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Symposium, Flying Trampolines and Falling Bookcases: Understanding the Third Restatement of Torts (Spring 2010)

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**SYMPOSIUM, FLYING TRAMPOLINES AND FALLING
BOOKCASES: UNDERSTANDING THE THIRD
RESTATEMENT OF TORTS (SPRING 2010)**

By Michael D. Green

Michael Green: On Monday, I was in my office. I had finished writing my exam for my students, and I started thinking about what I would say here and then putting together a PowerPoint presentation—which, if I know what I’m going to say, I usually find helpful. I don’t know if any of you read the New York Times, but yesterday, there was a front-page article trashing PowerPoint presentations.¹ So we have General James N. Mattis, and this is a quote, “PowerPoint makes us stupid.”² We have a Four-Star General declaring that PowerPoint is dangerous. In the same New York Times article, Brigadier General H.R. McMaster said that “some problems in the world are not bullet-izable.”³ So I thought about just throwing this presentation in the garbage, but then I wouldn’t know what to say. So I’m going to hold onto it and use it in my presentation.

For those of you who don’t know, I’ve snuck a little marketing into the first slide—a demon deacon into here. If you know Wake Forest University, this is our mascot, and the President of the University keeps me on retainer to promote the University.⁴

David⁵ really covered what’s going on in the Third Restatement,⁶ which a lot of people don’t understand largely

1. Elizabeth Bumiller, *We Have Met the Enemy and He Is PowerPoint*, N.Y. TIMES, Apr. 26, 2010, at A1, available at <http://www.nytimes.com/2010/04/27/world/27powerpoint.html>.

2. *Id.*

3. *Id.*

4. WAKE FOREST UNIVERSITY, <http://www.wfu.edu/athletics/deacon/> (last visited Jan. 25, 2011).

5. J. David Prince, Professor of Law, William Mitchell College of Law.

6. Referring generally to the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010). References to the “Third Restatement,” unless otherwise made clear, herein refer to the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010).

because it's different from the way prior restatements have been done. In the past, there was one person who would take on a subject and write the entire restatement. William Prosser, back in the 1950s and 1960s, did the Second Restatement of Torts.⁷ His predecessor was a Professor at the University of Pennsylvania School of Law named Francis Bohlen, who did the First Restatement.⁸ When the American Law Institute (ALI)⁹ began planning the Third Restatement, there was no one on the contemporary torts scene like those two titans who could do the comprehensive work that they did. That is why the Third Restatement is being done in discrete projects, as David said. The first one was Products Liability.¹⁰ That was completed and published in 1998. Apportionment of Liability was published in 2000.¹¹ And the third project is Liability for Physical and Emotional Harm that will comprise of two volumes.¹² One was just published in January.¹³ The second volume is waiting.¹⁴ And further projects are contemplated, as David said.¹⁵

Economic loss—these are commercial torts. These torts occur, for example, when businesses interfere with contractual relationships. Fraud also results in economic loss. The project to restate this area of tort law had made significant progress and then stalled when the reporter, Mark Gergen, resigned.¹⁶ The ALI is trying, and has been for a while, to find another reporter to do that project, which is sorely needed.¹⁷ And I expect we'll see a project

7. See Herbert Wechsler, *RESTATEMENT (SECOND) OF TORTS*, Introduction (1965). References to the "Second Restatement," unless otherwise made clear, herein refer to the Restatement (Second) of Torts (1965).

8. Referring to the Restatement (First) of Torts (1934).

9. "The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law." AMERICAN LAW INSTITUTE, <http://www.ali.org/> (last visited Jan. 14, 2011).

10. *RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB.* (1998).

11. *RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB.* (2000).

12. *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM* (2010); see also *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. 26, 2011).

13. *Current Projects: Restatement Third, Torts: Liability for Physical and Emotional Harm*, *supra* note 12.

14. *Id.*

15. J. David Prince, Professor of Law, William Mitchell College of Law.

16. *Update on ALI Tort Work*, THE ALI REPORTER, http://www.ali.org/_news/reporter/winter2008/10_ALI_Torts.htm (last visited Jan. 26, 2011).

17. In the time between the presentation and publication of these comments,

addressing damages in the future. The property torts—and today public nuisance is a very major issue—also need a keen mind to bring them up to date. There are a couple of courts that have preliminarily confronted the use of public nuisance to deal with global warming.¹⁸ So that is an area that needs attention, and it would not surprise me if we see a project on that—not just on nuisance, but on torts to land, including trespass—in the future. The impact of constitutionalizing speech that harms reputation—that is, defamation—still remains to be done, and I’m not sure this will be completed in my lifetime. The Third Restatement is a rolling process in which a project is identified based on input from members, potential reporters are contacted, and a prospectus for the project is prepared. The ALI likes to do torts projects—people are interested in torts, they understand torts. It is also the area in which the ALI has been most influential. Torts restatements are the most cited restatement works that the Institute has done.¹⁹ But for now, we’ll have to wait and see what the future holds for the Third Restatement.

I thought I would explain a little bit of the Physical and Emotional Harm Restatement—this project is about protecting interests in physical integrity and emotional tranquility. That is what it covers. We identified the interests being protected and then worked backwards. There are other ways of organizing tort law,²⁰ but this is the way restatements have done it for over seventy-five years, and this is as good an organizing principle as any other.

Professor Ward Farnsworth of the Boston University School of Law has been named as the Reporter for the Liability for Economic Loss portion of the Third Restatement of Torts. *Restatement Third, Torts: Economic Torts and Related Wrongs: Members*, AMERICAN LAW INSTITUTE, <http://www.ali.org/index.cfm?fuseaction=projects.members&projectid=15> (last visited Jan. 26, 2011).

18. *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh’g granted en banc*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010); *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 131 S.Ct. 813 (2010); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009).

19. Email from Aron Goldschneider, Case Citations Director, The American Law Institute, to Michael D. Green, Bess and Walter Williams Distinguished Chair and Professor of Law, Wake Forest University School of Law (Feb. 16, 2011, 15:13:34 EST) (on file with author).

20. For example, by the basis for liability—negligence, strict liability, and intentional torts.

In terms of the content of the Third Restatement, the first two chapters cover intent and negligence and provide definitions of those terms.²¹ Those definitions are enduring and not terribly different in the Third Restatement from prior versions. The Third Restatement also covers a few of the strict liability torts, specifically strict liability for abnormally dangerous activity and strict liability for animals.²²

Chapter 3 is probably the most significant chapter in the Physical and Emotional Harm Restatement; it deals with the legal issues that arise in negligence.²³ So the questions of *res ipsa loquitur* and the role of statutory violations are covered.²⁴ The emergency doctrine and the standard of care to which children and others with disabilities are all addressed.²⁵ This is the stuff of first-year torts.

Chapter 4 is about strict liability for abnormally dangerous activities and for animals.²⁶

Chapters 5 and 6 address what we teach in law school, at least, as factual cause and proximate cause.²⁷ More on that later.

Chapter 7 is about duties to intervene and to rescue.²⁸

Infliction of emotional harm, both negligent and intentional, is in Chapter 8.²⁹

And landowners' duties are contained in the last—well, not quite the last—chapter.³⁰

Chapters 1 through 9 have been approved. As David said, they are available on Westlaw and Lexis Nexis. Chapters 1 through 6 have been published in Volume 1. Except for the fact that it seemed a bit like show and tell in elementary school, I was going to display Volume 1, which I brought with me. I can safely tell you that it looks like a restatement. Chapters 6 through 9, along with

21. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 1, 3 (2010).

22. *Id.* §§ 20, 23.

23. *Id.* §§ 7–19.

24. *Id.* §§ 16, 17.

25. *Id.* §§ 9, 10.

26. *Id.* §§ 20–25.

27. *Id.* §§ 26–36.

28. *Id.* § 40 (Tentative Draft No. 5, 2010).

29. *Id.* §§ 45–47 (Tentative Draft No. 5, 2010).

30. *Id.* §§ 49–54 (Tentative Draft No. 6, 2009).

Chapter 10, which is being prepared by Ellen Pryor from SMU,³¹ will be published as Volume 2. And that's the reason there's a lag here. Ellen is in the process of preparing that additional chapter, Chapter 10. It deals with the liability of employers of independent contractors. So, this is the basic rule: no vicarious liability for employers of independent contractors, but there are a number of exceptions. And then there's also liability for employers of independent contractors for their own torts. So if I hire, as an independent contractor, someone to do a dangerous task, not paying attention to whether they're competent to do it, I may be liable for my own negligence in employing that independent contractor. All of this will be addressed in this Chapter 10.³²

So, these are the essential tort concepts in physical and emotional harm. I think if we pick out one linchpin in the Third Restatement, it is the idea of creating a risk—that is the first question I would ask in a tort case: Did the defendant create a risk? When you're driving a car, you create a risk. When you pilot an airplane, you create a risk. When you conduct underground excavations or manufacture a product, you create a risk. Indeed, walking across the street creates a little bit of a risk. I'm hard-pressed to identify any activity—or even non-activity—in which you might not create some risk to others. But the first inquiry is: Have you created a risk? If you have, then there is a presumptive duty. That's the point of creating a risk. Once you create a risk to others, tort law becomes concerned and expects some attention by the actor. Thus, there is a presumptive duty and it is the ordinary duty, the familiar duty, of reasonable care under the circumstances. That's contained in section 7.³³

There are exceptions to that ordinary duty of reasonable care contained in section 7(b).³⁴ The Second Restatement, although its connection with the Third Restatement has been much ignored, is quite similar. You see the language on the slide there from the

31. Ellen Smith Pryor, Associate Provost, Homer R Mitchell Professor of Law and University Distinguished Teaching Professor, SMU Dedman School of Law; *Current Projects: Restatement Third, Torts: Liability for Physical and Emotional Harm*, *supra* note 12.

32. Ellen Pryor, *Restatement (Third) of Torts: Coordination and Continuation*, 44 WAKE FOREST L. REV. 1383, 1391 (2009).

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

34. *Id.* § 7(b).

Second Restatement.³⁵ In general, anyone who does an affirmative act is under a duty to others to exercise reasonable care. That's basically what section 7(a) of the Third Restatement says.³⁶ There's an important caveat. There's a hook in section 7 providing for exceptions, contained in section 7(b). It says that in exceptional cases, for reasons of principle or policy, a court may adopt a no-duty or limited-duty rule.³⁷ So it's not quite a universal duty of reasonable care when creating a risk.

For example, the issue of social host liability has been, for the most part, not adopted to impose an obligation of the host to exercise reasonable care on behalf of guests who imbibe.³⁸ It just seems to upset too much of the social interaction, conviviality, and lubrication that we think important to us, and we're concerned about affecting this ordinary and common behavior. That seems to be the reason for courts to decline to impose a duty on social hosts. And on the few occasions when they have imposed a duty, legislatures have often stepped in and overturned those decisions.³⁹ So a court would be free under the Third Restatement to say social host liability upsets too much of ordinary social behavior. We are not going to adopt a duty of reasonable care when it comes to social hosts—that is the import of section 7(b).⁴⁰

35. 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 . . .”).

36. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(a) (“An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”).

37. *Id.* § 7(b) (“In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.”).

38. Diane Schmauder Kane, Annotation, *Social Host’s Liability for Death or Injuries Incurred by Person to Whom Alcohol Was Served*, 54 A.L.R. 5th 313 (1997) (“For the most part, the courts have been in agreement that a social host cannot be held liable for the injury or death of an adult guest to whom intoxicating beverages were furnished under either a common-law negligence theory or an averment that the host’s act of serving the adult guest constituted wanton and reckless misconduct.”).

39. See MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, *TORT LAW AND ALTERNATIVES* 187 (8th ed. 2006).

40. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) (2010) (allowing the modification of ordinary duty of reasonable care if a “countervailing principle or policy” warrants it).

Suppose that the defendant did not create a risk; remember, I said the central matter here is creation of risk. Well, Chapter 7 begins with the proposition that there is no duty to rescue.⁴¹ That is familiar enough; there is no duty to rescue if you don't create a risk. And then there are exceptions to that principle of no duty to rescue contained in Chapter 7.⁴² The primary ones are special relationships—and I'll mention a little bit more about that later.

The role of foreseeability in duty determinations is probably the most controversial provision in this Third Restatement, I think.⁴³ The Third Restatement forcefully asserts that when courts analyze duty, they should do it on a categorical basis.⁴⁴ Courts are making law when they issue no-duty or duty rulings. This is a matter of law, and it lays down precedent for future cases. The existence of duty should not be based on the specific facts of the case. Specific facts of the case are for the jury to decide, not for the court. Of course, courts are always free—as they have been since the Supreme Court of the Garden of Eden—to declare that the facts are such that no reasonable jury could find otherwise. That's not a no-duty ruling; that is a ruling that, as a matter of law, there is no negligence because no reasonable jury could find otherwise. The Third Restatement goes to some pains to distinguish those two devices—no duty and no negligence, no breach as a matter of law.

What the Third Restatement says is that foreseeability is always context-specific and cannot be formulated on a categorical basis. To put it another way, consider the challenge I put to my students: Give me a category; a category that might be subject to a no-duty ruling. And if I cannot construct facts within that category that both create low-risk situations and high-risk situations, if I cannot do that for any category you identify, I'll buy you a free lunch. So far I have not paid off, although one student came to me two years ago with a category that had me concerned. "Blackwater," she said,

41. *Id.* § 37 (Proposed Final Draft No. 1, 2005) ("An actor whose conduct has not created a risk of physical harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ 38–44 is applicable."); RESTATEMENT (THIRD) OF TORTS § 37 cmt. e (2010) (Proposed Final Draft No. 1, 2005) (discussing the rationale for the no duty to rescue rule).

42. *Id.* §§ 38–44 (Proposed Final Draft No. 1, 2005).

43. *Id.* § 7 cmt. j.

44. *Id.* ("The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases. . . . Thus, for reasons explained in Comment *i*, courts should leave such determinations to juries unless no reasonable person could differ on the matter.").

“the company that provided private security for government officials in Iraq. Okay, Professor Green, how about the sort of private security provided in war zones by companies like Blackwater?” The Blackwater operations were her challenge, leaving me to construct hypotheticals with a high and low degree of risk within that category. And, of course, the difficulty there was coming up with a factual scenario that was low risk. That was a challenge. I finally scrambled to safety and avoided having to concede my student had won. I said, “Okay. Blackwater has a training facility in the mountains of North Carolina. And they need to equip the facility, and to do so they are buying mattresses to supply the training facility.” I said, “I don’t see much risk in buying mattresses for a training facility.” With that response, I managed to preserve my record of never having to pay off a free lunch on that challenge.

Many courts rely on foreseeability for duty purposes. They like the flexibility it gives them to rule dispositively in a case. But the Restatement position on this is that using foreseeability just obscures what is truly going on. If a court is going to rule that there is no duty here, explain the basis for it. Give us the reason. Remember section 7(b); we need alcohol in social relations without liability.⁴⁵ But don’t use foreseeability to do it. Recently, there was one courageous court, I can say, that was willing to sacrifice and give up the security blanket of foreseeability. That was the Iowa Supreme Court last November in *Thompson v. Kaczinski*,⁴⁶ in which Justice Daryl Hecht said, in effect: “Yes, we’re going to break our addiction to foreseeability. We’re not going to use it in the future for duty purposes. We have kicked the habit.”⁴⁷ We’ll have to see how many courts are able to do that in the future.⁴⁸

45. *Id.* § 7 cmt. a (discussing how courts sometimes modify the ordinary duty of reasonable care in circumstances where a social host serves alcohol and his or her guests subsequently drive).

46. 774 N.W.2d 829 (Iowa 2009); *see also* *Gipson v. Kasey*, 150 P.3d 228 (Ariz. 2007) (citing positively to and adopting the Third Restatement’s approach to duty determination by eliminating a foreseeability inquiry); *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568 (Wis. 2009) (same). *But see* *Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009) (declining to adopt any sections of the Third Restatement).

47. *Thompson*, 774 N.W.2d at 835–36.

48. Since the time of this conference, the Nebraska Supreme Court also decided to banish considerations of foreseeability in determining duty. The court emphasized that foreseeability remained important in a tort case, but for purposes of breach rather than duty. *See A.W. v. Lancaster County Sch. Dist.* 0001, 784

I should add that there is a wonderful article that was written by a student here at William Mitchell about this issue in the context of a recent Minnesota Supreme Court decision. Maija Varda wrote on *Foss v. Kincade*,⁴⁹ and she did a magnificent job of critiquing the court's decision.⁵⁰

One of the things that the Third Restatement does is to separate factual cause from proximate cause. Section 29 explains the rationale for this cleavage.⁵¹ Often in a case, only one or the other is at issue. Why should we combine them and have to deal with both when only one is at issue? This separation enables us to focus on what is truly at issue. It then enables clear and more focused analysis of the one issue that is at stake. And finally, it seeks to avoid use of the word "cause" for purposes of dealing with what is known as "proximate cause."⁵² The Third Restatement adopts new language, employing "scope of liability" to replace proximate cause.⁵³ Scope of liability is what proximate cause is really about. This issue arises when the defendant has been negligent, the defendant's negligence has caused harm, but nevertheless we are not going to subject the defendant to liability because liability simply can't extend forever.

So scope of liability seems like a more accurate term to use than proximate cause. Proximate cause confuses juries. There was a study conducted about what juries hear and understand when they're told about proximate cause, and many jurors thought it was about an approximate cause.⁵⁴ Well, that doesn't really quite do it to inform the jury of the task at hand. It is not about proximity, it is not about cause, it is about where we're going to say "This is the line we're going to draw on the extent of liability and beyond that we will not hold a defendant liable." We'll see whether the scope of

N.W.2d 907 (Neb. 2010).

49. 766 N.W.2d 317 (Minn. 2009).

50. Maija Liisa Varda, Note, *Torts: Childproofing the Gate to Landowner Liability: How Judges Misuse the Concept of Foreseeability to Keep Cases from the Jury—Foss ex rel. Foss v. Kincade*, 36 WM. MITCHELL L. REV. 354 (2009).

51. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. b (2010).

52. *Id.*

53. *Id.* § 6.

54. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1353 (1979) ("[T]he term 'proximate cause' was misunderstood by 23% of the subjects in Experiment I. They interpreted it as 'approximate cause,' 'estimated cause,' or some fabrication.").

liability language is attractive to courts and gets adopted or not.⁵⁵ Factual causation is straightforward. Section 26 adopts a “but-for” standard.⁵⁶ There’s really no way to do factual cause without that concept. We’ve been dazed and confused with the substantial factor test for way too long.⁵⁷

Section 27 addresses multiple sufficient causes.⁵⁸ Remember in your law school torts class, your professor used the hypothetical of two negligently and independently started fires. They join together, and they burn down plaintiff’s house. Did D1 cause the destruction of the house? Well, no, because it would have happened to the house anyway due to D2’s fire. Did D2 cause the destruction of the house? Well, no, because it would have happened anyway due to D1’s fire. So we’re left with the conclusion that nobody caused the destruction of the house even though there is a pile of ashes there. And, of course, this is the classic situation where both fires were of tortious origin. It makes no sense, we might say, that because of the other tortious conduct, the complementary tort is not a cause. Section 27 addresses this issue.⁵⁹ This issue was actually the primary purpose of the substantial-factor standard in the Second Restatement,⁶⁰ and the Third Restatement reaches the same result but does it without employing substantial-factor terminology.⁶¹ Likewise, substantial factor is rejected for use either in section 26 on factual cause, or in

55. One should be modest in their expectations about the Institute’s ability to change usage. The first two restatements of torts used “legal cause” to encompass both factual cause and proximate cause. As the Third Restatement reports, the effort to embed legal cause in torts terminology failed. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM ch. 6 (2010). Yet, despite having just been published (although the approved final draft had been around for several years), the scope of liability language has already been explicitly adopted by one state supreme court, for its application see *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009), and employed by several others. See, e.g., *Reiswerg v. Statom*, 926 N.E.2d 26 (Ind. 2010); *Leavitt v. Brockton Hosp., Inc.*, 907 N.E.2d 213 (Mass. 2009).

56. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 (2010).

57. See Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 972–78 (2001).

58. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM. § 27 (2010).

59. *Id.*

60. RESTATEMENT (SECOND) OF TORTS § 432(2) & cmt. d (1965).

61. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM. § 27 (2010).

section 29 on scope of liability.⁶² The test for scope of liability is not whether the defendant's conduct was a substantial factor in causing the harm. So we see substantial factor relegated to the dustbin of history.

I acknowledge that substantial factor is often used and quite popular. I see Minnesota cases in which substantial factor is used for cause in fact, as it was in a 2008 case.⁶³ But two years earlier, in 2006, in *Lietz v. Northern States Power Co.*,⁶⁴ it was used to mean scope of liability. That confuses me, and, when I am confused, I am unhappy. I like to have neat categories and boxes that deal with the elements of a tort case. When they start leaking between each other, that upsets my brain. Doing away with substantial factor and, I might add, proximate cause, should increase happiness among those who, like me, prefer conceptual clarity.

I think I said that foreseeability as an aspect of duty was the most controversial issue in the Third Restatement. I now think that is wrong. I think it was actually section 28, comment c⁶⁵ that was the most controversial. I know one of our panelists here would agree with me, right Hildy?⁶⁶ This comment was difficult to do. It was very controversial. Fortunately, we got help in the process of doing this; a member of the ALI said, "You know, maybe we should ask some scientists, because this, after all, is about scientific proof. Neither Green nor Bill Powers [my co-reporter at the time] are scientists. And the members of the ALI are lawyers, not scientists." So we had a wonderful day at the National Academy of Sciences. They brought in a variety of scientists—toxicologists, epidemiologists, and a doctor, I think. We went through the draft comment c and listened to their comments, criticisms, and suggestions. It was a very enlightening and helpful session. This is probably the longest comment that the ALI ever placed in a restatement. It attempts to provide a framework for proving causation in cases that involve toxic substances, and you see on the slide above the five subsections that are contained in this

62. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 26 cmt. j, 29 cmt. a (2010).

63. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 375–76 (Minn. 2008).

64. 718 N.W.2d 865, 872 (Minn. 2006).

65. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 cmt. c (2010).

66. Hildy Bowbeer, *Flying Trampolines and Falling Bookcases: Understanding the Third Restatement of Torts (Spring 2010)*, 37 WM. MITCHELL L. REV. 1034 (2011).

comment.⁶⁷ Also, in the reporters' notes, we try to cite the major cases that have been influential in this area.⁶⁸ There is no provision on toxic substance causation in the Second Restatement.⁶⁹ This is really a product of an area of torts that has developed in the years since the Second Restatement was published.

Let me address the intersection of toxic substance causation and the multiple sufficient causes that we discussed earlier. Consider this hypothetical: There is a car parked on the edge of a parking lot on the top of a cliff. It's a lookout point. And three people lean on the parked car. The force of the three people starts the car rolling and it goes over the cliff. The pressure from any two of those persons would have been enough to send the car over the cliff. One person's force, however, would not. So, it takes two. Is each or any of those three persons a cause of the car's destruction? C says "it was A and B, not me." B says, "no, it's A and C." And A says B and C. You can see this is an expansion of the two fires hypothetical. This is with three tortious actors. This issue exists to a large extent today in asbestos litigation, although it is rarely recognized as such. It exists in asbestos litigation because employees over a lifetime are exposed to more asbestos than the threshold required for contracting asbestotic disease. Thus, what we're seeing is litigation over whether exposure to a little bit of a given defendant's asbestos was a "substantial factor" in the plaintiff's asbestotic disease. So there are these cases around the country where somebody worked with defendant's asbestos for three days out of thirty years.

Section 29, which deals with scope of liability,⁷⁰ says that if there is minimal contribution in this multiple sufficient cause situation—if we have one person contributing one-hundred percent of the force required to push the car over the cliff, and another person contributes one percent—well, it's overdetermined. We could take the small contribution and say we're not going to impose liability here. And section 29 does that—when the contribution to an overdetermined causal situation is trivial, section 29 says that defendant's conduct is not within the

67. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 cmt. c (2010).

68. *Id.* § 28 cmt. c reporters' note.

69. Referring generally to the Restatement (Second) of Torts (1965).

70. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (2010).

scope of liability.⁷¹ In the Second Restatement that was another use of substantial factor, and the Third Restatement reaches the same result, but does it as a matter of scope of liability rather than as a matter of causation and substantial factor.⁷²

There are some new special relationships in the affirmative duties. You probably recall the psychotherapist in *Tarasoff v. Regents of the University of California*,⁷³ which has become a classic torts case. The *Tarasoff* case occurred after the Second Restatement and was widely followed by many other state supreme courts. The Second Restatement says nothing about psychotherapists, patients, or a duty to third persons when the patient reveals that he or she has violent tendencies that threaten that third person.⁷⁴ The modernizing of the restatement to reflect this development is contained in Chapter 7.⁷⁵

Schools and students have emerged in the last forty years as another relationship imposing an affirmative duty on schools with regard to their students' safety. Sometimes it is as property owners when they are renting dormitory space to students. Sometimes it's simply as students. But the student-school relationship is recognized in Chapter 7 as justifying an affirmative duty.⁷⁶

Finally, in this Chapter there is an open-ended comment⁷⁷ that might accommodate a case like, and I don't know how to pronounce the plaintiff's name. Do you have any better idea? Bjerke?? Scandinavian I am not, so I always have trouble pronouncing such names. But *Bjerke v. Johnson*⁷⁸ is a case in which a woman agreed to have an adolescent live with her, agreed to look after this adolescent, and told the parents that she would act as a surrogate parent.⁷⁹ In this case, the Minnesota Supreme Court recognized an affirmative duty on the part of the surrogate parent.⁸⁰ The suit arose because the adolescent then ended up in a

71. *Id.*

72. Compare RESTATEMENT (SECOND) OF TORTS § 432(2) cmt. d (1965), with RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (2010).

73. 551 P.2d 334 (Cal. 1976).

74. See generally RESTATEMENT (SECOND) OF TORTS (1965).

75. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 (2010).

76. *Id.*

77. *Id.* at cmt. o.

78. 742 N.W.2d 669 (Minn. 2007).

79. *Id.* at 664–65.

80. *Id.* at 667.

sexual relationship (with the boyfriend of the surrogate parent) that was plainly inappropriate, and the question was whether the surrogate parent had a duty to protect her charge in that situation.⁸¹

So there are a couple of open-ended comments that say maybe relationships such as this might be the basis for future recognition of special relationships imposing a duty of care.⁸² Maybe in the Fourth Restatement of Torts, we will see coalescence over some family relationships resulting in a duty of reasonable care to protect another family member.

Let me stop at this point. We can talk about negligent and intentional infliction of emotional distress during the question and answer period if there are audience members who would like to do that. What I want to avoid is the fate of the speaker who continued on well past the allocated time, droning beyond any reasonable period. And then as he quit, he apologized and said, "I'm sorry, but I can't see the clock on the back of the wall." At which point a disgruntled member of the audience said, "Yes, but can't you see the calendar?"

Thank you very much. I look forward to listening to other speakers during the remainder of the program.

81. *Id.* at 665.

82. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 cmt. o (2010).

**SYMPOSIUM, FLYING TRAMPOLINES AND FALLING
BOOKCASES: UNDERSTANDING THE THIRD
RESTATEMENT OF TORTS (SPRING 2010)**

By Justice Daryl Hecht

David Prince¹: Our next speaker is Justice Daryl Hecht from the Iowa Supreme Court, another Iowa influence. Justice Hecht is a native of northwestern Iowa. He got his undergraduate degree from Morningside College in Sioux City and his law degree from the University of South Dakota, and practiced law in my home town, Sioux City, for over twenty years before he was appointed to the Iowa Court of Appeals in 1999,² and has been on the supreme court since 2006.³ One of the things that always impresses me is people who make the commitment in their hearts and minds and then take the time to go back to school and pursue a degree when they're well into their professional career. And Justice Hecht also has an LL.M.⁴ from the University of Virginia that he received about five or six years ago.

Justice Hecht is the author of the Iowa Supreme Court's opinion in *Thompson v. Kaczinski*,⁵ a case that Mike Green mentioned,⁶ in which that court adopted the position taken in section 7 of the Third Restatement of Torts⁷ to leave foreseeability

1. J. David Prince, Professor of Law, William Mitchell College of Law.

2. See SUPREME COURT, http://www.iowacourtsonline.org/Supreme_Court/Justices/Daryl_L_Hecht/ (last visited Feb. 3, 2011).

3. *Id.*

4. An LL.M. is an abbreviation for a Master of Laws Degree. BLACK'S LAW DICTIONARY 434 (3rd pocket ed. 2006). A Master of Laws Degree is a "degree conferred on those completing graduate-level legal study, beyond the J.D. or LL.B." *Id.* at 450.

5. 774 N.W.2d 829 (Iowa 2009).

6. See Michael D. Green, *Flying Trampolines and Falling Bookcases: Understanding the Third Restatement of Torts (Spring 2010)*, 37 WM. MITCHELL L. REV. 1011 (2011).

7. The Restatement says:

(a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.

(b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a

as a consideration in determining the duty question.⁸

Judge, again, thank you so much for taking a day to come up and join us; I'll be very interested to hear your perspectives on these issues.

Justice Hecht: Thank you David for that kind introduction. It's actually a great pleasure for me to be here this morning. The work of an appellate judge tends to be rather solitary, and unlike professors who get to come to class and have regular interchanges with students or lawyers who constantly have interactions with clients and other lawyers and judges, appellate judges can spend most of their time reading and writing, largely by themselves. And so it's really fun for me to get out from time to time and have interactions with folks in this kind of setting.

I commend the law school for sponsoring this interesting symposium on the Third Restatement. It's my view that the Restatement (Third) on Physical and Emotional Harm⁹ represents an outstanding piece of scholarship and I hope that you will find our discussion today informative and useful. As the case of *Thompson v. Kaczinski*¹⁰ is the main reason Professor Prince invited me to speak here today, I'll turn immediately to a discussion of the case.

Pastor Thompson was driving to church one Sunday morning about 9:30 and as he crested a hill on a gravel road, he noticed and swerved to avoid a large object on the roadway.¹¹ He lost control of

court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 (2010). References to the "Third Restatement," unless otherwise made clear, herein refer to the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010).

8. See *Thompson*, 774 N.W.2d at 835. The Third Restatement omits foreseeability when discussing the duty analysis:

(a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.

(b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

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

9. See generally RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (2010).

10. 774 N.W.2d 829 (Iowa 2009).

11. *Id.* at 831.

the vehicle he was driving.¹² The car veered into the ditch, and Thompson was badly injured.¹³ The object on the roadway was, in fact, the top of a trampoline owned by James Kaczinski and Michelle Lockwood, whose residential property abutted the gravel road and sat right at the top of this hill.¹⁴

Discovery responses in the case revealed that Kaczinski and Lockwood had disassembled their trampoline and placed its component parts on their yard, approximately forty feet from the road just a few weeks before the crash.¹⁵ On the evening before Pastor Thompson came by, a rain storm with relatively high winds blew through the area and displaced the top of the trampoline from the yard to the surface of the road.¹⁶ The following morning, Kaczinski and Lockwood were awakened by Pastor Thompson's screams for help.¹⁷

Pastor Thompson and his wife then sued Kaczinski and Lockwood alleging that the defendants' breach of statutory and common law duties caused severe physical injury to Pastor Thompson resulting in loss of consortium to his wife.¹⁸ The statutory duty alleged by the plaintiffs was based on an Iowa statute, section 318.3, which provides "a person shall not place or cause to be placed an obstruction within any highway right-of-way" or an impediment or hindrance which impedes, opposes, or interferes with free passage along the highway right-of-way.¹⁹

The defendants filed an answer, of course, denying negligence and soon thereafter filed a motion for summary judgment.²⁰ In their motion, the defendants asserted that they owed no duty to the plaintiffs, because the wind's displacement of the top of the trampoline to the surface of the roadway was not foreseeable.²¹

I'll now refer briefly to the district court's summary judgment ruling. The court concluded that the defendants owed neither a statutory nor a common law duty to the plaintiffs under the circumstances.²² First, the court reasoned that the statute only

12. *Id.*

13. *Id.* at 832.

14. *Id.* at 831.

15. *Id.*

16. *Id.*

17. *Id.* at 832.

18. *Id.*

19. IOWA CODE § 318.3 (2010).

20. *Thompson*, 774 N.W.2d at 832.

21. *Id.*

22. *Id.*

proscribes the intentional placement of obstructions on the roadway, and as the defendants didn't intend to put their trampoline on the top of the roadway, the court believed no duty arose under the statute.²³ Second, the court concluded that the defendants owed no common law duty because the wind's displacement of the trampoline to the roadway was not foreseeable.²⁴ And although the defendants didn't claim entitlement to summary judgment on the ground of causation, the district court's summary judgment ruling nonetheless resolved that issue as a matter of law against the plaintiffs on the same foreseeability ground.²⁵

So the plaintiffs brought their appeal and we—the supreme court—transferred the case, as we do most of the cases appealed to the Iowa Supreme Court, to the court of appeals for a decision.²⁶ The court of appeals affirmed and we then granted the plaintiffs' application for further review.²⁷

In our decision that was filed on November 13 of last year, we addressed three issues. First, relative to the statutory duty question, did the district court err in concluding the defendants owed no duty under the statute?²⁸ Second, did the district court err in concluding that the defendants owed Pastor Thompson no common law duty of reasonable care under circumstances?²⁹ And finally, the third issue, did the district court err in resolving the causation question as a matter of law at the summary judgment stage?³⁰ I'll discuss briefly each of those issues and our court's resolution.

First, with the respect to the statutory duty, we interpreted the statute as a prohibition of only intentional placement of obstructions along roadways.³¹ And I realize our analysis of that issue really isn't germane to the discussion here this morning, so I'll simply note that we concluded the statutory framework which authorized criminal sanctions for the placement of obstructions signaled the legislation's intention that only intentional conduct

23. *Id.*

24. *Id.* at 835.

25. *Id.* at 836.

26. *Id.* at 832.

27. *Id.*

28. *Id.* at 832–34.

29. *Id.* at 834–36.

30. *Id.* at 836–40.

31. *Id.* at 832.

was proscribed by the statute.³² And so we affirmed the district court's ruling that the statutory basis for the claimed duty did not exist.³³

Next, with respect to the common law duty question, we first noted that our prior decisions had included the concept of foreseeability as an important feature of the common law duty analysis.³⁴ We quickly turned our attention, however, to the proposed final draft, number 1, section 7(a) of the Third Restatement.³⁵ This section, as Professor Green has already indicated,³⁶ at least from my analysis, establishes what I describe as a default position for the analysis of common law duty in negligence cases alleging physical injury.³⁷ The default position is that "an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."³⁸ On this default position, courts need not concern themselves with the existence or content of this ordinary duty in most cases involving physical harm.³⁹

This general duty of reasonable care is displaced or modified, as has already been noted, under the Third Restatement formulation only in exceptional cases. An exceptional case, according to the drafters, is one in which "an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases."⁴⁰ When a court wishes to limit liability for conduct based on principle or policy, it can do so in the duty analysis, and duty is usefully employed if a court seeks to make a general pronouncement about when actors may, or on the other hand, may not be liable.⁴¹ Most importantly, in my view, the drafters noted that reasons of policy and principles justifying a departure from the general duty to exercise reasonable care do not depend on the foreseeability of harm, based on the specific facts of

32. *Id.* at 833–34.

33. *Id.* at 834.

34. *See id.*

35. *Id.* at 834; RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(a) (Proposed Final Draft No. 1, 2005).

36. *See supra* note 33 and accompanying text; Green, *supra* note 6.

37. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(a) (Proposed Final Draft No. 1, 2005).

38. *Id.*

39. *See id.*

40. *Id.* § 7(b).

41. *See id.* § 7 cmt. a.

a case.⁴² Simply put, when departing from the general duty because of a principle or policy, the drafters caution courts against using foreseeability as an analytical criterion.⁴³

So in *Thompson v. Kaczinski*, the Iowa Supreme Court concluded that the *Thompson* case didn't fall within a particular class of cases for which a countervailing principle or policy warranted denying or limiting the landowner's duty to exercise reasonable care.⁴⁴ I emphasize at this juncture that our court's decision in *Thompson*, reversing the district court's conclusion that the landowners owed no common law duty because the hazard was not foreseeable,⁴⁵ should not be viewed as a determination that the significance of foreseeability has been diminished in the determination of tort liability for physical injuries in Iowa. Foreseeability, of course, remains a crucial element in the analysis of whether the general duty has been breached,⁴⁶ and in the determination of whether the harm claimed by the plaintiff is within the scope of liability.⁴⁷

I'll now turn to the third issue in the *Thompson* case, which involves the scope of liability. As I noted earlier, the district court concluded in its summary judgment ruling that the defendants were entitled to summary judgment under the then-prevailing principles of proximate cause,⁴⁸ concluding that the displacement of the trampoline from the yard to the roadway was not foreseeable.⁴⁹ The court concluded that any breach of duty on the part of the landowners wasn't the legal cause of the passenger's injuries.⁵⁰ And that, of course, as I suggested, was consistent with the proximate cause analysis in our earlier cases.⁵¹

But our court, the Iowa Supreme Court, took issue with the district court's conclusion on causation as well. We began our discussion of the causation question by reviewing the Iowa precedent, which was based on Restatement (Second) of Torts

42. *Id.* § 7 cmt. j.

43. *Id.*

44. 774 N.W.2d 829, 835 (Iowa 2009).

45. *Id.* at 836.

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

47. See *id.* § 29 cmt. d.

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

49. *Id.*

50. *Id.*

51. See *supra* note 34 and accompanying text.

(Second Restatement), section 431.⁵² You'll recall that the standard stated in section 431 and related sections, established that legal causation requires a determination of (1) whether the defendant's conduct was a substantial factor in bringing about the harm, and (2) whether there's a rule of law relieving the defendant from liability.⁵³ In our discussion of *Thompson*, we noted that the Second Restatement framework for analysis of legal causation has been criticized because it blends factual determinations—that is, whether the defendant's conduct was a substantial factor in bringing about the harm—with policy judgments—that is, whether there's a rule of law precluding liability.⁵⁴

The Iowa Supreme Court's opinion in *Thompson* acknowledged that the court's prior decisions in this area had applied the legal causation framework quite unevenly in the past as part of the proximate cause analysis.⁵⁵ Attributing this inconsistency of our proximate cause analysis to the confusing nature of the standard rather than to a lack of mental acuity of the justices, we looked to the Third Restatement in an effort to clarify this area of Iowa law. In our opinion in *Thompson*, we jettisoned the confusing vernacular of proximate cause and adopted the Restatement's formulation of scope of liability.⁵⁶ On this formulation, the concept of factual causation is separated from the policy consideration of whether the law should attach legal liability to a particular act or omission. Under the Third Restatement scope of liability formulation, an actor's liability is, as has already been noted, limited to those physical harms that result from the risks that made the actor's conduct tortious.⁵⁷ This principle, referred to as the risk standard, is intended to prevent the unjustified imposition of liability by confining liability's scope to the reasons for holding the actor liable in the first place.⁵⁸

52. *Thompson*, 774 N.W.2d at 836–37.

53. RESTATEMENT (SECOND) OF TORTS § 431 (1965); *accord* *Kelly v. Sinclair Oil Corp.*, 476 N.W.2d 341, 349 (Iowa 1991).

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

55. *Id.*

56. *See id.* at 837–39.

57. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (2010).

58. *Id.* § 29 cmt. d.

The Third Restatement drafters make it clear that scope of liability is to be treated as a question of fact for the fact-finder, and this has already been mentioned.⁵⁹ When the limits of liability imposed require careful attention to the specific facts of the case and difficult, often amorphous, evaluative judgments for which a modest difference in the factual circumstances may change the outcome, the scope of liability is a more flexible and preferable device than duty for placing limits on liability. And that, I think, is a very, very sound analysis and one of the primary reasons why our court was convinced to make this change.

The scope of liability issue is fact-intensive, as it requires consideration of the risks that made the actor's conduct tortious and a determination of whether the harm at issue is a result of any of those risks.⁶⁰ When a defendant challenges the plaintiff's claim on scope of liability grounds before trial, the court must initially consider all of the range of harms risked by the defendant's conduct that the jury could find as a basis for determining the defendant's conduct tortious. The court then must compare the plaintiff's harm with the range of harm risked by the defendant's conduct to determine whether a reasonable jury might find the plaintiff's harm was within that range.⁶¹

In *Thompson*, the Iowa Supreme Court concluded at the summary judgment stage that a reasonable juror could find the harm suffered by Pastor Thompson was within the range of harms risked by the defendant's conduct in leaving the disassembled and untethered components of the trampoline on the yard near the roadway.⁶² Put another way, the court concluded a reasonable fact-finder could find it was reasonably foreseeable that a top of a disassembled, untethered trampoline might become airborne like a frisbee in the wind and be deposited on the surface of the nearby road, causing a hazard for motorists.

It was, therefore, the function of the jury to determine whether the harm was within the defendants' scope of liability. We, therefore, reversed the district court's summary judgment ruling and remanded to the district court for further proceedings.⁶³ It remains, of course, to be seen if the *Thompson* case is tried, whether

59. *Id.*

60. *See id.*

61. *Id.*

62. *See Thompson v. Kaczinski*, 774 N.W.2d 829, 839 (Iowa 2009).

63. *Id.* at 840.

the fact-finder will (1) find a breach of the general duty of care, and (2) find that the plaintiffs' harm was within the range of harms risked by the defendants' conduct.

In my view, the Restatement (Third) formulations of duty and scope of liability will make analysis of tort law easier for courts, attorneys, and jurors. Now there is really no need to complicate the duty analysis with foreseeability, as that concept is more than adequately covered in the analysis of breach and scope of liability. And the retention of the concept of foreseeability in those two determinations, the breach and scope of liability endeavors, preserves for the court sufficient flexibility to resolve cases which can be resolved as a matter of law because there is no legitimate fact question for resolution by the fact-finder.

There will be an adjustment period for Iowa trial courts and attorneys as they develop the pattern jury instructions to comport with the principles announced in the Third Restatement and adopted in our *Thompson* decision. And I'm sure there will be a period of frustration as lawyers get used to this new formulation. But I think once we're passed that period of adjustment, Iowa courts and attorneys will agree that the Third Restatement formulation of duty and scope of liability will make life easier.

Thank you. It's been a pleasure to be here.

**SYMPOSIUM, FLYING TRAMPOLINES AND FALLING
BOOKCASES: UNDERSTANDING THE THIRD
RESTATEMENT OF TORTS (SPRING 2010)**

By Justice Paul H. Anderson

Justice Anderson: Thank you, David,¹ for that nice introduction. It is a pleasure to be here with you at William Mitchell Law School this morning for your symposium on the Restatement of Torts. I regret that I was unable to be here for the first part of the symposium, but our court held Special Term this morning. Like so many things these days, the issues before us were complicated, so it took longer than I expected. Unfortunately, I did not have a chance to hear Mike Steenson's² comments on our court's jurisprudence in the area of product liability, tort law, and in particular, on falling bookcases. Thus, I feel a little bit behind the eight-ball because I have not had the complete context of previous speakers' remarks.

Because of this circumstance, my presentation will not be overly case-specific. Rather, I hope to give you some insight into how judges look at the Restatement of Torts. Here, of course, I will be talking about the Third Restatement³ because in most instances, it is the most recent Restatement. But there will be some crossover between the Third Restatement and the Second Restatement⁴ because the Third Restatement is a work in progress.⁵ It is a work in progress that has been going on for almost two decades.⁶

1. J. David Prince, Professor of Law, William Mitchell College of Law.

2. Michael K. Steenson, Professor of Law, Kelly Chair in Tort Law, William Mitchell College of Law.

3. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (2010).

4. RESTATEMENT (SECOND) OF TORTS (1965).

5. *Current Projects—Restatement Third, Torts: Liability for Physical and Emotional Harm*, THE AMERICAN LAW INSTITUTE, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=16 (last visited Feb. 3, 2011) (“The second volume, dealing with affirmative duties, emotional harm, landowner liability, and liability of actors who retain independent contractors, is expected to be published in late 2011.”).

6. See THE AMERICAN LAW INSTITUTE, PAST AND PRESENT ALI PROJECTS 1

The questions I have been asked to address are—how do judges look at the Restatement? Do we find it useful, or is it, at worst, mostly irrelevant, or at best, of marginal assistance to us? To begin with, we as appellate judges must always first look to our own law as precedent. We are bound by our precedent and must treat any deviation from our precedent quite gingerly. As a state court, we also look to the United States Supreme Court's precedent. We look to the Supreme Court precedent on matters that fall under the U.S. Constitution because that Court has the final say under the Federal Constitution. But lawyers should be aware that in Minnesota, like all other states, we have our own constitution, so we will go to our own state constitution when we deem it necessary and appropriate to do so.

There are occasions when, after looking at what the U.S. Supreme Court has said, we conclude that we will not follow that Court but rather look to our own constitution and our own case law. For more specific information on when we will look to our own constitution, I refer you to a recent law review article that I co-authored with St. Thomas Law School Professor Julie Oseid.⁷ The article is called, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*. The article appears in Volume 70 of the *Albany Law Review* at page 865, and was published in 2007.⁸

In the *Albany Law Review* article, I note that the Supreme Court sometimes changes its own jurisprudence.⁹ The question then arises, how do we as a state supreme court deal with such changes? A few years ago, this topic came up at a seminar where a prominent federal circuit court judge told those of us on state supreme courts that we must learn to adjust to the current change in Supreme Court precedent. In essence, the judge said—live with it. He said the reality of the current legal/judicial landscape is that the Supreme Court has changed, and we need to follow its lead. At this point, I raised my hand in response to these comments and

(2010) available at http://www.ali.org/doc/past_present_ALIprojects.pdf (listing the date range for the Products Liability portions of the Third Restatement of Torts as "1991–1998").

7. Julie Oseid, Associate Professor, University of St. Thomas School of Law.

8. Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865 (2007).

9. *Id.* at 866.

essentially said the following,

Your honor, I am from Minnesota, and we have a slightly different perspective in our state. Many of you do not know where Minnesota is—we are that state you fly over as you go from coast to coast. We are tucked into the north central part of the United States. Many of you think we are Canadians—almost, but not quite.

I then went on to give the following illustration on how we, in Minnesota, sometimes view changes in Supreme Court precedent.

Elmer and Ethel are a retired farm couple living in west central Minnesota. They have recently turned the operation of their farm over to their children. It is Saturday afternoon, they are driving their pickup into town where they will get some groceries and perhaps stop at the local cafe for coffee and dessert. Elmer is behind the steering wheel; Ethel is seated to his right, next to the passenger door. They see a red convertible with the top down coming from the other direction. The man and the woman in the car are seated so close to one another that you could not fit a blade of straw between them. Ethel looks at the young couple and with a nostalgic tone she says, “You know, Elmer, we used to sit like that.” Elmer responds, “Well, Ethel, I haven’t moved, I’m still sitting where I used to sit.”¹⁰

The point I attempted to convey by telling this story is that state courts are different. We have our own constitutions. We have and are bound by our own precedent. Like Elmer, we often see ourselves as sitting where we have been sitting for a long time. While Supreme Court decisions have considerable sway, states have separate constitutions and separate precedents. Thus, if the Supreme Court acts like Ethel and moves too far to one side, we may look to our own constitution to stay behind the wheel where we have been sitting for decades, if not longer. As petitioners before our court, you need to understand this important concept.

Once we get beyond the fundamental principle of following our precedent and our constitution, the question arises as to how we treat other legal sources—federal court decisions, other state court decisions, commentaries, treatises, and documents such as the restatement. Just where does the restatement fit into this hierarchy of sources of the law? I can assure you that the

10. See *id.* at 865–66.

restatement is not at the lower rung of the hierarchy where you will most likely find journals, articles and commentaries or even note comments such as those that appear in the *William Mitchell Law Review*.¹¹ The restatement is more persuasive than these other sources. Moreover, different judges will have different perspectives with respect to the restatement, and so to a certain extent, my comments that follow will represent a personal perspective.

I remember when I first became an appellate judge and particularly when I first joined our supreme court. It was during my first year on the court when the chief justice addressed the question of how we respond to the restatement and a party's argument urging us to adopt the restatement. In particular, what do we do when facing a question of whether we will recognize a new tort? The chief justice noted that despite what the restatement says, we need to be very careful when and if we adopt a new tort. Another justice echoed the same sentiment and a discussion followed as to how courts need to move with caution as we develop our tort law. There was further discussion to the effect that just because something is included in the restatement, it is not necessarily something that is the best thing for us to do. I remember another colleague making the comment that, while the restatement is a valuable resource, it is not necessarily the best thing since sliced bread.

I remember my reaction to this discussion. I felt a bit in awe of the fact that we can develop and even change our tort law, but wondered under what circumstances we should make a change. Also, I was proceeding tentatively because tort law had not been a major practice area for me. This fact made me willing to defer to my colleagues. I also remember being impressed and even persuaded by the logic and the depth of the restatement's analysis; nevertheless, in the case before us that day, I ultimately came to the conclusion that just because something is in the restatement, it did not necessarily mean that our court should or must agree with it. I concluded that as a supreme court exercising our sovereign power, we needed to proceed carefully and sometimes this means that we will go in different directions from the restatement.

As I previously noted, judges will approach the restatement from many different perspectives. I found that out from my experience on the court. Further, judges will most likely approach

11. *WM. MITCHELL L. REV.* (1974–2011).

the restatement differently than do members of the academy. Last night it was interesting listening to David talk about the Third Restatement of Torts. When David spoke, there was more than a hint of excitement about the Restatement and what a great piece of legal work it was and how proud he is of it. I am devoid of such feelings because I am not so sure that the Restatement is such a marvelous body of work. The Restatement Third does not take my breath away. For me, it is another tool to use when looking for the right answer to a legal question. Further, I do not look at the Restatement as one complete body of work. There are pieces of specific information in it that I will need on a specific occasion. When I need this information, I will go to the restatement, but—to put my attitude in vernacular terms—I do not genuflect when I walk past the restatement in our library. Thus, it is necessary to appreciate the fact that there is often a difference in perspective on the restatement between members of the academy and members of an appellate court.

Even on our court, we have different perspectives. I have had colleagues who will look at the restatement and essentially conclude that it *is* the best thing since sliced bread. Anytime we have a case where the law is developing, and we find something in the restatement that addresses the development, we can almost always depend on having a colleague cite the restatement and say that we would be wise to follow the restatement.¹²

On the other hand, I have other colleagues who, in essence, consider the restatement to be something drafted by a group of pointy-headed elites who have retreated to, and are writing from, an ivory tower. This elite group will sometimes bring “real trial lawyers” in to consult, but it is for the most part devoid of any connection to reality. To these colleagues, even the term “restatement” is a misnomer. Rather, it is a policy/advocacy document and should be treated as such and responded to accordingly.¹³

12. See, e.g., *Larson v. Wasemiller*, 738 N.W.2d 300, 306 (Minn. 2007) (“Although we have not specifically adopted this tort, we have frequently relied on the Restatement of Torts to guide our development of tort law.”); *Hoyt Props. Inc., v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 318, 324 (Minn. 2007) (concluding that the representation was actionable in the case based on the Second Restatement of Torts); *Schafer v. JLC Food Sys., Inc.*, 695 N.W.2d 570, 575 (Minn. 2005) (adopting RESTATEMENT (THIRD) OF TORTS: PRODS. LIABILITY § 7 (1998)).

13. Andrew F. Popper, *Restatement Third Goes to Court*, 35 TRIAL 54, 55 n.5

I have had other colleagues tell me they do not find the restatement to be that useful. They say it is too nuanced, too opaque, and the concepts that are contained in the restatement are too difficult to explain to a jury. They are reluctant to adopt the restatement language because it is so nuanced. They do not denigrate the restatement or denigrate the people working on it. They reject it because it is the result of compromise expressed in convoluted language—language that breaks down when one tries to translate it to Joe Mechanic who is sitting on a jury.¹⁴

I tend to fall into the group that likes the restatement, but that said, I do not think it is the best thing since sliced bread. I treat it with a certain amount of skepticism, but I am also deferential to and respectful of the work that has gone into drafting it. If you read my opinions in the area of tort law, you will see that on many occasions, I cite the restatement as an important authority.¹⁵

The lesson you should take from my comments thus far is that if you are arguing a case before our court, it is important to be aware of differing positions on the restatement, and especially my position, because I think my position tends to reflect the position of most judges. The restatement is something that you should use, something you use much the same way that I use case law from the federal circuit and district courts. I often tell my clerks to look at federal case law when they have the opportunity if the federal case law relates to an issue before us. Federal judges generally hire some really good law clerks who spend a significant amount of time researching legal issues. While we are not bound by what a federal court may say, there is often much good legal reasoning that gets incorporated into federal opinions. Further, if a state court opinion or commentary contains good, sound legal reasoning, I am going to take a long, hard look at it.

(1999) (“It is important to remember that ALI is in effect a private legislature, and its restatements are policy documents without the force of law.”).

14. See, e.g., Robert E. Keeton, *Warning Defect: Origins, Policies, and Directions*, 30 U. MICH. J.L. REFORM 367, 398 (1997) (noting that “trial courts often borrow language from appellate opinions and from Restatements, even though appellate opinions and Restatements have rarely been drafted with an explicit purpose of expressing ideas in a form suitable for use in instructing a jury.”).

15. See, e.g., *Swanson v. Brewster*, 784 N.W.2d 264, 269 n.6 (Minn. 2010); *Foss v. Kincade*, 766 N.W.2d 317, 321 (Minn. 2009); *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 372 (Minn. 2008); *Clifford v. Geritom Med, Inc.*, 681 N.W.2d 680, 684–85 (Minn. 2004).

I look to the restatement in much the same way. It is a legal document that has been prepared by reasonable people who have put considerable thought into the end product. Thus, it can be very helpful. Again, if you look at my opinions, you will see that I frequently cite to the restatement.¹⁶ Even if I do not adopt it, I often look to the restatement to confirm that we are correct in our legal analysis. I use it to confirm that we have support for the position we have either announced or affirmed.

As an example of what you should do when you have a case where you want us to adopt the restatement, I recommend that you look at a case like *Schafer v. JLC Food Systems, Inc.*¹⁷ In *Schafer*, a person in a restaurant sustained an injury after swallowing part of a pumpkin muffin.¹⁸ In our opinion, we agreed with the parties that when the specific harm-causing object is not known, circumstantial evidence should be available if such evidence is sufficient and other causes are adequately eliminated for purposes of submitting an issue of liability to the jury.¹⁹ What we did in this 2005 case was to look at some of our jurisprudence going back to two cases that involved Coca-Cola.²⁰ We then cited the law from those cases.²¹ But what happened next is important for you to know. We went on to say that our prior law is consistent with the approach taken by the restatement.²² We then put the exact wording from the restatement in a footnote.²³ That is how we used it. We first found what was either explicit or implicit in our own case law, and then we went on to see what the restatement said about that issue. If the restatement provides support or direction as it did in the pumpkin muffin case, we will cite the restatement to support the correctness of our reasoning.

I will now review principles you must keep in mind when you are arguing before a policy or doctrine court like our supreme court—a court that is going to determine what the law is. From what I have said, there are three important points that emerge.

16. See cases cited *supra* note 15.

17. 695 N.W.2d 570 (Minn. 2005).

18. *Id.* at 572.

19. *Id.* at 576.

20. *Id.* (citing *Lee v. Crookston Coca-Cola Bottling Co.*, 290 Minn. 321, 330–31, 188 N.W.2d 426, 433 (1971); *Holkestad v. Coca-Cola Bottling Co.*, 288 Minn. 249, 257, 180 N.W.2d 860, 865–66 (1970)).

21. *Id.* at 576–77.

22. *Id.* at 576.

23. *Id.* at 576 n.2.

First, the restatement is not the Bible to us. We do not view it as the true gospel. Just because the restatement has articulated a principle, it is not the absolute last word for us. Second, judges are different and you will have different judges looking at the restatement in different ways, some with more skepticism, some with greater acceptance. Third, the restatement can be very helpful to you when you make an argument, and that is how you should view it. You should submit it to us and indicate to us that it is helpful to resolving the particular legal issue before us.

I will now give some examples of how the foregoing principles work. We recently issued an opinion that I wrote which dealt with two parties and the issue of which party had the burden of proof.²⁴ Here, the language we used with respect to who had the burden of proof on the aggravation issue is of interest. We said:

Our holdings in *Mathews* and *Canada by Landy* are consistent with the Restatement (Second) of Torts, which only shifts the burden of proof to the defendant in situations that involve the combined tortious conduct of two or more actors who are seeking to limit their liability for the harm they have caused²⁵

What we said, and the point that comes through in this opinion, is that on this type of nuanced issue, we first looked to our case law but then checked to see if our case law is “consistent with” the restatement. We concluded that it was consistent.²⁶

Another case that I can refer to is *Larson v. Wasemiller*.²⁷ In *Larson*, we referenced the restatement.²⁸ Here is the exact language we used: “Although we have not specifically adopted this tort, we have frequently relied on the Restatement of Torts to guide our development of tort law in areas that we have not previously had an opportunity to address.”²⁹ We then went on to cite the restatement and to recognize the tort as an application of the tort of negligent selection of the independent contractor.³⁰ You can see that the language we use is very favorable to the restatement.³¹ In essence,

24. *Rowe v. Munye*, 702 N.W.2d 729 (Minn. 2005).

25. *Id.* at 736.

26. *See id.*

27. 738 N.W.2d 300 (Minn. 2007).

28. *Id.* at 306, 308.

29. *Id.* at 306.

30. *Id.*

31. *See id.* (noting the court’s frequent reliance on the Restatement of Torts and casting the material as generally accepted).

we simply said we will go to the language in the restatement for support even though we have not adopted it specifically.³² We may in fact be telling you that we are not going to specifically adopt the language in the restatement because there is no way that a majority on our court are going to adopt the restatement in this case. Nevertheless a majority of us are comfortable with letting the language in the restatement guide us to a result under our case law that is consistent with the restatement.

I will now point out some language in a third case. It is *Hoyt Properties Inc., v. Production Resource Group, L.L.C.*,³³ a case that basically dealt with whether a parent corporation misrepresented itself.³⁴ It is a case where the majority³⁵ and dissent³⁶ both used the restatement.³⁷ The majority found support for its position in the restatement, concluding that two illustrations provided in the restatement supported its position.³⁸ The dissent talked about the same illustrations and said that the illustrations do not mean what the majority said they do.³⁹ The dissent said the majority was using the illustration erroneously.⁴⁰ The reason I cite this opinion is so you can see what we did here. We are not just looking at the black letter words in the restatement. We are looking at the comments. We are looking at the illustrations that have been used to explain the restatement. Further, when we will look to the comments, and look to the illustrations, we may even disagree, as we did in the *Hoyt* case, about how those comments and illustrations should be used.

There is another thing that I want to point out with respect to the restatement: when the language of the comments changes, we pay attention to those changes. I do not have the specific case in front of me today, but I remember looking at the language in the

32. *See id.* (noting the court has not adopted the restatement but will rely on it).

33. 736 N.W.2d 313 (Minn. 2007).

34. *See id.* at 316–17.

35. *Id.* at 313–21.

36. *Id.* at 321–26 (Anderson, P. J., dissenting).

37. *Id.* at 318, 319, 324.

38. *See id.* at 318–19 (drawing out the distinction between an illustration of an expression of opinion, which is legally non-actionable, and an illustration exemplifying a statement implying facts through a legal opinion, which is actionable).

39. *Id.* at 324 (disagreeing with the majority’s understanding and arguing that both illustrations are legal opinions that may “imply ‘fact[s] susceptible of knowledge’”).

40. *See supra* notes 38–39 and accompanying text.

comments that explained nuanced changes to some language in the black letter language of the restatement. There was just a subtle difference in the explanation. But it was a change. I grabbed onto that change in the comments to help form what was going on in the one or two word change in the black letter language of the restatement, and this analysis led us in a particular direction.

Thus, when you are looking at the restatement, do not just look at the black letter language in the restatement, pay attention to how the drafters got there. I can guarantee that if it is a tough issue for us, I will have my law clerk research the origins of the language. My law clerk, Sarah McBroom,⁴¹ a William Mitchell graduate who is here with me today, will back me up on this. If it is an important question, what I will do is say, “Sarah, go back to see what the comments were. See how they changed. Tell me how they got to where they are today.” She will then verify the source and the changes. I always say the most important word in the vocabulary of any lawyer is the word “why.” Just yesterday, I reiterated to Sarah that things always happen for a reason. And our job is to ask why and then find the answer.

*Lake v. Wal-Mart*⁴² is another illustrative case that was decided by our court. The facts of the case are relatively simple. Some female college students had traveled to Mexico for spring break.⁴³ While in Mexico, they engaged in a bit of horseplay and one of the girls took pictures of another girl as she was coming out of the shower.⁴⁴ The latter did not have any clothes on when she came out of the shower.⁴⁵ When the photographer returned to Minnesota, she took the film to the local Wal-Mart store, most likely forgetting about some of the pictures she took.⁴⁶ A few months later, there was a certain buzz of conversation in the community to the effect of “Have you seen the pictures?,” “Have you seen the pictures from Mexico?”⁴⁷

41. Sarah McBroom graduated from William Mitchell College of Law in 2009, and clerked for Justice Paul H. Anderson from 2009–2010. In 2010, she received a Skadden Fellowship to work with the Legal Aid Service of Northeastern Minnesota.

42. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998).

43. *Id.* at 232.

44. *Id.*

45. *Id.*

46. *Id.* at 232–33.

47. *See id.* at 233 (explaining appellants had been asked about the photos and learned that they were circulated in public).

What happened is that the young man who was operating the photo developing machine at Wal-Mart had seen this roll of film, made a copy of the pictures that interested him, and then shared those pictures with some friends.⁴⁸ Once the young lady, whose picture was taken, learned that the pictures were circulated and about the sequence of events leading up to their circulation, she sued Wal-Mart. The question before us was, do we recognize the tort of invasion of privacy in Minnesota? The chief justice, writing for the court, drafted an opinion that recognized the tort of invasion of privacy.⁴⁹ When doing so, the chief justice cited the restatement⁵⁰ and adopted three out of four prongs of the restatement.⁵¹ This is how the law gets developed. Two justices dissented.⁵² I was in agreement with the majority even though I had some reservations that the majority was going too far, too fast. In any case, *Lake v. Wal-Mart* is a good case to review when considering how courts use the restatement to develop tort law.

At this point I will pause for just a bit to explain how the law gets developed. While the *Wal-Mart* draft opinion was circulating, there was another interesting case before our court dealing with how a trial judge in a Vulnerable Adults Act case should treat the testimony of a victim who had multiple personalities.⁵³ Which, if any, personality does the judge allow to testify? I was trying to figure out how to treat this testimony at the same time I was reviewing the *Wal-Mart* case, which by then had been in my chambers for about ten days. I was quite anxious that *Wal-Mart* keep moving through the court and felt a certain degree of pressure from other court members to keep the opinion moving. I also remember I was very frustrated by this pressure. Ultimately, I signed off on the majority opinion in *Wal-Mart*, but I sometimes regret doing so because I really wanted to write separately to question whether we should move so quickly to adopt all three of the four prongs of the restatement.

48. See *id.* (explaining appellants friends had been shown the photograph by a Wal-Mart employee).

49. See *id.* at 235.

50. *Id.* at 233 n.2 (citing RESTATEMENT (SECOND) OF TORTS § 652B (1977)).

51. 582 N.W.2d at 233.

52. *Id.* at 236–37.

53. *Wall v. Fairview Hosp. and Healthcare Servs.*, 584 N.W.2d 395 (Minn. 1998).

Here a statement frequently attributed to Otto Von Bismarck, the former Chancellor of Germany, is relevant. The statement is “to retain respect for sausages and laws, one must not watch them in the making.”⁵⁴ Remember that courts are human institutions and are populated by human beings who are fallible and court decisions are driven by fallible human beings who occupy the position of judges. In the right to privacy case, I think we could have developed the law better if we had gone more slowly. This is especially so when I think back to that conversation I had during my first year on the court and remember that we should be very reluctant to adopt new torts and we should move slowly when adopting them. That said, even if we did move more quickly than I would have liked in *Wal-Mart*—the bottom line is that we got it right when we did adopt the restatement.

Finally, I will cite a couple of other cases. I was reminded of these cases when listening to Justice Hecht’s comments about how every case comes to the court in the context of a particular set of facts.⁵⁵ Sometimes the facts are ordinary; sometimes they are sad or even tragic. In *Bjerke v. Johnson*,⁵⁶ we had a fact situation where a young girl loved working with horses, and as a result, sought work at a horse stable.⁵⁷ While working at the stable she was sexually abused by one of the stable hands.⁵⁸ The facts were sad and tragic. We were charged with the task of developing a sensible rule of law within the context of these facts.

Another example of a case with sad facts is *Yang v. Voyageur Houseboats, Inc.*⁵⁹ This case involved a situation where a recent immigrant to the United States who had become successful organized a family celebration by taking his family on a houseboat trip to Crane Lake.⁶⁰ He rented a houseboat that could accommodate six adults and four children.⁶¹ As you review the facts in this case you can just feel the family’s excitement about going on

54. It appears that this quote is commonly misattributed to Bismarck, and comes in many different forms, but it is unclear to whom the quote should actually be attributed. See Marci A. Hamilton, *Political Responses to Supreme Court Decisions*, 32 HARV. J.L. & PUB. POL’Y 113, 118 n.24 (2009).

55. Justice Daryl Hecht, *Flying Trampolines and Falling Bookcases: Understanding the Third Restatement of Torts (Spring 2010)*, 37 WM. MITCHELL L. REV. 1025 (2011).

56. 742 N.W.2d 660 (Minn. 2007).

57. *Id.* at 663.

58. *Id.*

59. 701 N.W.2d 783 (Minn. 2005).

60. *Id.* at 786.

61. *Id.*

a vacation on a northern Minnesota lake. This is what we consider to be the good life in Minnesota. But while on the boat, family members suffered carbon monoxide poisoning.⁶² Thus, a grand celebration turned tragic. The question we had to answer is who, if anyone, was responsible—the party who owned the boat and rented it, or the father who was in charge of the boat once he rented it?⁶³ The boat owner had the renter sign a waiver assuming all responsibility.⁶⁴ Did this waiver absolve the owner of all responsibility?⁶⁵

Well, we looked to the restatement⁶⁶ and concluded that that is not the way a waiver works under the circumstances. We concluded that the person who rented the boat is like an innkeeper.⁶⁷ Then we used the restatement⁶⁸ and language that states that an innkeeper has a duty to his guests to take reasonable action to protect them against an unreasonable risk of harm.⁶⁹ Once again, while we did not specifically adopt the restatement, we looked at it and used it as a guide. We looked to it and we found it was consistent with where we wanted to go as we developed our tort law and it helped us conclude that we adopted the correct legal principle.

So as the time to conclude my remarks approaches, I will reflect on my key message to you. What is my bottom line? The bottom line is that most judges find the restatement quite valuable. It is very helpful to us. But those of you who are lawyers need to know how you can most effectively utilize it when you are presenting to a court like ours, which is a policy-making court. In this respect, I hope that my remarks today will be helpful to you as advocates who seek to use the restatement effectively.

Thank you very much.

62. *Id.* at 786–87.

63. *See id.* at 785–86.

64. *Id.* at 786–87.

65. *See id.* at 789–791.

66. *Id.* at 789; RESTATEMENT (SECOND) OF CONTRACTS § 195(2)(b) (1981).

67. 701 N.W.2d at 790.

68. *Id.* at 791; RESTATEMENT (SECOND) OF TORTS § 314A(2) (1965).

69. 701 N.W.2d at 790–91.

**SYMPOSIUM, FLYING TRAMPOLINES AND FALLING
BOOKCASES: UNDERSTANDING THE THIRD
RESTATEMENT OF TORTS (SPRING 2010)**

By Hildy Bowbeer

David Prince¹: Our next speaker is Hildy Bowbeer, who is the Assistant Chief Intellectual Property Counsel at 3M, where she manages intellectual property litigation. Before assuming her current position, she managed product liability and mass tort litigation with 3M's Office of General Counsel. Before she joined 3M, Hildy was a founding partner of the law firm Bowman and Brooke where she had a national trial and appellate practice doing product liability defense work. She is an American Law Institute (ALI) member.² In addition to the reporters who do the work on these restatement projects, there are advisory committees who provide a lot of assistance, and Hildy was an advisor to this particular Restatement. Her other professional activities include chairing the board of directors at Minnesota CLE,³ so I get to see her at our quarterly CLE board meetings. She also chairs the Mediation and Arbitration Committee of the Intellectual Property Owner's Association and is a member of the Governor's Commission on Judicial Selection.⁴ She does a lot of speaking at seminars and conferences around the country. She is a Michigan Law graduate, but she's an Iowa native from Clinton as I recall. So again, the Iowa influence here is pretty impressive.

1. J. David Prince, Professor of Law, William Mitchell College of Law.

2. AMERICAN LAW INSTITUTE, <http://www.ali.org/> (last visited Feb. 24, 2011) ("The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law.").

3. Minnesota CLE is a legal education provider. *About Us*, MINNESOTA CLE, <http://www.minncle.org/About.aspx> (last visited Feb. 24, 2011).

4. INTELLECTUAL PROPERTY ASSOCIATION, <http://www.intellectualpropertyassociation.com/> (last visited Feb. 24, 2011); *What is the Commission on Judicial Selection?*, MINNESOTA HOUSE OF REPRESENTATIVES, <http://www.house.leg.state.mn.us/hrd/pubs/ss/ssjudsel.htm#Q9> (last visited Apr. 9, 2011).

Hildy Bowbeer: Thank you very much for the opportunity to speak to you. One of the things that's fun about this is that it is a bit of a return to my roots. I've been doing intellectual property litigation for the last nine years, and it's a treat to be able to come back to what had been my life for the preceding twenty-two years.

It has been my pleasure for a number of years to get to work with Mike Green⁵ in connection with the various ALI projects in which he's been involved. And, as Mike Steenson⁶ and Dave Prince⁷ have said, this was a monumental work of scholarship. In some ways I think it was even more difficult than many restatements because torts seems like it ought to be so intuitive. Every first year student in every law school takes torts. We think we know what it means and how it works. But maybe that "I know it when I see it" feeling about torts has made it even more difficult to catch it and pin it down.

So, my first tip, since I'm here talking from the practitioner's point of view, is that regardless of what side of the courtroom your client happens to be sitting on—whether it's on the plaintiff's side or on the defense side—the Third Restatement is an incredible resource, just for the sheer scholarship and the volume of research that's incorporated in it.⁸

What I'm going to try to do with these comments for the next twenty-five minutes or so is not to come at this from a particular point of view—although my point of view as a corporate attorney will slip through from time to time—but to be more agnostic in describing where I think the value of the restatement lies for any practitioner, regardless of the focus of your torts practice.⁹

First, let me return for a moment to the kind of scholarship and research resource that is the Third Restatement.¹⁰ The "black letter" portion is actually a relatively small part of it; the vast majority is comprised of the comments and the reporters' notes. So no matter what issue you may want to look at—and actually

5. Michael D. Green, Bess and Walter Williams Distinguished Chair and Professor of Law, Wake Forest University School of Law.

6. Michael K. Steenson, Professor of Law and Kelley Chair in Tort Law, William Mitchell College of Law.

7. Prince, *supra* note 1.

8. Referring generally to the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) project. References to the "Third Restatement," unless otherwise made clear, herein refer to the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010).

9. *See id.*

10. *See id.*

these comments refer not only to this volume, to Physical and Emotional Harm, but to the trilogy of the Third Restatement,¹¹ which now includes the Products Liability Restatement from twelve years ago,¹² and the Apportionment Restatement (also the work of Mike Green and Bill Powers¹³) from ten years ago.¹⁴ Regardless of what kind of torts work you do, you need these volumes in your library because they are that good a resource.

So that's tip number one: this is a resource that no good law library at any law firm should be without. That being said, and I think all of the speakers here would agree, it ain't gospel. And despite the prodigious efforts of the reporters and of the ALI and its members to leave clients and points of view at the door and crystallize and articulate the law in an objective fashion, the treatise that is the Third Restatement has a point of view. Sometimes it has multiple competing points of view. And so, it has to be read as a resource, as one way of looking at the law—often an articulate way—but obviously one that needs to be read thoughtfully and put in its proper context, like any other resource in the law. And I think we've seen that the Minnesota Supreme Court has tended to view it that way as well, both with respect to grappling with new issues and, from time to time, to crystallizing existing issues where it seeks to rationalize a variety of holdings over time.¹⁵

I think it's particularly important for every practitioner to think about these concepts early in your case, not when you're on the steps of the Minnesota Supreme Court, or even the court of appeals. Either you, as lead counsel, or somebody on your team needs to be tasked with thinking, "what is the law that applies to this case, and where should the law be going in this area." At that critical juncture, and throughout the case, one of the resources you would be consulting is the restatement to help you crystallize your thinking as you consider how you might make your case. This is particularly true if you hope eventually to persuade the court to take a different approach from the past, or to articulate a vision of the law in a way it hasn't done previously. If you wait for appeal, you have waited too long. You will have, most likely, waived the

11. *See id.*

12. RESTATEMENT (THIRD) OF TORTS: PRODS. LIABILITY (1997).

13. William Powers, Jr., President and Hines H. Baker and Thelma Kelley Baker Chair in Law, University of Texas at Austin.

14. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. (2000).

15. Paul H Anderson, *Flying Trampolines and Falling Bookcases: Understanding the Third Restatement of Torts (Spring 2010)*, 37 WM. MITCHELL L. REV. 1042 (2011).

issues. And you certainly can't expect that the court in most cases will be reaching outside the bounds of the record below and doing that thinking for you. This is not to say it never happens that way. There were cases I experienced when I clerked for the Minnesota Supreme Court where the court thought both parties had missed the boat, and it reached out to look for an alternative way of thinking. But in general, it is your responsibility to think early and often about where the law ought to be going. And the restatement is one place to go to help you pull that together and to help you support another point of view.

Jury instructions are one of the areas where the restatement can come in handy. In Minnesota, we are blessed with the finest set of jury instruction guides of any state in the country, and Mike Steenson¹⁶ can take a huge amount of credit for that.¹⁷ They are thoughtful, well-supported, and relatively easy for ordinary jurors to understand. But they cannot possibly cover everything. So, one of the important things in any case is to look at what jury instructions you want to request, either because you need to fill in around the edges of the existing instructions, or because you expect you will be urging the court eventually to adopt a different approach to the law. In both instances, you may well need to make that request in the form of a jury instruction. Furthermore, apart from considerations of preserving these legal positions for appeal, I can tell you from experience that jury instructions matter *to the jury*. The *words* matter. So for all of these reasons, you should not wait until you are up on appeal to begin thinking about what standards the jury should have applied when they considered your case. That is simply too late. Thus, to the extent you can turn to a resource like the restatement to help you think about what to communicate to the jury about the standards you want it to apply to your case, and how to communicate that in a way that makes sense, that is a very real value the restatement can bring long before the appeal, and one you should not forgo.

Mike Green pointed out in his comments that there were some portions of the Restatement that were especially controversial,¹⁸ and he correctly identified the one that I think is

16. Steenson, *supra* note 6.

17. Michael D. Steenson has co-authored the JURY INSTRUCTION GUIDES CIVIL—MINNESOTA PRACTICE SERIES (5th ed. 2000) with Peter B. Knapp, Professor of Law, William Mitchell College of Law.

18. Michael D. Green, *Flying Trampolines and Falling Bookcases: Understanding*

the most troubling to a number of us who were actively involved with this project—comment c to section 28,¹⁹ which discusses at some length an approach to dealing with issues of general and specific causation in toxic torts cases.

There are a couple of things that are troubling about section 28—and I'm not saying anything here that I and others have not already shared with Mike.²⁰ First, I think this comment—the subject matter of the comment—did not belong in the Third Restatement. Setting aside my disagreement with the position taken in comment c, I think it's a discussion that belongs more appropriately in the Federal Judicial Center's Reference Manual on Scientific Evidence²¹ or, perhaps, in a restatement on evidence or a restatement on expert evidence, but not in a restatement of torts. I think comment c delves into issues of scientific proof and the admissibility of scientific evidence and expert opinion in a way that simply was not appropriate to the scope of this project.

Second, and more troubling, this comment ventures into a dangerous area far beyond anything supported by the case law or by the very underpinnings of tort law. It suggests that if litigation about a particular substance happens to occur before there is a body of rigorous scientific evidence on causation, then it might be okay for a court to relax its vigilance in its role as gatekeeper for expert evidence.²² In other words, comment c suggests that in these cases, it might be appropriate for the court to let in whatever proof happens to be available and let the jury sort it out. It even goes so far as to suggest that a court might consider shifting the burden of proof to the defendant when the plaintiff lacks rigorous proof that the substance at issue was capable of causing the plaintiff's illness or injury.²³

Now, in Minnesota, we are blessed with juries that, by and large, are savvy when it comes to poor science, junk science, or good science. But query whether the case ought to get that far in the first place. So, to the extent comment c to section 28 could be read to suggest that the court shift the burden of proof to the

the Third Restatement of Torts (Spring 2010), 37 WM. MITCHELL L. REV. 1011 (2011).

19. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 cmt. c (2010).

20. Green, *supra* note 18.

21. See generally REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2nd ed. 2000).

22. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 cmt. c (2010).

23. See *id.*

defendant when rigorous scientific evidence is not available,²⁴ it takes a profoundly troubling turn away from a principled interpretation of the law and from the appropriate role for a restatement. It is also, in my opinion, wrong-headed legal thinking and poor public policy.

Finally, I wanted to talk a little about some of the issues that Mike Green²⁵ and Mike Steenson²⁶ have already discussed with respect to foreseeability, the scope of liability, and the role of duty. I'll take as an example—because it was an example that I spent time with in my product liability practice—the issue of duty to warn. This is an area where the Third Restatement and the way it approaches duty and causation may be both consistent with Minnesota law and useful in recasting it in a construct that makes more sense. For example, think about Minnesota precedent that says duty is for the court to decide, and as a matter of law there is no duty to warn of an obvious or well-known risk.²⁷ Naturally, as an attorney who defends product manufacturers, I think that is a pretty good rule. Actually, I think it is a good rule for consumers as well. A consumer should not want manufacturers plastering products with warnings about obvious or well-known risks. Thus, it makes intuitive sense that a manufacturer should not be held liable for failing to provide a written warning about an obvious risk.

But although this outcome is intuitively and practically correct, is this really a *duty* issue, as Minnesota law tends to cast it?²⁸ While it seems appropriate for the court to decide that the law does not require warnings about obvious risks, does casting this issue in terms of “duty” mean that the court must also resolve as a matter of law whether there was a “duty” to provide a warning in other, more factually ambiguous circumstances? That would be a natural extension of the “duty” framework, and yet it puts the court in the traditional role of the jury, resolving issues of fact.

The Third Restatement gives us some opportunities to recast this issue to get to the same intuitively correct result, but in a way that may even make more sense. A court applying the Third

24. *See id.*

25. Green, *supra* note 18.

26. Steenson, *supra* note 6.

27. *See, e.g.,* Frey v. Montgomery Ward & Co., 258 N.W.2d 782, 786 (Minn. 1977); Clark v. Rental Equip. Co. Inc., 300 Minn. 420, 220 N.W.2d 507 (Minn. 1974); Westerberg v. Sch. Dist. No. 792, Todd Cnty., 276 Minn. 1, 9, 148 N.W.2d 312, 317 (1967).

28. *See, e.g.,* cases cited *supra* note 27.

Restatement's approach to duty can recognize generally a duty of reasonable care to provide warnings, leaving it to the jury in most cases to determine whether under all the circumstances reasonable care would have required a warning of a particular risk in connection with a particular product. But how, then, are courts to reconcile this with established Minnesota law that manufacturers will not be held liable for choosing not to warn of obvious risks?²⁹

One path, as Mike Green pointed out,³⁰ is that the Third Restatement tells us there can be limits on duty for policy reasons.³¹ Thus, one way the court can look at this is simply to say: we have decided as a matter of policy there should be no duty to warn of obvious risks,³² that limited real estate on products ought to be devoted to risks people are not likely to know about. An alternative path for the court, equally consistent with the Third Restatement, would be to approach it from a summary judgment perspective as a simple question of factual cause—that if this plaintiff ignored this obvious risk, no reasonable jury could conclude the plaintiff would have observed and heeded a written warning about that risk.

In other words, there are ways the restatement can help us crystallize issues and principles that have been fuzzy or difficult to articulate. It may give us a way to get to results that have always seemed intuitively correct, but with a sensible construct that can help us characterize and develop the law going forward.

The last caveat I would offer—and this is true for every restatement—is that for all of its wonderful qualities, you have to be careful not to mine it for sound bites. The comments of this and all restatements are densely packed. There's a lot of explanation, a lot of qualification, a lot of context. So as you are looking at it and thinking "how can I use this and how should the courts use this to advance the law in a sensible but rational way," you have to be careful not to take a sentence here or there out of context. That has happened with prior restatements, and I think it is always a risk. For example, in section 402(a) of the Restatement (Second) of Torts³³—which at the time was the only section of any restatement that addressed product liability—there was one statement in one

29. *See, e.g.*, cases cited *supra* note 27.

30. Green, *supra* note 18.

31. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) (2010).

32. *See id.*

33. RESTATEMENT (SECOND) OF TORTS § 402(a) (1965).

comment dealing with product defects that a manufacturer could assume an adequate warning would be heeded.³⁴ In the context of the full comment, it made sense. But taken out of that context, that statement was turned on its head and morphed into what, in many states (although not, thankfully, Minnesota), became a causation-skipping presumption in failure to warn cases: that the plaintiff would have seen, read, and heeded a warning, even where there is no evidence that a warning of any kind would have been effective. It is an example of how taking a comment or a fragment of a comment out of context can lead to some unintended and, I believe, dangerous results.

Overall though, as I said at the beginning, I would suggest that every lawyer who wants to practice in the area of torts ought to own this work, ought to spend some time with it, and ought to be thinking about how to use it in conjunction with established Minnesota law to make the law make sense for that next jury and that next appellate judge. I congratulate Mike Green and Bill Powers for their outstanding work product, and thank them for the privilege of being associated with it.

Thank you.

34. *Id.* at cmt. j.