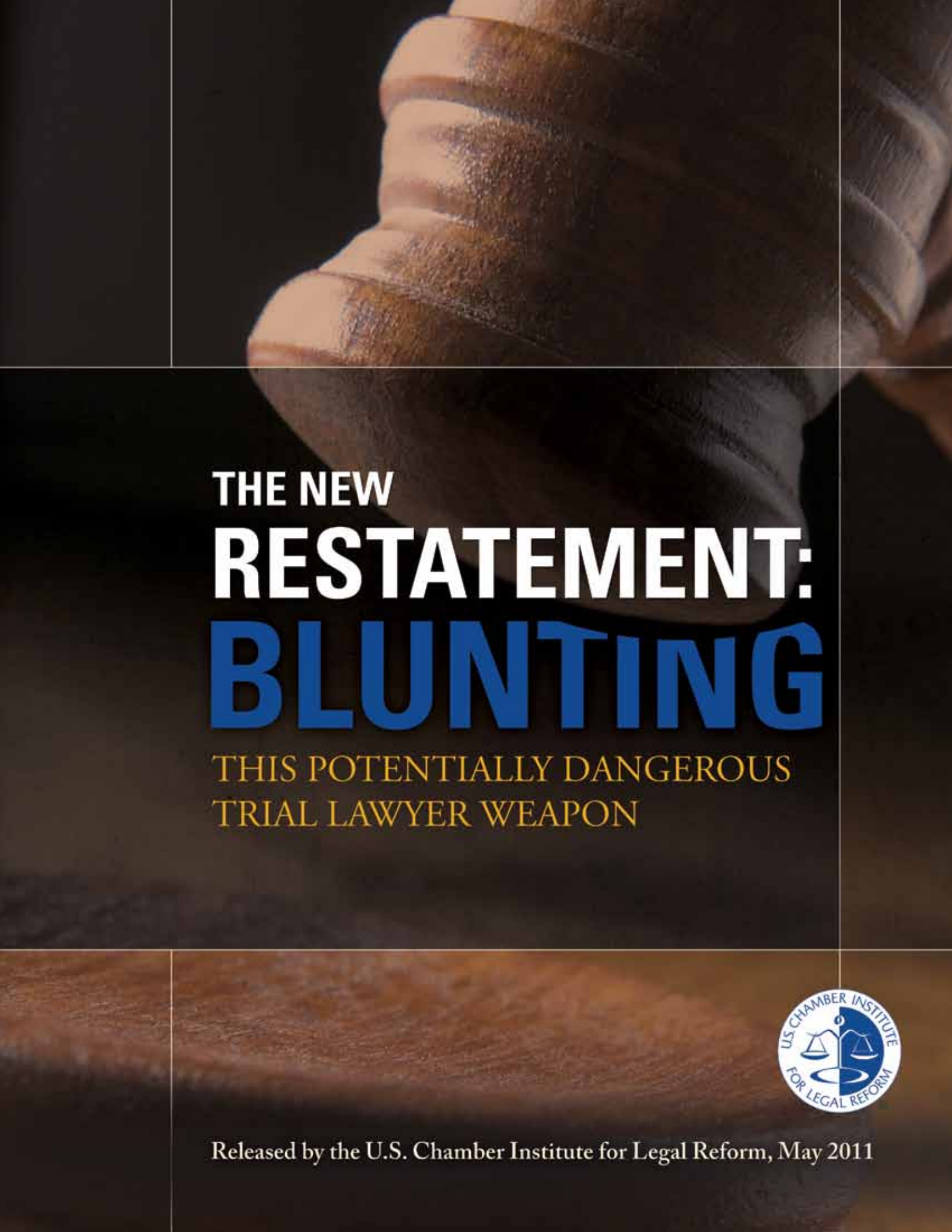

# THE NEW RESTATEMENT: BLUNTING

## THIS POTENTIALLY DANGEROUS TRIAL LAWYER WEAPON

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# TO MOST AMERICAN JUDGES,

especially those on state appellate courts, the Restatement of Torts is the Holy Grail. Judges follow the Restatement as if it were gospel. It is viewed as an objective product, the consensus of the best minds in the nation regarding what is or should be the best rule of tort law. All this is surprising because Restatements are created by a totally private group, albeit a prestigious one: the American Law Institute (ALI), which is composed of noted law professors, judges, and private practitioners. ALI's products have garnered such respect because they are usually the result of very careful study and have a degree of objectivity, reason and quality about them.

That is why a recent "guide" to the ALI's latest work, the Restatement (Third) of Torts: Liability for Physical and Emotional Harm,[1] is most troubling. "The New Restatement's Top Ten Tort Tools," is an unprecedented collaboration of the Reporter to the new Restatement (the person who drafts the work), Professor Michael D. Green of Wake Forest University School of Law, and Larry S. Stewart, a former head of Association of Trial Lawyers of America (now the American Association for Justice (AAJ)) and aggressive Florida plaintiffs' lawyer. The forward to the article, which appeared in AAJ's magazine, *Trial*, states in large print that the new Restatement "contains many clarifications and modifications [in tort law] that you can use to your client's advantage." [2] It begins by describing the new Restatement as a "powerful new tool" for plaintiffs' lawyers.[3]

This white paper responds to the *Top 10 Tort Tools*. It provides tips to litigators on how to persuade judges not to apply provisions in the new Restatement in ways that are not supported by law or sound public policy. It also refers, where relevant, to model legislation that can prevent the "Top 10 Tools" from doing significant harm.

## DEVELOPMENT OF THE RESTATEMENTS

Restatements are intended to reflect "existing" principles of law. Those principles do not have to be the majority or even a significant minority rule. The Restatement of Torts is supposed to reflect what is "the best" rule of law among many that are created by common law judges in different states.

The first Restatement of Torts was published in 1934.[4] Tort law was "restated" again in the 1960s and 1970s.[5] The Restatement (Second) of Torts had a powerful influence on American tort law. It was the source for strict liability for manufacturers of products.[6] It was the source for eliminating immunities that once protected municipalities, charities, and families from suits among its members.[7] The Restatement (Second) was a powerful broom in sweeping all of those immunities away. It helped develop careful principles of causation and duty.[8] It was neither pro-plaintiff nor pro-defendant. Each of those interests could look to parts of the Restatement (Second) and find favor with it.

Beginning in the 1990s, the ALI decided to restate the law of torts a third time. Rather than cover the entire law of torts as in earlier Restatements, the Restatement (Third) focused on specific topics. In 1998, the ALI published the portion of this new Restatement on Products Liability.[9] Courts have already cited it thousands of times. It is a fair and balanced work that put rational rules in so-called strict product liability. It made clear that manufacturers should not be strictly liable in an absolute sense for the design of their products or their failure to warn about them; those aspects of product liability law should be based on fault.[10] It preserved strict liability for instances where it should arguably be applicable, such as construction or manufacturing defects that resulted from a failure of quality control.[11]

The second part of Restatement (Third) appeared two years later and was called "Apportionment of Liability."[12] This addressed some controversial topics, such as joint and several liability, comparative fault or comparative responsibility, contribution and indemnity. It was a fair and balanced work that has also been embraced by courts.

In the beginning of the new century, the ALI began the next part of the Restatement (Third). It had a much broader focus. It was originally called "Liability for Physical Harm," but then, during the course of its creation, it was extended to "emotional harm." The first part was officially published in April 2010 as Restatement (Third) of Torts: Liability for Physical and Emotional Harm.[13] For lawyers, the content of this Restatement may seem like a trip back in time to the first year of law school. It covers basics of tort law, including negligence, duty, abnormally dangerous activity, factual cause and proximate cause.

FOR LAWYERS, THE CONTENT OF THIS RESTATEMENT MAY SEEM LIKE A TRIP BACK IN TIME TO THE FIRST YEAR OF LAW SCHOOL. IT COVERS BASICS OF TORT LAW, INCLUDING NEGLIGENCE, DUTY, ABNORMALLY DANGEROUS ACTIVITY, FACTUAL CAUSE AND PROXIMATE CAUSE.

It is a work of many hundreds of pages. The original Reporter for this new Restatement, Gary Schwartz (not a relative), unfortunately passed away during his period of authorship. New Reporters were brought in and the captain of the ship became Professor Michael Green who holds the Williams Chair at Wake Forest University School of Law. Parts of the new Restatement "restate" existing principles of law, but certain portions of this new Restatement lend themselves to a particularly pro-plaintiff reading. Although some of the twenty Advisors to the project, and I was one, cautioned against these turns, it was like a freight train going forward, pushed by effective, persuasive plaintiffs' lawyers to suggest changes in tort law that would be new and dramatic.

One's views on whether a written work is or is not pro-plaintiff can be perceived as subjective.

Nevertheless, if one needed objective proof that certain portions of the new Restatement were intended as fodder for pro-plaintiff changes to the law, that truth was self-evident when AAJ's *Trial* magazine published Green and Stewart's "Top 10 Tort Tools" article the same month that the new Restatement was published in final form.

As an ALI member for over three decades, I can recall no incident where an ALI Restatement Reporter joined with a practitioner to promote what is supposed to be a fair and objective document as a "tool" for either the plaintiff or defense bar, but new times bring new surprises. ■

## THE NEED TO CURB THE NEW RESTATEMENT'S TOP 10 TORT TOOLS

There is a great need to put rational and reasoned brakes on, and blunt, the new Restatement's "Top 10 Tort Tools" for plaintiffs' lawyers. Judges who are used to the fair and objective nature of Restatements may read the Restatement's comments as plaintiffs' lawyers wish them to: in a manner that causes them to adopt new tort principles, just as judges a few decades ago adopted Restatement (Second) of Torts provisions on strict liability for products. Chaos in the law resulted because some of those judges did so without reasoning about where and when strict liability should apply. We saw firsthand that Restatements can move across the country with rapid speed. Strict product liability literally swept the nation in less than seven years.

The same may be true with the new Restatement's "Top 10 Tort Tools." While each tool named by Professor Green and plaintiffs' oracle, Larry Stewart, would, in their view, expand liability, this paper focuses on the five most radical of these proposals – each of which is predicated on unsound public policy. Our purpose is both to alert the legal community to these supposed changes in the law and to provide reasons why courts should not embrace them. With respect to each, we provide a concise rebuttal to the expansion advocated by the "Top 10" authors. These are the five and this is why they were chosen.

First, the new Restatement could be read to relax the need to show proof of causation. The Restatement potentially implies major changes in this key area, which could create new and unwarranted liability exposure especially for manufacturers of pharmaceuticals, chemicals, or any product that is alleged to have caused a latent injury. This white paper shows how to prevent courts from adopting such unfair rules.

Second, the Restatement could be interpreted to create a revolutionary new and unprecedented duty of care to trespassers. Courts could retroactively adopt this rule. The white paper provides reasoning to dissuade courts from doing so.

Third, the new Restatement may expand so called "affirmative duties." These expansions could hold a defendant responsible for an injury it did not cause or create. The white paper shows why these proposed expansions represent unsound public policy.

Fourth, the new Restatement could cause courts to create new ways to sue based on regulatory statutes that do not in their text say anything about civil liability. The white paper shows why this is an unwarranted invasion of legislative responsibility and is a true trespass on the separation of powers.

THE NEW RESTATEMENT COULD BE READ TO RELAX THE NEED TO SHOW PROOF OF CAUSATION. THE RESTATEMENT POTENTIALLY IMPLIES MAJOR CHANGES IN THIS KEY AREA, WHICH COULD CREATE NEW AND UNWARRANTED LIABILITY EXPOSURE ESPECIALLY FOR MANUFACTURERS OF PHARMACEUTICALS, CHEMICALS, OR ANY PRODUCT THAT IS ALLEGED TO HAVE CAUSED A LATENT INJURY.

Fifth, the Restatement removes all objective criteria or requirements for claims based on the negligent infliction of emotional distress. While courts have expanded the right to bring negligent infliction of emotional harm claims, the overwhelming majority of courts have maintained goal-tender objective criteria. The absence of any criteria could lead to thousands of new and unfounded claims. This white paper helps courts appreciate why such an expansion of the law is unwise and comes at the expense of persons who have truly endured a serious physical harm.

Finally, the white paper identifies five other aspects of the new Restatement and briefly explains why courts should not be persuaded by plaintiffs' arguments.

## 1. RELAXING THE NEED TO SHOW PROOF OF CAUSATION

An area that plaintiffs' attorneys have found the most ruminative over the past twenty years is toxic torts, especially when there has been a significant period of time between a person's exposure to a product or substance and his or her alleged injury. Courts have struggled to find a fair way to address this thorny topic, but there is controversy and difference in the approaches judges use.

### *A. Shifting the Burden of Proof to Defendants*

The new Restatement enters this area in Section 28, which begins with the conventional principle that a plaintiff has the burden of proof to show that a defendant's tortious conduct was the cause of the plaintiff's harm. The Restatement could be read to depart from traditional law, however, in cases with multiple defendants. Although the Restatement still requires the plaintiff to prove that his physical harm was caused by the tortious conduct of at least one defendant, he need not show which defendants actually caused the harm if he "cannot reasonably be expected to prove" that fact. Instead, as to any defendant who "engaged in tortious conduct that exposed the plaintiff to a risk of harm," the burden of proof shifts to the defendants.[14]

***How to address attempts to shift the burden of proof.*** As was clearly pointed out to the authors of the Restatement in the debates over this topic, it is odd that the Restatement enters this area because this is evidence law, not tort law. Courts have recognized that it may be appropriate to shift the burden of proof to the defendants when a plaintiff can show that two or more persons were clearly negligent and directed their conduct toward the plaintiff, but the plaintiff cannot discern which party caused a harm. The new Restatement arguably stretches this principle to provide that all the plaintiff has to show to shift the burden of proof is *potential* exposure and that he need not show that the conduct of any particular defendant has any causal nexus to his harm, or even that any defendant's participation was substantial.[15] Defense lawyers should urge courts to reject this view, and adhere instead to the rule that a plaintiff has the burden of proof. Otherwise, the civil justice system can subject innocent defendants to liability.

### *B. Forgiving the Lack of Sound Scientific Evidence*

Comment c of Section 28 could be read to ignore the *Daubert* rule that a judge should act as a "gate keeper" against junk science.[16] According to the commentary, "[c]ausation is a question of fact normally left to the jury, unless reasonable minds cannot differ."[17] Judges should appreciate that in making such statements, the Restatement does not – and cannot – abrogate basic evidentiary principles, such as the court's duty of gate-keeping and screening out highly speculative evidence on causation.

THE NEW RESTATEMENT GOES EVEN FURTHER BY "FORGIVING" THE LACK OF EPIDEMIOLOGICAL EVIDENCE ON THE BASIS THAT "SOME PLAINTIFFS MAY BE FORCED TO LITIGATE LONG BEFORE EPIDEMIOLOGICAL RESEARCH IS AVAILABLE."

The new Restatement goes even further by "forgiving" the lack of epidemiological evidence on the basis that "some plaintiffs may be forced to litigate long before epidemiological research is available."[18] But this

commentary could be understood (wrongly) to suggest that epidemiological evidence is never necessary in a toxic tort case. Such a reading would be a radical shift in the law. Epidemiological evidence shows when a group that was exposed to a product has a substantially greater risk of harm than another group that was not exposed, and it often plays an important role in deciding the reliability (and therefore admissibility) of novel theories of medical causation.

***Addressing sue-first, get-scientific-evidence-later attempts.*** When asked to interpret the new Restatement, courts should recognize that scientists generally consider epidemiological evidence "the best evidence of general causation" in a toxic court case.[19] It is true that there may be situations where epidemiological evidence has not yet developed, but mere unavailability is no basis to excuse a plaintiff from producing reliable evidence supporting causation. If "unavailability" of evidence were a reason to allow a plaintiff to move forward, the entire law of torts would crumble.

TOXIC TORT CASES TRADITIONALLY REQUIRE A SHOWING OF GENERAL CAUSATION AND SPECIFIC CAUSATION. FOR EXAMPLE, IN CIGARETTE CASES, A PLAINTIFF MUST SHOW PROOF THAT CIGARETTE SMOKING AUGMENTS THE RISK OF PEOPLE DEVELOPING LUNG CANCER. THAT IS "GENERAL" CAUSATION.

### C. *Circumventing the Need to Show General Causation*

The commentary to Section 28 also confuses issues of general and specific causation, with the result that a plaintiff does not need to show general causation where there is a "reasonable explanation for the lack of general causation evidence."[20] Although the commentary tempers this suggestion with an acknowledgment that relief from this burden of proof is appropriate only "in some limited circumstances," it provides little help in identifying the appropriate "limited circumstances." The omission is unfortunate and potentially misleading. Toxic tort cases traditionally require a showing of general causation and specific causation. For example, in cigarette cases, a plaintiff must show proof that cigarette smoking augments the risk of people developing lung cancer. That is "general" causation. There then is a separate issue as to whether smoking caused the particular plaintiff's cancer. The commentary to Section 28, however, could be read to eliminate the need for sound scientific evidence in stating that occasionally "general and specific causation issues may merge into a single inquiry."[21]

***How to counter attempts to circumvent general causation.*** Defendants must make courts aware that Section 28's apparent invitation to mix general and specific causation is a fundamentally incorrect statement of law and unsound as a matter of public policy. As noted above, general causation addresses whether a specific product, or agent, is capable of causing a harm. Specific causation addresses whether the agent, or product, in fact, did cause the harm to the individual at issue. They are distinct issues.

In sum, the section is best addressed by showing, first, that it has nothing to do with tort law, but has wandered into the area of admissibility of evidence and *Daubert's* requirement of a judge acting as a gate keeper. Although the author of the Restatement, Professor Green, has argued that all of this is tort law, it is apparent from the text that it is not. Second, any attempt by plaintiffs to excuse themselves from proving general causation should be met by the Restatement's important concession that this burden can be excused only in "limited circumstances." Any other reading of the Restatement would unnecessarily depart the world of "real science" for a plaintiffs' lawyer dream-world where plaintiffs need not prove their claims.

## 2. CREATING A REVOLUTIONARY NEW DUTY OF REASONABLE CARE TO TRESPASSERS

One of the most fundamental rules of tort law is that owners of land owe no duty to persons who enter upon their premises without either expressed

or implied permission. In fact, some land owners provide notice to those who might enter the property by posting signs stating "no trespassing." The tort law of most states follows basic common sense in this area and says quite clearly that owners of land owe no duty to trespassers except to refrain from reckless, willful conduct with very well-defined, narrow exceptions. [22]

In the article written for plaintiffs' lawyers, Stewart and Green hail Section 51 of the new Restatement, which calls for a new duty of reasonable care to trespassers.[23] Professor Green defended the creation of the new duty to trespassers by saying that it exists in some states and that he has not created a duty to all trespassers.[24] This is partially true. The new Restatement provides that the traditional rule of refraining from willful conduct applies to what it calls "flagrant trespassers."[25] These flagrant trespassers are not owed a duty of care. Unfortunately, the concept of "flagrant" is undefined and appears nowhere else in American law. Its definition is left to the whim of state judges without any real or meaningful guidance to interpret.

The comments provide guidance on what is a flagrant trespasser, but it is disconcerting. For example, the new Restatement does give an example of who is not a "flagrant" trespasser:

> RICK ASSAULTS SASHA ON A PUBLIC STREET AND SNATCHES HER PURSE. IN THE COURSE OF HIS ESCAPE FROM THE SCENE, HE CLIMBS OVER THE FENCE AT RACHEL'S BED AND BREAKFAST AND IS INJURED BY THE UNINSULATED WIRE … RICK'S COMMISSION OF THE CRIME IS NOT RELEVANT TO THE DETERMINATION OF WHETHER HIS TRESPASS ON RACHEL'S LAND IS FLAGRANT.[26]

In plain English, a criminal escapee who enters your land is owed a duty of reasonable care.

***How to preserve the no duty to trespasser rule in court.*** When plaintiffs' lawyers in appellate courts try to change existing law by citing the new Restatement, defense counsel should indicate that there has been absolutely no showing that there was any problem with the approach taken in the Restatement (Second) of Torts, which limited the duty of landholders to trespassers.[27] The landholder was to refrain from willful conduct towards trespassers. The Restatement (Second) does include exceptions to the "no duty" rule, for example, for child trespassers who are attracted to highly dangerous artificial conditions on the land.[28] In addition, the Restatement (Second) provides that landholders owe a duty of care to trespassers who are tolerated by the landholder or who trespass on the edge of the land where it was unclear that the trespasser was walking on private property.[29] There is no public policy need to change these rules. In point of fact, changing the rule will create confusion in the law due to the lack of clarity as to who is a "flagrant" trespasser. A change would also have the potential to burden every citizen in the state who owns property (whether commercial or residential) by increasing the costs of liability insurance. Moreover, the "new" approach – if read broadly – would move away from the fundamental principle of individual responsibility. If a person chooses to go on someone else's land, then he or she knows he or she is unwanted and would be responsible if they are injured. At a minimum, if a court appears inclined to adopt the new approach, defendants should argue for a presumption that a trespass is "flagrant," and the development of a definition for that term should be guided by reference to the existing body of rules already developed under the common law for deciding when (if ever) a duty is owed to trespassers.

***How legislation can help.*** In some jurisdictions, it may be sound public policy to legislatively prevent this new duty to trespassers from becoming law in the courts. A source for model legislation on this issue is the American Legislative Exchange Council's (ALEC) "Trespasser Responsibility Act" (TRA). The TRA preserves existing law and says that an owner of land "does not owe a duty of care to a trespasser." It maintains the existing "no duty" rule.

The TRA is supported by the same public policy principles that suggest courts should not adopt the new Restatement's duty to trespasser rule. Furthermore, plaintiffs' lawyers, their lobbyists, and consumer activist allies would be placed in an awkward position to have to argue that land holders should owe a duty of reasonable care to trespassers. This is especially true in current economic times where many homeowners and small businesses already face insurmountable costs. Plain and simple, the current no-duty-to-trespasser rule is sound public policy. The ALI rule comes at the wrong time and is fundamentally unsound.

## 3. EXPANDING AFFIRMATIVE DUTIES

A fundamental rule of American tort law is that a person is not responsible for a risk of physical or emotional harm that he or she did not create. Simply stated, there is no affirmative duty to rescue another.[30] The new Restatement embraces this traditional rule in Section 37. Nevertheless, the Green/Stewart article suggests that the new Restatement could substantially expand the "exceptions" to this fundamental no duty rule.

### *A. Recognizing New Relationships Imposing a Duty to Protect*

The law has long recognized that "special relationships" can create affirmative duties.[31] The new Restatement follows this traditional approach and lists two such relationships.[32] One is based on a defendant's relationship with a plaintiff. The other is based on a defendant's relationship with the person who caused a harm. The new Restatement is classic in setting forth lists in each category, for example, a common carrier has a duty of care to its passengers and an innkeeper has a duty of care to its guests.[33]

The real new pro-plaintiff ammunition, both with respect to a defendant's relationship with a plaintiff or its relationship with a person who caused the harm, is located in the "comments" that state the provision is not exclusive.[34] In effect, without any meaningful criteria, the Restatement suggests that courts could create "special relationships" simply based on their own imagination.[35]

A FUNDAMENTAL RULE OF AMERICAN TORT LAW IS THAT A PERSON IS NOT RESPONSIBLE FOR A RISK OF PHYSICAL OR EMOTIONAL HARM THAT HE OR SHE DID NOT CREATE.

***Rebutting special relationship expansions in court.*** In rebutting plaintiffs' lawyers attempts to expand upon traditional relationships, one can show that in the almost 40 years of existence of the Restatement (Second), courts were very reluctant to create affirmative duties through new "special relationships" – despite the Restatement (Second)'s own disclaimer of any "opinion as to whether there may not be other [special] relations" giving rise to an affirmative duty.[36] The judicial reluctance to pioneer new categories of special relationships reflects the fact that such relationships occupy an area of law that requires predictability. It goes against a fundamental tenet of American tort law to turn altruistic behavior into a legal obligation. Hopefully, courts will be responsive to such arguments, especially if they are bolstered by clear and meaningful citations to existing law. Nevertheless, there is a risk that this open-ended provision will create new and troublesome duties.

### *B. Expanding Duties Based on an Undertaking to Render Services to Another*

Section 42 also sets forth a duty of care to help others based on an "undertaking" to reduce the risk of harm to another.[37] In one sense this is classic tort law: while no one has an obligation to rescue another, if one "undertakes" such an effort, then the rescuer can be subject to tort suits if he does not do so with reasonable care.[38] This makes sense when the rescuer has placed the person he attempted to rescue in a worse position than he was in before.

The potential problem with the language in the new Restatement is that plaintiffs will attempt to

apply it to businesses that sponsor programs to promote safety or when a manufacturer suggests that it will in some way ensure the safety of its products or protect individuals from harm. If applied in this manner, such a rule of law could discourage companies from engaging in socially beneficial activities and potentially create new liability exposure if a corporation engages in what the new Restatement has amorphously defined as an "undertaking." This would be unsound public policy.

***Curbing duties based on an undertaking.*** When plaintiffs' lawyers attempt to expand duties based on an alleged "undertaking," defense counsel should be very specific with courts and point out the substantial anti-societal affects that come with such an expansion as well as existing case law to the contrary. Such new exposure directly chills the very conduct we want corporations and others to engage in – programs directed at public safety and well being. There is little doubt that some courts will brush aside such arguments, but, if they do, there is precedent for legislative correction. For example, almost every state has a so-called "Good Samaritan" law that limits the liability of doctors and medical professionals when they help a person in peril without charge.[39] Some of these statutes extend to volunteers beyond medical professionals.[40] If a state court unreasonably expands a business's affirmative duties based on an undertaking directed at public safety, then such statutes could be expanded to cover such conduct.

## 4. USING STATUTES AS A BASIS FOR CREATING NEW AFFIRMATIVE DUTIES IN TORT LAW

One of the most pro-plaintiff arguments in the Green/Stewart guide to the new Restatement rests on Section 38. This section advises courts to recognize new affirmative duties in tort law based on regulatory statutes.[41]

In one sense, the comment does not create totally "new law." Courts have, from time to time, found "implied causes of action" or created an affirmative duty in tort law based on statutes. The danger posed by the new Restatement is that it provides combustible fuel to activist courts to effectively create new causes of action based on regulatory or other statutes that say nothing about private civil liability. It does so by instructing courts to "consider the legislative purpose and the values reflected in the statute to decide that the purpose and values justify adopting a duty that the common law had not previously recognized."[42]

Language that is of even more concern reminds courts that "tort law can serve an enforcement role when the policy reflected in the statute is important, and the statute does not contain adequate enforcement provisions."[43] In practical terms, if a regulatory statute would fine a company a thousand dollars for a violation, then the new Restatement could prompt an activist judge to say, "Well, that is not enough punishment for this violation; let's have the company also worry about a tort suit." A new tort claim would be born.

LANGUAGE THAT IS OF EVEN MORE CONCERN REMINDS COURTS THAT "TORT LAW CAN SERVE AN ENFORCEMENT ROLE WHEN THE POLICY REFLECTED IN THE STATUTE IS IMPORTANT, AND THE STATUTE DOES NOT CONTAIN ADEQUATE ENFORCEMENT PROVISIONS."

***Blunting this expansion in courts.*** In some jurisdictions, and especially in federal courts, there has been a reluctance to create brand new ways to sue where a legislature has not specifically authorized a private right of action. There is a strong body of law in the federal courts recognizing the impropriety of judicially created remedies for statutory regimes, and those cases should be utilized to diminish the flame of the new Restatement's beacon for creating implied causes of action.[44]

***Legislation can curb this expansion.*** Most would agree that if new causes of action are to be created by policy makers, they should be explicit. On this basis, the Georgia legislature enacted a law in 2010 that provides that if a state legislature wishes to create a new way to sue, then it must say so openly and explicitly.[45] The legislation, which was based on a model Transparency in Lawsuits Protection Act developed by ALEC, became law within less than a year, passing both the Georgia Senate and House by substantial margins in a single legislative session.

## 5. REMOVING OBJECTIVE REQUIREMENTS FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIMS

The Green/Stewart "Top 10 Tort Tools" article also suggests that the new Restatement may make it easier for plaintiffs to recover for negligent infliction of emotional distress even when they suffered no physical harm.

The Restatement (Second) of Torts provided liability for negligent infliction of emotional distress only where the distress resulted in illness or physical harm.[46] Emotional harm damages were always tied to physical injury. That is the traditional approach of American tort law.

Since publication of the Restatement (Second), developments in case law have allowed claims for negligent infliction of emotional harm. This occurred both where an individual himself suffered physical harm and in so-called "bystander" cases where an individual, such as a mother, father, or child witnesses a close relative's death or serious injury due to negligence of another.[47]

In some ways, with respect to emotional harm claims, the new Restatement is helpful. For example, it does not permit recovery for negligent infliction of emotional harm in cases of latent injuries.[48] An individual who is exposed to asbestos in 1990 and wonders whether he will become ill twenty or thirty years later does not have an emotional distress claim. A plaintiff may bring a claim, however, where there was a threat of immediate infliction of a physical injury. For example, if a defendant negligently releases poison gas, a person who is walking nearby and is exposed to it, knows it is poison, but is never harmed, may have a claim for an emotional harm. The new Restatement also clarifies that emotional harm damages are not permitted for the injury or death of a pet.[49] The Restatement follows almost universal case law in not allowing a claim in such circumstances.[50]

Thus, the treatment of negligent infliction of emotional harm claims by the new Restatement has some balance. There are significant reasons, however, why Green and Stewart list negligent infliction of emotional distress in the "Top 10 Tort Tools." The new Restatement could be understood to expand liability for emotional injuries by eliminating traditional barriers that served "as a hedge against fraudulent or fancied claims and the feared flood of litigation" by arguably supporting claims purely for the grief, fright, anxiety, embarrassment, disappointment, hurt feelings, or worry that occurs in everyday life without an independent tort.[51]

The first important barrier to emotional-distress claims required that a person have actual physical contact with the entity causing emotional harm. Many, but not all, states have dropped this element, and the new Restatement has followed suit.[52] The second barrier required an individual to show an objective physical manifestation of the emotional harm. Such a manifestation might include fainting, high blood pressure, or an objectively diagnosed medical condition. The new Restatement also eliminates this barrier to emotional harm claims.[53]

PERHAPS MOST SIGNIFICANTLY, THE NEW RESTATEMENT SUPPORTS DOWNGRADING THE THRESHOLD FOR RECOVERABLE EMOTIONAL DISTRESS FROM "SEVERE" TO "SERIOUS" IN CASES ALLEGING NEGLIGENT INFLICTION.

Perhaps most significantly, the new Restatement supports downgrading the threshold for recoverable emotional distress from "severe" to "serious" in cases alleging negligent infliction.[54] The new Restatement states that requiring "serious" emotional distress is supposed to eliminate "claims for routine, everyday distress that is part of life in a modern society."[55] The new Restatement, however, adopts this "serious" standard for negligent infliction of emotional distress as a direct contrast to the higher "severe" threshold required for intentional infliction of emotional distress claims.[56] As the Reporters' notes recognize, many courts do not distinguish between the two torts with respect to the level of emotional distress required, and "[t]here is almost no authority" that compares the difference between the two standards.[57] Rather, under current law, the question of interpretation is often "how severe." The Restatement (Second) set the bar high, providing that "the law intervenes only where the distress inflicted is

so severe that no reasonable man could be expected to endure it."[58] Some courts apply this threshold for negligent infliction of emotional distress claims. Others require, for example, an "emotional or mental disorder, such as . . . neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so."[59] Courts have viewed such high standards as imperative to controlling what could otherwise be an overwhelming number of emotional harm claims, particularly after abandoning traditional limits, such as a showing of physical impact, a physical injury, or a subsequent physical manifestation of the emotional distress.[60] In sum, the new Restatement encourages courts to permit recovery for negligent infliction of less serious emotional harms than under current law.

With respect to negligent infliction of emotional harm claims based on the plaintiff observing an injury to another person, there is, once again, a potential expansion of existing law. In some jurisdictions, courts do not allow a claim simply because an individual witnesses another person being harmed or killed. In jurisdictions that allow such claims, they are often specifically limited to situations where the plaintiff himself was within the zone of danger, *i.e.,* he was at risk himself. The new Restatement drops that limit.[61] The basic requirements are that the plaintiff viewed the event "contemporaneously" and that the person who suffered a sudden serious bodily injury was a "close family member of the person suffering the bodily injury."[62] Even in jurisdictions that allow these types of third-party claims, they are typically limited to husband-wife, mother-father, or child-parent relationships. The new Restatement employs the open-ended phrase "close family member," and takes a "pragmatic" and "functional" approach to defining who qualifies for recovery, potentially leaving the decision to a jury.[63] This change could expand third-party emotional harm claims to a wider range of plaintiffs.

WHEN ARGUING AGAINST THE EXPANSION OF EMOTIONAL HARM DAMAGES IN THE NEW RESTATEMENT, ONE MUST PERSUADE A COURT THAT OBJECTIVE CRITERIA AND A HIGH THRESHOLD FOR EMOTIONAL HARM ARE NECESSARY IN THIS SEA OF SUBJECTIVITY.

***Arguing against expansion of claims for emotional harm.*** When arguing against the expansion of emotional harm damages in the new Restatement, one must persuade a court that objective criteria and a high threshold for emotional harm are necessary in this sea of subjectivity. For one thing, these objective criteria are an important check on fraudulent claims. Moreover, if too many emotional harm claims are allowed, then a defendant's assets could be exhausted before compensating people who have serious physical injuries. In addition, defendants need to remind judges that the overwhelming majority of courts recognize that while we can all feel empathy for those who suffer "emotional harm," the law needs strict black letter guidelines if it is to allow these claims at all. Bankrupting companies based on potentially thousands of plaintiffs who suffered no physical injury is an unsound policy at any time, and particularly so in challenging economic times. ■

## THE OTHER FIVE "TOP TEN TORT TOOLS"

This white paper concentrates on the five most important expansions contained in Green and Stewart's top-ten list. Their list also includes five other topics:

THE NEW RESTATEMENT CONTAINS A GENERAL DUTY FOR ALL PEOPLE TO USE REASONABLE CARE AND NOT TO CREATE A RISK TO OTHERS. THE RESTATEMENT (SECOND) LIMITED SUCH A DUTY TO FORESEEABLE RISKS.

**1. Stretching foreseeability.** The new Restatement contains a general duty for all people to use reasonable care and not to create a risk to others. The Restatement (Second) limited such a duty to foreseeable risks. The new Restatement replaces foreseeability limits with a test that would hold defendants liable for "harms that result from the risks that made the actor's conduct tortious."[64] This untested principle might be applied to hold an individual liable for very remote consequences of his conduct. For example, in a case specifically mentioned in the Green/Stewart article, a homeowner left a disassembled trampoline on his property. If a guest who was unaware of this hazard entered that property and was injured, then he should be able to bring a claim. In the case cited in the article, however, a severe storm came through and blew the trampoline into the roadway. The plaintiff, who never entered the defendant's property, swerved to avoid the trampoline, lost control of his car, and was injured. The Supreme Court of Iowa, following a draft of the new Restatement, reversed lower courts and allowed a claim.[65] Once again, the new Restatement has dispatched a needed perimeter of tort law. Its absence can lead to absurd outcomes, a point utilized by Judge Cardozo in ruling for the defendant in the famous *Palsgraf* case.[66]

COURTS NEED TO APPRECIATE THAT ELIMINATING SUPERSEDING CAUSE SHIFTS RESPONSIBILITY AWAY FROM TRUE WRONGDOERS.

**2. Discarding superseding causes.** Section 34 of the new Restatement may, in some jurisdictions, reduce the ability to raise a superseding cause as a defense.[67] As a practical matter, this means that if a defendant is negligent and created a risk of harm, it may be liable even if an unforeseeable event was the most direct cause of the plaintiff's injury. For example, if a walkie-talkie designed for security personnel is defective, the manufacturer may be liable for a guard's injury when he is attacked by thieves and cannot summon help. Such a rule has implications for small businesses, such as convenience stores and gas stations, that face litigation alleging that they failed to provide adequate security on their property. It could also impact "crashworthiness cases" in which a drunk driver claims that, had the manufacturer properly designed the car, he would not have suffered as extensive injuries in a crash. Courts need to appreciate that eliminating superseding cause shifts responsibility away from true wrongdoers.

**3. Reducing the standard of proof in medical liability cases.** Another of the "Top 10 Tort Tools" should be of particular concern to physicians. In a number of states, experts in medical malpractice cases must testify that there was a reasonable degree of medical or scientific "certainty" that a doctor's conduct caused a patient's injury. The new Restatement drops this certainty and replaces it with a simplified and lower "more reasonable than not" standard.[68] Physicians need to carefully consider this area. At the very time rational limits need to be added to medical liability cases, it is unsound public policy to go in the opposite direction and expand liability exposure of the medical profession.

THE NEW RESTATEMENT ALSO PUTS DENTS IN A FAMOUS (TO LAW STUDENTS) TORT DOCTRINE CALLED *RES IPSA LOQUITUR*. *RES IPSA LOQUITUR* ALLOWS PLAINTIFFS TO WIN A CASE WITHOUT HAVING TO PROVE THAT THE DEFENDANT WAS NEGLIGENT.

**4. Eliminating limitations on *res ipsa loquitur*.** The new Restatement also puts dents in a famous (to law students) tort doctrine called *res ipsa loquitur*. *Res ipsa loquitur* allows plaintiffs to win a case without having to prove that the defendant was negligent. In a classic case occurring over 200 years ago, a pedestrian plaintiff was walking by a building and a barrel of flour fell out of that building onto his head, causing him serious injury. The plaintiff did not have to show negligence – the accident itself suggested negligence on the part of the owner of the building. Loosely translated *res ipsa loquitur* means "the thing speaks for itself." There are, however, certain additional barriers

on *res ipsa loquitur.* One such important requirement is that the defendant needs to be in control of the instrument that caused the harm. For example, in the classic case, the barrel was in the defendant's factory before it fell out of the window. The new Restatement replaces that requirement with a potentially less demanding one – that the "accident causing plaintiff's harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member." Depending on how this "class of actors" provision is construed, the new Restatement might be interpreted to permit application of *res ipsa loquitur* even when there is no showing that the defendant was in control of the object that injured the plaintiff.[69] The defendant's control of the object that hurt the plaintiff is an essential part of the rationale for the *res ipsa* doctrine.

**5. Expanding liability for "abnormally dangerous activities.** Finally, the new Restatement provides a step ladder to expand an area of law where true strict liability exists. This area of law is called "abnormally dangerous activities," such as blasting in an urban area. Judges decide when an activity is deemed "abnormally dangerous." This requirement continues under the Restatement (Third), but the criteria for determining what is, and is not, an abnormally dangerous activity are broader and provide the judge with more latitude to allow new categories of such claims.[70] Abnormally dangerous activity strict liability is the nuclear weapon of all of tort law. It must be confined to clearly predictable categories, such as demolition explosions. ■

## CONCLUSION

If left unchecked, the new *Restatement Third of Torts: Liability for Physical and Emotional Harm*'s "Top 10 Tort Tools," could be used to expand tort liability. These supposed tools pose a greater potential threat than most statutes, law review articles, or vigorous lobbying efforts of plaintiffs' lawyers. Through these "Top 10 Tort Tools," changes in American tort law could occur in the least visible branch of government, namely, state courts. The legal and business community can curb these potential extensions, or prevent them, but it will take careful, conscientious, and vigilant action to do so. This white paper is intended to help achieve that goal. ■

## ENDNOTES

1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010).

2 Michael D. Green & Larry S. Stewart, *The New Restatement's Top 10 Tort Tools,* Trial, April 2010, at 44.

3 *Id.*

4 Restatement of Torts (1934).

5 Restatement (Second) of Torts (1965).

6 *Id.* § 402A.

7 Restatement (Second) of Torts §§ 895C, 895E, 895F, 895G (1977).

8 *See generally* Restatement (Second) of Torts, chs. 12 & 16 (1965).

9 Restatement of the Law Third, Torts: Products Liability (1998).

10 *See id.* § 2(b), (c) (determining defects in design and warnings based on the foreseeable risks of harm and ability to reduce the risk through a reasonable alternative design or reasonable instructions or warnings).

11 *See id.* § 2(a) (providing that a product contains a manufacturing defect when it "departs from its intended design even though all possible care was exercised in the preparation and marketing of the product").

12 Restatement of the Law Third, Torts: Apportionment of Liability (2000).

13 Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm (2010) [hereinafter Restatement Third, Physical and Emotional Harm].

14 *Id.* § 28(b).

15 *Id.* ("When the plaintiff sues all of multiple actors and proves that each engaged in tortious conduct that *exposed* the plaintiff to a risk of harm and that the tortious conduct of one or more of them caused the plaintiff's harm but the plaintiff cannot reasonably be expected to prove which actor or actors caused the harm, the burden of proof, including both production and persuasion, on factual causation is shifted to defendants.") (emphasis added).

16 *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

17 Restatement Third, Physical and Emotional Harm § 28 cmt. c(1).

18 *Id.* § 28 cmt. c(3).

19 *See Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 882, 885-86 (10th Cir. 2005) (finding that district court properly excluded expert who would testify that silicone breast implants are responsible for systemic autoimmune disease when such testimony was "flatly contradictory" to all epidemiological studies on the issue); *see also Raynor v. Merrell Pharms., Inc.*, 104 F.3d 1371, 1374-75 (D.C. Cir. 1997) (providing that expert theories drawn from in vitro and animal studies had been disproven by established epidemiology); *Meister v. Med. Eng'g Corp.*, 267 F.3d 1123, 1127-32 (D.C. Cir. 2001) (excluding plaintiff's expert testimony that implants caused plaintiff's scleroderma when experts failed to show that her ailment can be caused by silicone implants).

20 Restatement Third, Physical and Emotional Harm § 28 cmt. c(4).

21 *Id*. § 28 cmt. c(1).

22 *See* Restatement (Second) of Torts § 333(1965) (providing, subject to narrow exceptions, that "a possessor of land is not liable to trespassers for physical harm caused by his failure to exercise reasonable care (a) to put the land in a condition reasonably safe for their reception, or (b) to carry on his activities so as not to endanger them").

23 Restatement Third, Physical and Emotional Harm § 51 (Tentative Draft No. 6, Mar. 2, 2009).

24 Green & Stewart, *supra*, at 47.

25 Restatement Third, Physical and Emotional Harm § 52 (Tentative Draft No. 6, Mar. 2, 2009).

26 *Id*. § 52, cmt. a., illus. 4.

27 *See* Restatement (Second) of Torts § 333 (1965).

28 *Id*. § 339.

29 *See id.* §§ 334 to 338.

30 *See* Restatement (Second) of Torts § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.").

31 *See id*. § 314A (setting forth special relations giving rise to a duty to aid or protection).

32 Restatement Third, Physical and Emotional Harm § 37 (Final Proposed Draft No. 1, April 6, 2005).

33 *Id*. § 40.

34 *Id*. § 40 cmt. o. By way of comparison, the Restatement (Second) "expresses no opinion as to whether there may not be other [special] relations" giving rise to an affirmative duty." Restatement (Second) of Torts § 314A caveat (1965).

35 The Third Restatement states that, in addition to the new special relationships listed, courts are free to recognize others, and it even suggests that "one likely candidate" is the relationship among family members. *See* Restatement Third, Physical and Emotional Harm § 40 cmt. o.

36 See note 34, *supra*.

37 *Id.* § 42.

38 *See* Restatement (Second) of Torts §§ 323 ("Negligent Performance of Undertaking to Render Services."), 325 ("Failure to Perform Gratuitous Undertaking to Render Services").

39 *See, e.g.,* Fla. Stat. § 768.13(2)(c)(1); Tex. Civ. Prac. & Rem. Code Ann. § 74.151(a).

40 *See, e.g.*, R.I. Stat. § 9-1-27.1 ("No person who voluntarily and gratuitously renders emergency assistance to a person in need thereof including the administration of life saving treatment to those persons suffering from anaphylactic shock shall be liable for civil damages which result from acts or omissions by such persons rendering the emergency care, which may constitute ordinary negligence. This immunity does not apply to acts or omissions constituting gross negligence or willful or wanton conduct.").

41 Restatement Third, Physical and Emotional Harm § 37 (Final Proposed Draft No. 1, April 6, 2005) ("When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and its scope.").

42 *Id*. § 38 cmt. c.

43 *Id*. § 38 cmt. e.

44 *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (holding that plaintiff suing under an implied right of action must show that the statute manifests an intent "to create "not just a private right but also a private remedy"); *see also Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (finding no implied right of action under the Family Educational Rights and Privacy Act (FERPA) nondisclosure provisions because "the provisions entirely lack the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights").

45 S.B. 138, 2009-10 Reg. Sess. (Ga. 2010) (codified at Ga. Code Ann. § 9-2-8).

46 *See* Restatement (Second) of Torts §§ 313(1), 436 (1965) (providing liability for unintentionally causing emotional distress for resulting illness or bodily harm).

47 *See* Victor E. Schwartz *et al.*, Prosser, Wade & Schwartz's Torts 464-78(12th ed. 2010).

48 *See* Restatement Third, Physical and Emotional Harm § 47, cmt. h (Tentative Draft No. 5, 2007).

49 *See id.* § 47, cmt. j.

50 *See* Victor E. Schwartz & Emily J. Laird, *Non-economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 Pepp. L. Rev. 227 (2006).

51 *Daley v. LaCroix*, 179 N.W.2d 390, 393-94 (Mich. 1970) (citing 64 A.L.R.2d 100, § 6).

52 *See* Restatement Third, Physical and Emotional Harm § 47, cmt. b, c (Tentative Draft No. 5, 2007).

53 *See id.* § 47, cmt. g.

54 *See id.* § 47 & cmt. i.

55 *Id*.

56 *See id.* § 46.

57 *Id*. § 46, Rptrs' Notes cmt. i. The notes grasp a single paragraph of an unpublished mid-level appellate case, *Mikol v. Celaya*, 2003 WL 21983704 (Cal. Ct. App. 2003) as the "strongest support" for requiring severe emotional distress for intentional infliction claims, but only serious emotional distress for negligent infliction claims. *Id.*

58 Restatement (Second) of Torts § 46, cmt. j (1965).

59 *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 395 S.E.2d 85, 97 (N.C. 1990).

60 *See id.*

61 *See id.* § 48 cmt. i.

62 *Id*. § 48.

63 *See* § 48 cmt. e (stating that "[s]ometimes people live functionally in a nuclear family without formal legal family ties. When defining what constitutes a close family relationship, courts should take into account changing practices and social norms and employ a functional approach to determine what constitutes a family."); *id.* § 48 cmt. g (stating that "determination of the class of persons who may qualify as a close family member is a matter of law for the court" but that "if the class is defined more generally or functionally as provided in comment *e*, it may be necessary in some cases for the jury to decide whether a given plaintiff has the requisite relationship" to qualify for recovery).

64 Restatement Third, Physical and Emotional Harm § 34.

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

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

67 Restatement Third, Physical and Emotional Harm § 34 ("When a force of nature or an independent act is also a factual cause of harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.").

68 *Id.* § 28, cmt. e.

69 *Id.* § 17 ("The factfinder may infer that the defendant has been negligent when the accident causing the plaintiff's harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member."); *id.* cmt. b (finding "unsatisfactory" the requirement applied by "a number of courts" that "the 'instrumentality' inflicting the harm was under the 'exclusive control' of the defendant").

70 *See id.* § 20 (providing that an activity is abnormally dangerous if "(1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and (2) the activity is not one of common usage").

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