not intrude.

VI. A HIERARCHICAL STRUCTURE

Ensuring that no-duty determinations are not based on social norms, cost-benefit analyses, or the absence of any relational status and, instead, are based on recognized public policy, clear conflicts with other domains of law, or demonstrable institutional incompetence will narrow the focus of no-duty inquiries for the better. It will bring order, clarity, and consistency to decisions and will help segregate the elements of negligence so that the roles of judge and jury are maintained. Moreover, clarifying that foreseeability plays no role in duty determinations furthers those goals and dissuades courts from masking fact-based decisions in duty rubric.

Apart from those important boundary rules, the Third Restatement also provides an analytical structure for no-duty determinations. The beginning point is the presumption of duty with the burden on the objector to establish policy or principle reasons why that duty should not exist.⁵² Thus, the no-duty issue should be whether there are valid public policy reasons, clear irreconcilable conflicts with other domains of law, or irreconcilable issues of institutional competence to exempt categories of actors from the duty to exercise reasonable care.⁵³

51. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. 1 (2010).

52. *Id.* at § 7 cmt. b. See, e.g., *Yount v. Johnson*, 915 P.2d 341, 345–47 (N.M. Ct. App. 1996) (finding no public policy reasons to extend the modified duty applicable in organized contact sports to “horseplay”).

53. Courts have frequently reversed the analysis. Instead of starting with the presumptive duty of reasonable care, some courts use public policy to find a duty. See, e.g., *J.S. v. R.T.H.*, 714 A.2d 924 (N.J. 1998) (using public policy and foreseeability to hold spouse had a duty to warn of other spouse's criminal sexual propensities). While the result is the same, following the analytical framework of

Unfortunately, the Third Restatement provides little guidance for how those factors should be evaluated in the duty decision-making process. It is not enough to only exhort courts to make categorical rulings and articulate reasons for decisions. Leaving it to individual courts to form their own methodology (or not use one at all) can result in unprincipled or unpredictable duty determinations. For example, without any guidelines, two different courts could consider identical factors in identical cases and yet come to opposite conclusions depending on the personal philosophies, experiences, or proclivities of the judges. A fully developed set of rules should not permit that outcome.

A starting point for guidance can be found in the foundational precepts of individual rights and the basic rationales for negligence law.⁵⁴ Thus, as a matter of proper perspective, individual autonomy and personal security should be at the foundation of all duty determinations.⁵⁵ These rights would not necessarily trump other factors. Courts would still be free to conform duty to public policy or to consider conflicts with other domains of law or institutional incompetence, but using these rights to inform the decision would provide an important baseline reference for duty determinations. In weighing the duty issue, those rights should not be lightly compromised. Thus, contravening public policy should be clear, conflicts with other domains of law or institutional incompetence should be substantial, and those factors should justify duty modification only where there is irreconcilable conflict and an articulable basis to justify trumping the presumptive tort duty.

A second baseline is provided by the twin negligence rationales of corrective justice and deterrence of socially dangerous behavior.⁵⁶ Tort law remedies an injustice caused by the defendant

the Third Restatement will result in a more coherent, understandable decision. Thus, in *J.S.* foreseeability should have played no role and the presumptive duty to exercise care and the *absence* of any public policy considerations to modify that duty were sufficient.

54. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 6 cmt. d (2010).

55. While individual autonomy applies equally to all actors, there is no conflict in subjugating an actor's autonomy to other individuals' rights to personal security since there is no right to engage in risky behavior that could harm others and such conduct violates basic public policy that one's activities be conducted in a socially reasonable way.

56. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 6 cmt. d (2010).

and provides an incentive to engage in safe conduct. The overall social welfare is improved and activities are forced to be conducted in a prudent manner—outcomes that are generally consistent with the goals of public policy. No-duty rules prevent these ameliorative effects and courts should avoid them only where there are clear and strong reasons to do so. In other words, unless the scales tip clearly in favor of no-duty, the presumptive rule should apply.

To be sure, applying these rules to duty determinations will not be decisive and courts will still have to use reason and logic, but adhering to these rules would clarify analysis. Furthermore, clearly articulated reasoning in “bright-line” decisions would reduce confusion, produce principled, replicable decisions, and, ultimately, improve the administration of justice.