

“Creating” and “Posing” Risks as Organizing Principles in the Third Restatement (Torts)

If there had ever been a time for heroic deconstruction of the draft Third Restatement, that time has passed. At this advanced moment in the evolution of the Restatement we should focus on the humbler task of suggesting realistic ways in which the text of the Draft could be tweaked so that its underlying design can be presented to courts and practitioners in a more coherent, transparent and therefore user-friendly way.

Though this ambition seems modest, one area in which execution of this task proves especially onerous centres on the concept of the “conduct creating a risk” upon which the architecture of the Draft’s account of the duty of care rests. “Creation of risk” is not a settled term of art yet nowhere in the current Draft is this critical but troublesome concept defined, nor is there an explicit description of its relation to the concepts of “risk” which are deployed in other areas such as breach and scope of liability. In this paper I suggest such a definition and outline the relation of “creation of risk” to other risk notions in the Draft, particularly the notion that conduct may “pose” a risk even though it did not “create” it. In doing so I address material that suggests a new family of duties should be recognized, ones that arise from control of an instrumentality.

Part 1: Duty; when does conduct “create a risk” for the purposes of §7?

The Reporters of the Third Restatement use a concept of “creating a risk”¹ to create what they claim are two poles in their architecture delineating when a duty is owed in the tort of negligence. These poles are set out as § 7 and § 37 in the Preliminary Final Draft No. 1 dated April 6, 2005 (hereafter “PFD No.1”):

§ 7. Duty

(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.

§ 37. No Duty of Care with Respect to Risks Not Created by Actor

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.

In other words, a duty will be presumed² if the actor’s conduct created a risk of physical harm but there will be a presumption of no-duty if that conduct did not create such a risk as when a stranger encounters a baby drowning in a puddle. The claim that the duty architecture is based on these two poles is made clearly: “a relationship ordinarily is not what defines the line between duty and no-duty; conduct creating risk to another is”³. Nevertheless, it is not at all clear what it means to say that conduct “creates a risk” of physical harm⁴. It is not a term of art.

For example, a trial judge might assume that, as Tentative Draft No.4 of the Restatement had put it, “when an actor’s conduct is a factual cause of physical harm,

the actor's conduct necessarily 'created a risk of harm'⁵. Such a judge would therefore read § 7 as instructing her⁶ to recognize a duty whenever the defendant's conduct was a factual cause of physical harm. Yet such an instruction would be absurd. To understand why: suppose an actor fails to rescue a baby-stranger drowning in a puddle where but-for the omission the baby would not have drowned. Most courts would recognize the omission as a factual cause of the death applying the principle, recognized in §26 PFD No.1, that "conduct is a factual cause of harm when the harm would not have occurred absent the conduct". Yet even though the actor's conduct was a factual cause of the death, there is a virtually universal consensus throughout the common law world that no duty was owed to the baby in these circumstances.

In response to criticism⁷, the Reporters deleted the TD No.4 statement from the PFD No.1⁸ and presumably now consider that conduct can be a factual cause of physical harm without "creating a risk" for the purposes of § 7. Nevertheless, they have still not provided our trial judge with an explicit definition of their concept of "creating a risk" on which the duty architecture of their Restatement relies so heavily. All we have are the Reporters' illustrations from which we must glean the meaning that the Reporters intend to convey by the difficult concept of "creating a risk". In other words, if a user is confidently to pinpoint such a meaning, it can only be after a close and labor-intensive trawl of the Draft. Clearly, one change the Reporters should make to improve the user-friendliness of the Restatement is to expound expressly what they mean by this key concept.

"Risk"

What might such a statement look like? Let me start with "risk". Since the term "risk" is used liberally throughout PFD No.1 the Draft needs to include a careful explanation of its meaning. Here is an attempt at such an explanation. Viewed at the time of the conduct (which is the subject of the allegation of breach) there were certain prospects, a set of "risks", of physical harm presented by the facts whether those facts and therefore those "risks" were discoverable. It is important to appreciate that these "risks" include natural perils, in other words the prospect that "nature will take its course", as when an avalanche crashes down, a person dies of starvation, a wound becomes infected or a genetic pre-disposition is triggered by an environmental factor. As we have seen, the duty architecture of the Restatement divides these "risks" into those which were "created" by the "affirmative act"⁹ of the relevant actor and those that were not. A motorist creates a risk that a pedestrian will be crushed by the vehicle; a parent does not create the natural risk of starvation by failing to feed the child.

What does "create" a risk mean?

From the examples given by the Reporters, I conclude that when they state that an actor's conduct "creates" a risk of physical harm what they mean is that the actor engages in an affirmative act that increases the total physical risks of others relative to how things would be if the actor had not engaged in that affirmative act¹⁰. This definition allows us to accommodate the case where "conduct" does not "create a risk" for the purposes of § 7 but is nevertheless a factual cause of physical harm. For example, the conduct of a lifeguard does not create the peril of drowning faced by a swimmer but his breach of duty may be a factual cause of the swimmer drowning.

The examples of such affirmative acts described as "creating a risk" given in the PFD No.1 include contexts in which the defendant: was driving a car¹¹; was supplying a product¹²; entrusted her car to another¹³; was prescribing for a patient¹⁴;

was a social or commercial host serving alcohol to his guests¹⁵; was giving a weapon to another¹⁶; was storing chemicals¹⁷; was hitting a golf ball¹⁸; was jumping off a bridge¹⁹; was installing a building material²⁰; was locating a picnic area²¹ or utility pole²² or business operations²³; was leasing premises²⁴; was participating in a game of Russian roulette²⁵; or was hiring employees²⁶.

“Creating” a risk by increasing chance of encountering a natural hazard, third party or instrumentality

An important feature of the concept of “creating a risk” deployed in § 7 is that it includes an affirmative act that increases the physical risks of another by increasing the chance that the other will encounter some natural hazard, third party or instrumentality: a doctor persuades his patient to go skiing to exercise his arthritic knees; a bar serves alcohol to a patron; or a landlord leases premises to a tenant who owns a vicious dog²⁷. In other words it extends to cases where the immediate agent of risk is not the defendant but is a natural force such as an avalanche or another person such as a drunk driver or a hazardous instrumentality such as a dog. Confusingly, these points are not made in § 7. While it is true that a special section on breach is, inexplicably, devoted simply to the particular case of where a defendant’s conduct increases the physical risks of another by increasing the chance that the other will encounter the misconduct of a third party²⁸, the problem is that the remainder of these issues fleshing out the meaning of “conduct that creates a risk” within §7 are not made until the affirmative duties chapter, Chapter 7²⁹: again the Reporters need to insert them in a comment to § 7.

“Conduct” includes affirmative act in which omission is embedded

If we now move to the notion of “conduct” referred to in § 7, we see that the Draft notes, though regrettably not until § 37 comment c, that:

The proper question is not whether an actor’s specific failure to exercise reasonable care is an error of commission or omission. Instead, it is whether the actor’s entire conduct created a risk of physical harm. For example, a failure to employ an automobile’s brakes or a failure to warn about a latent danger in one’s product is not a case of nonfeasance governed by the rules in this Chapter [Chapter 7], because in those cases the entirety of the actor’s conduct (driving an automobile or selling a product) created a risk of harm. This is so even though the specific conduct alleged to be a breach of the duty of reasonable care was itself an omission.

The Reporters’ Note to this comment makes the point even more clearly: “it is the defendant’s entire course of conduct that must constitute an affirmative act creating a risk of harm and that negligence may consist of an act or omission creating an unreasonable risk”³⁰. This confirms that, while the notion of “conduct” in § 7 requires an affirmative act this includes action in which an omission is “embedded”³¹. So it is irrelevant if the specific allegation of breach is an omission such as failing to apply the brakes of a car: if the omission is “embedded” in a course of conduct that is an affirmative act such as driving a car, then the conduct may be characterised as “creating a risk”³². It is the *entirety* of the conduct that is in issue when we ask the “create a risk” question.

“Conduct” refers to the actor’s specific conduct at the relevant time and place

The next question we need to consider, which this passage from § 37 comment c does not resolve, is whether the § 7 notion of “conduct...creating a risk” refers to the generic form of the actor’s conduct such as “driving an automobile” or to the actor’s *specific* conduct (such as driving on Main Street at noon on 1 April 2009 at 40 mph). By trawling through PFD No.1 we can decipher an answer to this question: it is that “conduct” in § 7 is intended to refer to the entirety of the particular actor’s specific conduct at the relevant time and place. Thus in comment c to § 37 we are told:

a retail store that operates in a dangerous and isolated neighborhood might be characterized as creating a risk of criminal activity to patrons....whether the retail store has created a risk of criminal activity requires consideration of what would have happened if the store had not been in operation. Perhaps the patron would have been subject to an equivalent risk of attack at some other location, or perhaps the patron would have foregone late-night shopping if the store had not been there.

In other words, the relevant conduct here is locating the store at this particular place and the “creating a risk” question is the simple factual one of whether this causes an increase in criminal activity in the area (relative to that activity level absent the store) so that a risk of physical harm to patrons was created.

Whether conduct creates a risk is independent of whether it breaches obligation

It is also important to stress that this determination of whether the location of the store creates a risk to patrons (and therefore attracts a s.7 duty) is made completely independently of and without reference to the breach issue of whether creating such risks was reasonable. If “conduct” in s.7 meant the specific allegation of breach this would produce the absurd arrangement that it is only unreasonable acts that attracts a § 7 duty: it would then be impossible to conceive of a person satisfying a § 7 duty by reasonable care. Thus §7 treats a driver proceeding at 30mph as “creating a risk” and therefore under a duty even though with hindsight we may conclude such conduct was reasonable in the circumstances.

In other words, under § 7 we determine whether the fact that the defendant was driving on Main Street at noon on 1 April 2009 at 40 mph increased the risk of physical harm to others without reference to the breach issue of whether the creation of this level of risk (e.g. by driving at 40 mph and not braking) was reasonable or whether it is a breach.

What this means is that, even if it is possible to engage in the generic type of conduct of the defendant without increasing the risks confronting any person, for example if one drove slowly on a flat empty plain this would not increase the risks to anyone, once an actor engages in a form of such affirmative action at a certain time and place where it does increase the risk of physical harm to others, that actor “ordinarily” has a duty to exercise reasonable care according to § 7(a).

The notion of “creating a risk” is independent of knowledge, discoverability or foreseeability.

The affirmative act of one person lightly touching hands with another at noon on 1 April 1809 would not, at that date, have been judged to “create a risk” of physical harm in our sense of increasing the risks of others. Yet today we know that such conduct might transmit infection from one to another so it is indeed conduct that “creates a risk” even though this was not known or reasonably discoverable at the

time. That by his conduct an actor can “create a risk” unwittingly is acknowledged in PFD No.1, but again this clarification of an essential aspect of the key § 7 concept is not given until 30 sections later³³. Clearly, the Reporters should insert this and other fundamental points about the intended meaning of “conduct” in a comment to § 7.

The § 7 “risk” need not threaten injury contemporaneous with the conduct

Another feature of § 7 that should be made more explicit is that it covers situations where the actor’s affirmative act increased the chance that another would face a peril sometime in the future long after the risk-creating act had been completed. For example, suppose a friend gives a tin of food to a neighbour which is dangerously adulterated. For the purposes of § 7 the act of giving “creates a risk” because it increases the chance the neighbour would suffer food poisoning and it is irrelevant that such poisoning could happen long after the act of giving has been completed.³⁴

Is passively permitting access to an instrumentality an “act” creating a risk?

A final but important question on the catchment of § 7 is whether its notion of “an affirmative act creating a risk of harm”³⁵ covers cases where the defendant’s “conduct” consists merely of passively permitting access to an instrumentality under his control³⁶. There are indirect suggestions in PFD No.1 that such cases would come within the notion of “an affirmative act creating a risk”³⁷. Yet, arguably it will often require an awkward and unusual attenuation to characterise the mere storage of, say, a firearm where another can gain access to it as “an affirmative *act* creating a risk of harm”. Often it seems much more coherent to see the duty attaching to the *fact* of possession giving rise to an affirmative duty to control the instrumentality. In my view a more convenient arrangement of such case law would be to carve out a separate Chapter 7 family of duties triggered by control over an instrumentality and akin to the families of duties that arise from control over animate things such as other persons and animals.

The Accommodation of Empirical and Conceptual Uncertainty as to ‘creation of risk’

Though determining whether the affirmative act of the defendant increases the physical risks of another may seem a simple factual question, in practice it may be hard to answer confidently even if the parameters of the question are agreed³⁸. This means that in application the catchment of § 7(a) has fuzzy edges. We can see the Reporters’ addressing this empirical problem in their full discussion of the retail store:

In some cases, determining whether an actor’s conduct created a risk of harm may be problematic. In the absence of the rules provided in this Chapter [Chapter 7], it would be necessary to ask hypothetically what would have happened if the actor had not engaged in the conduct to determine whether a duty exists. See § 26, Comment e. Thus, a retail store that operates in a dangerous and isolated neighborhood might be characterized as creating a risk of criminal activity to patrons. If that characterization were accepted, § 7 would impose a duty of reasonable care to provide security for patrons and employees on the site. However, whether the retail store has created a risk of criminal activity requires consideration of what would have happened if the store had not been in operation. Perhaps the patron would have been subject to an equivalent risk of attack at some other location, or perhaps the patron would have foregone late-night shopping if the store had not been there. Fortunately, specific rules addressing the duty question exist for many of the common

patterns in which these difficult cases arise and are contained in §§ 39-44. In the absence of such a rule, the fact finder would have to determine whether an actor's conduct created a risk of harm as a predicate for determining whether a duty exists under § 7 or whether a duty, if any, must be found in this Chapter.³⁹

In other words, though entitled "Affirmative Duties", Chapter 7 provides a wider catchment of duties than affirmative duties. What we can say, setting aside §39 for the moment because it is *sui generis* and conceptually problematic, is that in the contexts enumerated in §§ 40-44 a duty is owed regardless of whether empirically it could be shown that "the actor's conduct creates a risk of physical harm"⁴⁰. In §§ 40-41 the duty-generating factual feature is, in the eyes of the law, the defendant's special status or relationship with the victim or perpetrator; in §§42-3 the duty-generating feature is an undertaking by the defendant to the victim or to another; while in §44 the relevant fact is that the defendant had taken charge of another person in a vulnerable position.

Moreover, the existence of §§ 40-44 duties also avoids conceptually awkward questions. Take the example of whether procreating⁴¹ should be characterised as an affirmative act creating a risk of harm (to the child itself or by increasing the physical peril of someone the child might injure): §§40-41 simply and smoothly accommodates the principle that a parent's conduct in relation to her child uncontroversially attracts a duty and we do not have to worry whether the case can be squeezed into §7⁴².

Similarly there may be empirical and/or conceptual disagreement as to whether we should characterise a land possessor's conduct in granting the public entry to the premises (e.g. a store) as "creating a risk" by virtue of the potential hazard that a third party might injure the entrant: but this is accommodated by the duty being clearly recognized in §40(b)(3)⁴³.

A bailee's implied acceptance of goods provides another illustration: "where a customer in a store lays aside a garment in the presence of employees preparatory to trying on a new one"⁴⁴ we do not have to trouble ourselves with any empirical or conceptual dilemmas about whether the bailee "creates a risk" for the purposes of §7: §42 recognizes the duty that is attracted by such gratuitous bailments. A final example is where a landlord fails to provide security devices at leased premises we do not have to worry if this can be established to be conduct that facilitates the risk of criminal attack⁴⁵ because § 40(b)(6) simply recognizes that the relationship of landlord and tenant is sufficiently "special" to impose a duty on the former.⁴⁶

Summary of Duty Architecture

What this means is that, although the Reporters claim that "what defines the line between duty and no-duty... [is] conduct creating risk to another"⁴⁷, this is an awkward and misleading picture of the duty architecture of the Restatement that they have drawn, and the underlying case law they seek to restate. That architecture is not best captured by the claim that duty cases are arranged around two poles defined by "creation of risk". The more accurate representation of the duty architecture is as follows.

First, § 7 provides a convenient label for a large number of contexts in which the recognition of a duty is uncontroversial because they involve an actor who engages in an affirmative act that unequivocally increases the physical risks of others. This simple fact of positively imperilling others is judged sufficient by itself to

provide an adequate normative rationale for the duty: if one acts one must take care not to increase the risks to the physical integrity of others.

Secondly, §§ 40-44 adumbrate other contexts in which the recognition of a duty is uncontroversial because, the type of status relationship of the actor to the victim or a third party (or the type of undertaking of the actor to such parties⁴⁸) raises normative concerns which, regardless of whether the particular actor's conduct "creates a risk of physical harm", have been judged to weigh in favour of the recognition of a duty. Though we use a short-hand of seeing some feature, be it a relationship or undertaking, as "triggering" a duty, we should not lose sight of the normative analysis that actually results in the recognition of the duty. Indeed, the notions of "relationship", "undertaking" and "taking charge" are themselves normative constructs so it would be more accurate for us to see the catchment of §§ 40-44 as "normative envelopes"⁴⁹.

For completeness we should note additional pillars to that architecture. A third is that even where a context might otherwise fall within §§ 7 or 40-44, courts may decline to recognize a duty on special grounds. Given the §7/Chapter 7 design adopted by the Reporters this feature of tort doctrine must be stated in duplicate: as an exception to §7(a); and as an exception to §§ 40-44⁵⁰.

Related to this is a fourth pillar in the duty architecture: that in future courts may recognize duties in contexts beyond those explicitly enunciated in §§ 7 and 40-44⁵¹. It is here that a central weakness of the duty architecture is revealed, for what drives the resolution of new duty claims is not a judicial meditation on the meaning to be ascribed to "an affirmative act creating a risk of harm", "special relationship", "undertaking" and so on, but a determination of complex policy concerns underlying these labels. Though the Reporters acknowledge something like this is in operation, they are unable to accommodate it smoothly within their present architecture with its focus on risk creation. This becomes evident once we turn our attention to §39 and the troublesome question of its place in the "risk" structure of the Restatement.

Part 2: Innocent Creation of a Continuing Risk and Affirmative Duties to Strangers

We have seen that §§ 40-44 sets out contexts in which a duty is owed, regardless of whether the particular actor's conduct "creates a risk of physical harm"⁵², because courts have determined that the systemic policy concerns intrinsic to certain relationships and undertakings support the recognition of a duty in such contexts. What this means is that, if a case falls within this "normative envelope" of a special relationship, undertaking and so on, the actor owes a duty including a duty of affirmative action. One important example would be where a § 40-44 actor has innocently completed an affirmative act that created a continuing risk (as where a doctor innocently inserted an intrauterine device in a patient⁵³) and later becomes aware of the danger (such as discovering the device could be dangerous): there is an affirmative duty in relation to that risk.

Within these well-settled normative envelopes in §§ 40-44 the affirmative duty that is owed can be even more general because it can relate to entirely natural perils. For example, when another has a heart attack there is a peril that his condition will deteriorate further unless he receives assistance. This peril of deterioration is not created by any human conduct so no one will owe a §7 duty⁵⁴. Another party may, however, owe a duty of affirmative action by virtue of the normative envelopes recognized in §§ 40-44. A parent owes a duty of affirmative action in relation to her

infant; a restaurant owes such a duty to a patron who has had a severe asthma attack on the premises⁵⁵; a possessor of land open to the public owes a duty to persons lawfully on their land who become ill.⁵⁶

But there are cases which recognize an affirmative duty even beyond the catchment of §§ 40-44. In a few rare cases U.S. courts have recognized an affirmative duty in a situation where not only do the facts not fit a status or undertaking expressly listed in §§ 40-44, but they also cannot be characterised as an extension of those provisions because there is no plausible argument that the defendant had any relevant “relationship” with another party⁵⁷ and there had been no undertaking by that defendant.

Completed act created a continuing risk to the stranger

What is the ambit of these rare cases where a duty of affirmative action can be owed to a stranger? So far such affirmative duty cases seem to have at least the following common denominator: that the defendant had by an affirmative completed act created a continuing risk to the stranger. Recall that the very fact of acting so as to create a continuing risk to others attracts a §7 duty so that if *that act of creation* had been done carelessly the actor would be subject to liability even to a stranger and even if the injury, such as being poisoned by adulterated tinned food, happened long after the completion of the risk-creating act⁵⁸. In contrast, here we are looking at continuing-risk cases where the complaint does not focus on the earlier completed act of risk creation⁵⁹ but asserts that the actor was under an affirmative duty to ameliorate the risk which the actor’s earlier completed act had innocently created.

The classic example is Maldonado v. S. Pac. Transp. Co.⁶⁰ in which a hobo attempted to board defendant’s moving freight train and fell under the train’s wheels, suffering serious injuries. Railroad employees, aware of his predicament, failed to render aid or call for medical assistance. Though the railroad was not subject to liability for the initial harm suffered by the plaintiff, it was held to owe a duty in relation to the continuing risk thereby created, namely that the condition of the hobo would deteriorate further unless he received assistance.

The Reporters attempt to capture this principle in § 39:

When an actor’s prior conduct, even though not tortious, creates a continuing risk of physical harm of a type characteristic of the conduct, the actor has a duty to exercise reasonable care to prevent or minimize the harm.

Given that §7 catches any conduct that “creates a risk of physical harm” why was the inclusion of the narrower § 39 thought necessary? The Reporters explain this merely in terms of clarification: a court might see a temporal ambiguity in §7 and thereby be uneasy about using §7 in a case where the risk-creating act has been completed yet the risk that had been created still persists.⁶¹

I believe this explanation is dangerously misleading and incomplete. Instead, we need to confront the explosive issue in these continuing-risk cases, namely that in these cases courts recognized an *affirmative* duty owed to a complete stranger: the alleged unreasonable conduct is a pure omission not one embedded in an act. It is well known that, historically, the law has refused to impose such duties⁶², so we are now having to map how far and why these continuing-risk cases have carved out an exception to that no-duty-to-rescue-a-stranger rule.

Necessity for Additional Limitation to Duty

If the Reporters had seized on just one feature of these continuing-risk cases and couched the exception merely in terms of the defendant having earlier created a risk, this exception would so broad it would threaten the basic no-duty-to-rescue rule. Knowingly or unknowingly we complete acts that create continuing risks all the time. If this mere fact triggered an affirmative duty our law would be a great deal more oppressive than we know it to be. For example, suppose Lionel persuades a stranger to take up skiing and even gives his skis to the stranger. These affirmative acts increase the physical risks confronting the stranger by, *inter alia*, increasing the chance that he will encounter the natural hazard of an avalanche. But surely the mere fact that by completed acts Lionel created a continuing risk is not sufficient to trigger an affirmative duty. If, a year later Lionel happens to see the stranger skiing on slopes that Lionel knows to be particularly prone to an imminent avalanche, it would require a significant extension of the law for a court to hold that Lionel owes an affirmative duty of care “to prevent or minimize the harm” by, for example, warning the stranger.

On what basis, then, can the exception to the no-duty-to-rescue-a-stranger rule, which is reflected in these continuing-risk cases, be adequately and suitably narrowed?

The “harm of a type characteristic of the conduct” Limitation

The Reporters acknowledge the need to confine the continuing-risk duty: “merely being a cause of a continuing risk is not sufficient for a duty under this Section. The conduct must also be *sufficiently connected* with the potential for later harm that imposing a duty to prevent or mitigate the harm is *appropriate*”⁶³. What the Reporters choose to do is to limit the exceptional duty-of-affirmative-action-to-a-stranger by limiting it to only certain harms: “when an actor’s prior conduct...creates a continuing risk of physical harm of a type characteristic of the conduct, the actor has a duty to...minimize the harm”. In other words, even if it can be shown that a defendant’s completed act increased the chance, say, that a stranger would encounter an avalanche, this is not sufficient to trigger the affirmative duty in §39. But what does “harm of a type characteristic of the conduct” mean⁶⁴? This is not self-evident.

When Comment d to §39 notes that the “risk characteristic of the conduct” requirement contained in this Section provides a more limited duty than the standard contained in § 7... [and that it] assures that a duty will not be imposed when there is no more than a causal connection between the earlier conduct and the harm”, all this does is to report the effect of this extra requirement, not what it means.

Nor do the illustrations of the principle provided by the Reporters assist us:

While playing golf, Arnold carefully looks for others before driving his ball and observes no one. Immediately after Arnold hits the ball, Jack suddenly appears from behind a tree and in the area toward which Arnold’s drive is heading. Arnold has a duty of reasonable care to Jack to prevent Jack from being hit by the ball⁶⁵

Randall, while on a bridge spanning a river, decides to jump from the bridge into the water, an action barred by no law. Randall carefully canvasses the area before jumping but does not realize that Cheri is treading water directly under the bridge. As Randall jumps, Cheri swims out from under the bridge. Randall lands on top of Cheri, knocking her unconscious. While not subject to liability for her initial injuries, Randall has a duty of reasonable care to Cheri to mitigate the extent of the harm she suffers.⁶⁶

Vince, while motoring on an isolated mountain road, innocently drives into Jane, who was hiking on the side of the road. Jane is seriously injured but remains lucid. Jane, who does not have a cell phone, asks Vince to use his cell phone to call for aid. Vince refuses and drives off. Vince owes a duty to Jane to use reasonable care to mitigate further harm and is subject to liability for any enhanced harm suffered by Jane due to delay caused by Vince's negligent failure to use his cell phone to summon assistance for Jane.⁶⁷

A friend might, in lending a staple to a neighbor, unwittingly provide adulterated food and only later learn about the danger. The conduct of lending the food has ceased, but the risk to the neighbor continues. This Section [§39] makes clear that the friend has a duty to use reasonable care to warn the neighbor, or otherwise mitigate the risk⁶⁸

An automobile driver who collides with another (negligently or nonnegligently) has a duty to use reasonable care to prevent further harm to the other.⁶⁹

And the illustrations where we are told that the principle does not operate are of no greater help:

The Hamford Bus Company serves a town that has a ski resort. Ben rides a Hamford bus to the town in order to go skiing. While Ben is skiing, the Hamford bus driver who transported Ben sees that he has strayed unknowingly into an area with a substantial avalanche risk. Although Hamford is a factual cause of the risk to Ben posed by an avalanche, Hamford and its driver have no duty, under this Section, to Ben with respect to the avalanche risk because Hamford's transportation of Ben does not create a characteristic risk of harm from an avalanche.⁷⁰

Bill, who has an extra ticket for a college basketball game between Wake Forest University and the University of Texas, gives it to Mike so he can attend the game. After Wake loses to Texas by 13 points, Mike, distracted by the mauling his team suffered, slips and falls down several rows of stairs and seriously injures himself. Bill, who is on the stairs at the same time, has no duty of care to Mike to assist him pursuant to this Section, even though Bill is a factual cause of Mike's harm. Bill's providing a ticket to a sports event does not create a characteristic risk of slipping and falling.⁷¹

A college student who transports several others during spring break to a seaside resort is a factual cause of a variety of risks of future harms that might occur. However, none of the harms that might result from those risks, i.e., injuries from a mugging, sexually transmitted diseases, or alcohol-induced injuries, has a sufficient relationship to transporting passengers on spring break to support an affirmative duty under this Section.⁷²

In my view the notion of "harm of a type characteristic of the conduct" has no independent meaning: it fails to provide a meaningful boundary to the set of cases in

which, exceptionally, a duty of affirmative action is owed to a stranger. Let me explain.

Irrelevance of “harm of a type characteristic of the conduct” to a §7 case

It is worth examining why, at no stage of a §7 case, does the notion of “harm of a type characteristic of the conduct” do any analytical work. Remember that we saw that a §7 duty is owed regardless of the allegation of breach and is certainly not predicated on some subset of risks somehow “characteristic of the conduct”. The trigger for a §7 *duty* is simply an act that imperils another (in the sense that, relative to how things would be if the actor had not engaged in that act, the act increases the physical risks of another, including by increasing the chance that the other will encounter some natural hazard, third party or instrumentality). As noted before: the simple fact of positively imperilling others is judged sufficient by itself to provide an adequate normative rationale for the duty: if one acts, one must take care not to increase the risks to the physical integrity of others.

Similarly, in such cases where the duty is triggered by an affirmative act, such as driving on Main Street at noon on 1 April 2009, the *breach* issue (of whether the actors conduct was reasonable in the circumstances) is necessarily pinpointed at a specific time and place: what should have been done is grounded in what affirmative activity the actor had been engaged in. When considering breach and asking which of the foreseeable risks created by that activity would a reasonable person have responded to in the sense of trying to ameliorate, the notion of “harm of a type characteristic of the conduct” is irrelevant.

Then, if the actor did not respond to one or more of the risks to which a reasonable person would have responded, these inadequately-tended-to risks are the “risks that made the conduct negligent”, the benchmark by which we answer the *scope* question of which consequences flowing from that conduct should be judged within the appropriate scope of the actor’s liability: again, the notion of “harm of a type characteristic of the conduct” plays no role.

In short: in affirmative conduct cases there is no role for any notion of “harm of a type characteristic of the conduct” in answering the duty, breach or scope questions because these normative questions are resolved simply by reference to the trigger for the duty, the imperilling act pinpointed at a specific time and place.

Irrelevance of “harm of a type characteristic of the conduct” to affirmative duty cases

Now consider affirmative duties such as those that can arise in the special relationships and undertaking scenarios set out in §§ 40-44. Here, the trigger is not the simple one of an act that imperils another and so the time and place of a specified act does not provide the structure for the breach and scope questions. Instead, as we have seen, the catchments of §§ 40-44, their “normative envelopes”, are expressed in terms of certain “special relationships”, “undertakings” and so on. Nevertheless, it is still the case that at no analytical stage of a §§ 40-44 case is resort ever made to the notion of “harm of a type characteristic of the conduct”. To understand why, we need to understand the complex normative reasoning that lies beneath these relationship-based and undertaking-based affirmative duties.

Academics sometimes lose sight of where the real forensic drama of the duty area lies. This is in the process by which judges: first identify factual features of a case that directly raise systemic normative concerns, some weighing in favour of the recognition of a duty and some weighing against; and then reach a resolution of that trade-off. It needs emphasis that these normative “duty” and “no-duty” concerns are

many (I have identified dozens⁷³) and varied (some can be most conveniently characterised in terms of social utility or efficiency, others in terms of the law signalling a moral value and so on) so the normative trade-offs required to resolve duty questions are typically complex. Nevertheless, the excavation of these concerns from the case law and their careful exposition is critical to our understanding of why and where a duty has been recognized, as well as being critical to questions about breach and scope.

Sections 40-44 set out occasions where the particular status or undertaking of the defendant has been found, over time and by wide judicial consensus, to support the recognition of a duty. Careful examination of the supporting case law reveals the richness of the normative concerns that these factual features raise, helping us to understand the relevant “normative envelope”, that is why and where the duty is owed. Take, for example § 40(a) which states that “an actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.” From the rich analyses of past case law there is no doubt that a restaurant is in such a special relationship with a patron eating a meal.

Thus, an affirmative duty of care is owed to him while eating his meal, as Illustration 1 to § 40 makes clear:

While eating lunch alone at the Walkalong restaurant, Joe suddenly suffers a severe asthma attack. Several waiters at the restaurant recognize that Joe is suffering an asthma attack. All of them, however, ignore Joe, and another 10 minutes pass before another patron observes Joe and summons medical care. The delay results in Joe suffering more serious injury than if he had received medical attention promptly after his plight was observed. The Walkalong restaurant is subject to liability to Joe for his enhanced injury due to the delay in his obtaining medical care.⁷⁴

But what are the limits to the “scope” of this relationship? Comment f to § 40 asserts that:

The duty imposed in this Section applies to dangers that arise within the confines of the relationship and does not extend to other risks. Generally, the relationships in this Section are bounded by geography and time. Thus...an innkeeper is ordinarily under no duty to a guest who is injured or endangered while off the premises...

Thus PFD No.1 states that, had Joe suffered his asthma attack after finishing his meal and exiting the restaurant, the risk that his condition would deteriorate unless he received medical assistance was “outside the scope of the relationship he had with Walkalong”⁷⁵: no liability is imposed on the restaurant even though its waiter callously watches Joe writhe in agony on the sidewalk in front of the restaurant.

But Comment f to § 40 is dangerously misleading in its conclusionary tone as to what the “confines” of the relationship are. The notions of a special “relationship” and “undertaking” are not themselves normative constructs, what I have called the “normative envelopes” within which the duty of affirmative action arises. Courts determine the normative question of what the legally-protected concept of that relationship is. It is true that this determination is often affected by a concern that the lines of duty obligations be clearly drawn and it is also true that two devices courts readily to hand are the artificial ones of “geography and time”. But the Restatement needs to make much clearer that, if jurisdictions have in the past opted to decree that Joe is no longer owed a duty the second he steps out over the restaurant’s threshold, it

is not because some objective “relationship” has ceased but because courts have simply seized upon this as a clear point at which the legal rule can be neatly drawn.

In other words, even if a reasonable person running a restaurant would have helped Joe when he suffered an asthma attack after exiting the restaurant, the reason there will be no liability on Walkalong for its failure to assist Joe is because the law has, for normative reasons, *chosen* to define the “relationship” as no longer “special” once the patron steps out the door of the restaurant and so no duty arises under § 40 and the unreasonable conduct of Walkalong is irrelevant.

Moreover, it is easy to think of fact situations which might in future persuade a court to move the bright-line boundary it had hitherto used. Suppose a schoolboy telephones his teacher on the weekend announcing that he intends to kill himself and his parents that evening, indicating where and how he would do so. Comment I to § 40 tells us that “as with the other duties imposed by this Section, [the affirmative duty imposed on schools in this Section]...is only applicable to risks that occur while the student is at school or otherwise engaged in school activities.” This statement may well accurately track the pattern of past cases, but it fails to emphasize that the “scope of the relationship”⁷⁶ is a normative question and may be held to extend further given a court’s normative vision of what should constitute the legally-protected relationship of school and pupil⁷⁷.

Notice that the richly textured reasoning on which these affirmative duties rest not only determine the catchment of the duty but also provide the structure for the breach and scope issues. For example, when Joe suffers his asthma attack inside the restaurant and the latter comes under a duty reflected in § 40(a), the breach question is framed not as what a reasonable passer-by would have done but what would have been done by a reasonable commercial host standing in the “special relationship” with the patron that the law has recognized exists at that time and place. Just as it is the normative conception of what makes the restaurant-patron relationship, the doctor-patient relationship or the school-pupil relationship “special” that defines the catchment of when an affirmative duty *based on that special relationship* is owed, so too that conception defines the breach question⁷⁸. As we will see, the scope issue is also structured by reference to what courts see as the normative rationale for the duty. In understanding the origin, nature and operation of the normative concerns that produce the normative “envelopes” for §§ 40-44 affirmative duties, we see that the notion of “harm of a type characteristic of the conduct” is irrelevant to them.

The notion of “harm of a type characteristic of the conduct” lacks substance in §39

Now if we return to §39 we find that, in marked contrast to §§ 40-44, the Reporters give us no indication of what normative concerns provide the basis of a §39 duty of affirmative action to a stranger. The comment that “the conduct must also be *sufficiently connected* with the potential for later harm that imposing a duty to prevent or mitigate the harm is *appropriate*”⁷⁹ tells us nothing. Similarly lacking in substance is the comment that “the duty imposed by [§39]...is justified by the actor’s creating a risk (even if nontortiously) and the absence of the pragmatic and autonomy reasons for the no-duty rule in § 37”⁸⁰.

Instead, we find that, whatever are the underlying normative trade-offs in the relevant case law, they are masked by Reporters’ attempt to limit the §39 duty by saying it is owed only when an actor’s prior conduct creates a continuing risk of “physical harm of a type characteristic of the conduct”. This notion is both unworkable as a practical matter and without normative substance.

Consider: how are we to distinguish harms that are “characteristic of the conduct” from harms that are not? Why isn’t the risk of an avalanche injury “characteristic” of the conduct of the Hamford Bus Company whose business is to deliver others into the very precinct where avalanches occur? In other words, why could we not *characterise* the relevant defendant conduct in terms of the relevant risk in issue?

The Reporters assert that the “harm characteristic of the conduct” requires a “similar relationship between the conduct creating [sic⁸¹] the risk and the harm”⁸² as that required under § 29 for scope-of-liability purposes though it will not be identical because in §39 the conduct creating the risk need not be tortious, as it is when addressed under § 29 which reads:

An actor’s liability is limited to those physical harms that result from the risks that made the actor’s conduct tortious.

This sanguine aside neglects the fact that the “risk standard” governing scope-of-liability that is set out in § 29 can *only* have substance in the light of what sort of conduct was tortious in the circumstances and this breach issue is itself *completely* dependent on the prior determination of where and why a duty is owed.

For example, suppose Dave was persuaded to ski by his physician, responding to Dave’s request for advice as to how to reduce the arthritis pain in his knees. Dave’s physician would owe a duty to Dave to give reasonably careful advice about the knee but would he also be obliged to advise about the risk of avalanche? As we have seen⁸³, the normative conception of what makes the doctor-patient relationship “special” not only defines the catchment of when an affirmative duty based on that special relationship is owed, but also defines the breach question both in terms of the characterisation of the “reasonable person” and the risks to which that person’s response is taken into consideration. The “reasonable person” is characterised as a reasonable party in the relevant “special relationship”.

But the risks to which that person’s response is taken into consideration are only those relevant to the law’s concept of what makes the doctor-patient relationship “special”. Clearly, it is relevant to this concept that skiing dramatically increases the risk of arthritic inflammation. Accordingly, it was unreasonable for his physician to encourage Dave to ski in these circumstances. Assume, in contrast, that the risk of avalanche was not one relevant to the law’s concept of what makes the doctor-patient relationship “special”: that in relation to this risk the doctor is in no more special a relationship to Dave than a stranger. This would mean that Dave’s doctor’s failure to warn Dave about the risk of avalanche, even if he had seen Dave was in imminent danger of being hit by one, would not engage the policy concerns that prompted the law of negligence to designate the doctor-patient relationship to be “special”: there would be no breach of the duty owed by virtue of the special relationship⁸⁴.

Then, when Dave is hit by an avalanche his negligence claim against his physician will fail even though a duty was owed, the advice he received was in breach of that duty and that breach was a but-for factual cause of his avalanche injuries (he would not have been on the snow fields but for that advice). The claim fails on the scope issue because the reason why we judge the conduct of Dave’s physician to have been tortious (the advice in relation to the advisability of Dave skiing with arthritic knees) has nothing to do with the risk of avalanche.

To reiterate: what does the work in § 29 is a notion of “harm characteristic of the *tortious* conduct in the individual case”, a notion wholly dependent on the prior normative determination of the boundaries of duty⁸⁵. In §7 this normative rationale is

seen to arise from the simply fact of positively imperilling others; in §§ 40-44 the normative rationale is seen to arise from legal conceptions of “special relationship” and “undertakings”. In §39 there is no such normative envelope to give substance to the notion of “harm characteristic of the conduct”. It is a notion without substance.

The Preferable “control-of-instrumentality” Limitation

There is another factual feature to be found in these rare cases in which a duty of affirmative action is owed to a stranger and the defendant had by a prior act increased the physical risks faced by others. It is a feature which keeps narrow the class of exceptional affirmative duties to strangers and suggests a more coherent way to explore what might be the normative concerns generating these exceptions to the no-duty-to-rescue-a-stranger principle.

In my view, the principle that emerges from the case law and the illustrations provided by the Reporters is confined to cases that contain the following factual feature: that the defendant has or has had control of an instrumentality and the risks to be protected are those involving the instrument itself (e.g. Arnold’s own golf ball; Randall’s own body⁸⁶; the adulterated food⁸⁷) or the risk involved in failing to assist a person injured by that instrument (Vince’s car; the train in *Maldonado* (1981)⁸⁸). By limiting our description of the duty principle in these continuing-risk cases in this way: we successfully accommodate the illustrations provided by the Reporters of where the principle operates and where it does not⁸⁹; we avoid the somewhat mystical enquiry into which are the risks “characteristic” of conduct; and we provide a substantive focus for the breach and scope issues in individual cases.

In other words, the “prior conduct” that poses a continuing risk for the purposes of a revised §39 is not *any* sort of “conduct”: it is conduct specifically linked to control of an instrumentality. If that is absent, there seems (yet) no judicial enthusiasm for recognizing a duty. Thus, the principle does not operate where, though the prior conduct of the defendant poses a continuing risk to others, the defendant had no control over the instrument of potential injury: the Hamford Bus Company owes no duty because it had no control over the unstable snow⁹⁰; and Bill owes no duty to assist Mike because Bill had no control over the instrument that had injured Mike, namely the steps⁹¹. If Lionel persuades a stranger to take up skiing and gives him his skis, Lionel creates a range of continuing risks including that of the stranger being hit by an avalanche but the only one in relation to which Lionel might be held to owe a revised §39 duty relates to the condition of the skis⁹².

A great advantage⁹³ of revising the §39 duty by inserting this narrow factual requirement, is that we can then speculate about what might be the normative concerns that arise merely by virtue of a person’s past or present control of an instrumentality and are such that an affirmative duty might be owed to a complete stranger. As with §§ 40-44, the exposition of this normative basis will be critical to assessing what: the outer catchment, or “normative envelope”, of this revised §39 duty might be; the standard of care it might require; and which consequences of breach might fall outside the appropriate scope of liability.

The control-of-instrumentality approach provides a coherent explanation for a case which, though the Reporters claim demonstrates the operation of the “risk characteristic of the conduct” requirement of their §39⁹⁴, cannot be explained by this latter “requirement”. In that case, *Minahan v. W. Wash. Fair Association*⁹⁵, a plaintiff arrived at a fairground to assist in unloading equipment. Because a fairgrounds employee did not have keys to the service gate, the plaintiff parked on a street at another entrance and unloaded equipment from that location. When reloading the

equipment after the dance concluded, plaintiff was struck by an intoxicated driver. The plaintiff sued the fairgrounds alleging that, even if it was not careless to do so, by preventing her from gaining access to the grounds, it created a continuing risk to her and this triggered a duty. The court refused to recognize that the fairgrounds owed a duty.

This result is easily accommodated if we revise §39 using a control-of-instrumentality requirement: the fairgrounds had no control over the vehicle driven carelessly by another driver. In contrast, to accommodate this no-duty result under the “risk characteristic of the conduct” requirement contained in the current §39 the Reporters must simply assert that that, though the prevention of access created a continuing risk of harm to the plaintiff, being struck by a vehicle driven carelessly by another driver was not a “risk characteristic” of such conduct.

A new family of duties arising from control of an instrumentality

Finally, recall my argument that a separate Chapter 7 family of duties triggered by control over an instrumentality should be recognized wherein we could locate cases where, for example, someone had carelessly stored a firearm (allowing us to avoid the mystical question of whether this was a creation of risk by an affirmative “act”)⁹⁶. Our revised §39 could be drawn widely enough to contain both such cases and the affirmative duty cases discussed in this Part in much the same way as §40 can be used to locate both types of duty.

Just as the special relationship between a doctor and patient in §40 supports the doctor owing a duty in his positive acts of treatment so too it supports an affirmative duty in relation to a continuing risk innocently created by such an act. For example, if acting with reasonable care a doctor positively advises a patient with condition X that he should eat more fish and later discovers this is in fact a very dangerous practice, the doctor has an affirmative duty to warn the patient under §40. So too we should draw the revised §39 widely enough to locate both a duty in relation to control and management of the instrumentality plus a duty of affirmative action if that control is lost. For example, the revised §39 would accommodate not only the duty a gun owner has in relation to careful storage of his weapon but also the duty he may well be found to owe if, having stored it with care the owner discovers it has been stolen by a stranger P who has said he will use it to kill another stranger T.

Part 3: Breach

Recall that, of the risks of physical harm presented by the facts at the time of an actor’s conduct, the duty architecture pivots around the subset of risks which the affirmative act of the actor has “created” relative to how things would be if the actor had not engaged in that affirmative conduct. The Draft should make it clearer, however, that once we get past duty it is no longer of direct relevance whether a risk was created by the actor or not: instead the starting point is the total risks presented by the facts at the time of conduct (regardless of whether those risks were created by the actor’s conduct)⁹⁷. The breach Section reads:

§ 3. A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person’s conduct lacks reasonable care are the foreseeable likelihood that the person’s conduct will result in harm, the foreseeable severity of any harm that

may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

At the breach stage we consider the total risks presented by the facts and ask whether that level would be lower if the actor used reasonable care. A “reasonable person” in the relevant circumstances would do no more to control some of the risks presented by the facts than the actor does. But if the reasonable person would do more to control other risks, this means that, because of the actor’s conduct, the real world has more risks than it should have. In other words, relative to what should be the case, some aspect of the actor’s conduct “poses” excess risks thereby breaching the obligation to take care. It is these “excess” risks that are at the heart of the breach issue (though, as we will see, it may be that only some of these are the risks that “made the conduct tortious”).

It is crucial to reiterate that whether the total risks presented by the facts are in excess of what they should be does not depend on whether the actor’s conduct created any of them. For example: when a driver drives at 30 mph this creates a risk but it may be one that a reasonable person would do nothing about, in other words, it creates a “reasonable” and not excessive risk; but when a restaurant fails to assist a patron having a heart attack, even though this failure does not create the risk faced by the patron (of further deterioration), this risk may well be one that a reasonable restaurant would respond to and so the risks presented by the actual facts including the restaurant’s inaction are in excess of what they should be⁹⁸. Since the critical idea in breach is that the world is excessively perilous due to some aspect of the actor’s conduct regardless of whether that risk was created by the actor, we should use a special term: I suggest we say that the relevant aspect of the actor’s conduct “poses” an excess risk. Synonymic phrases such as “risks arising from conduct” or “conduct that risked the outcome” should be avoided.

Unfortunately, the entire architecture of the Restatement is endangered by its attempt to describe this notion of excess-risks-posed-by-the-breach in terms of risks “created” by the breach⁹⁹. As we have seen, the present Draft characterises affirmative duty cases as ones where the actor’s “conduct has not created a risk of physical harm” (§37)¹⁰⁰, yet in its general discussion of the breach issue the Draft characterises breach as “conduct [that] creates a risk of harm”¹⁰¹ whether that conduct is an affirmative act or an omission¹⁰²; and in the scope chapter the Draft limits liability to “harms that result from risks created by the actor’s wrongful conduct, but for no others”¹⁰³. If “create” retains the narrow meaning that it has in §7 how can an actor under an affirmative duty, such as the restaurant, be in breach and so on?

The terminology of the Restatement needs to be carefully and thoroughly revised. The term “create a risk” should only be used in the §7 sense, namely that an affirmative act increases the total physical risks of others relative to how things would be if the actor had not engaged in that affirmative conduct. This needs to be contrasted with the idea that whenever there is a breach this means the total risks presented by the facts was in excess of what it should have been. This breach idea should be conveyed by saying the relevant aspect of the actor’s conduct “posed” these excess risks¹⁰⁴. This accommodates the differential in affirmative duty cases namely that, although the actor did not create the risk (e.g. of the restaurant patron dying from an untreated heart attack) the actor’s culpable inaction did pose risks in excess of what would exist in a hypothetical world in which the actor’s conduct was reasonable¹⁰⁵.

Finally for completeness, let me repeat two points about the breach issue here. First, in the tort of negligence, unless a risk was reasonably foreseeable or actually

foreseen by the actor, it cannot, by definition, be one of those that “made the conduct tortious”¹⁰⁶.

Secondly, as we have seen, in cases where the duty arises other than under §7, the breach issue will be characterised according to the “normative envelope” recognized by the courts relating to the relevant “special relationship” (§§40-41), the relevant “undertaking” (§§42-44), the “taking charge” (§44) and, if my suggestion is adopted, the relevant “control” over an instrumentality (revised §39). It is the normative conception of what makes, say, the dentist-patient relationship “special” that defines the breach question both in terms of the characterisation of the “reasonable person” (i.e. a “reasonable dentist” qua “dentist”) and the risks to which that person’s response is taken into consideration.

Suppose while on vacation at a ski resort a dentist sees Amy, who is his patient, in imminent danger of an avalanche and fails to shout a warning even though, given this was an easy and safe thing to do in the circumstances, it was something a reasonable citizen would have done. This failure is not a breach of the duty the dentist owes Amy by virtue of his “special” dentist-patient relationship with her¹⁰⁷: the peril of avalanche does not engage the policy concerns that prompted the law of negligence to designate the doctor-patient relationship to be “special” and so the failure to warn is no breach of the duty owed by virtue of the special relationship.

Part 4: Factual Cause

We have seen that while the duty architecture pivots around a subset of the total risks presented by the actual facts at the time of an actor’s conduct, the breach analysis starts from that total set of risks and asks whether this total was in excess of the risks that would have been present in a hypothetical world in which the actor’s conduct was reasonable.

When we move to the factual cause and scope issues the focus again shifts: from the disembodied conduct of the actor to the existence and normative character of the connection between the relevant aspect of that conduct and the physical harm of which legal complaint is made. But again, as in the breach issue, in both factual cause and scope we are concerned only with those of the total risks presented by the facts which were in excess of a “no-breach” world. Again the Draft should make these shifts clearer.

Just as breach is dependent on the normative envelope that forms the basis of the duty, so it is that the factual causation issue is, in turn, dependent on the breach issue. Contrary to the Reporters’ initial¹⁰⁸ preferred analytical arrangement, the most coherent breach question is not whether the actor’s conduct was a cause of the physical harm but whether the “tortious aspect” of the actor’s conduct that posed the excess risks was a cause¹⁰⁹. Suppose an actor is driving at 40mph, which is 10mph above what is reasonable in the circumstances, when a child darts out and, being unable to stop in time the actor collides with the child. Now consider §26 which sets out the most common route to establishing factual causation, the but-for test:

§ 26. Tortious conduct must be a factual cause of physical harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct...

This compares the excessively risky world in which the tortious actor’s conduct actually occurred and the hypothetical “no-breach” world and asks whether

the injury would have happened in the latter anyway. In our example the factual cause question under § 26 could not coherently be whether the child would have been injured had the driver not been driving at all. The question must be whether the child would have been injured if the driver had been driving at 30mph, the closest reasonable speed to that of the actor¹¹⁰. In other words, the but-for factual causation comparison is between what happened and what would have happened in the “nearest” no-breach world: again, as under the breach issue, the focus is on the “excess” level of risk due to the relevant aspect of the actor’s conduct (be that an affirmative act or an omission) because it looks at what effect that excess had relative to a hypothetical world where that excess is absent.¹¹¹

Finally, notice that the reason for that excess risk may be the actor’s culpable omission. In such cases we can now see why an actor’s conduct may be a factual cause of an outcome without creating a risk of that outcome.

Part 5: Scope of Liability for Consequences

In scope we are concerned with the normative character of the connection between the tortious aspect of the actor’s conduct and the physical harm it caused and which is now the subject of legal complaint. There are a number of issues here and I regret the Draft isolates only a few¹¹². The issue of relevance to this paper is that though, as we have seen, a breach poses risks in excess of the level that would be present in a no-breach world, it might be that only some of those excess risks are ones that “made the conduct tortious”. What should the law do if the harm that the breach goes on to cause results from one of these “innocent” excess risks and not from one of the excess risks that “made the conduct tortious”? The answer given by modern courts, at least for the tort of negligence, is that harm resulting from such an excessive but “innocent” risk should not give rise to liability¹¹³.

The point can be illustrated with Dave and his physician and how the relevant “normative envelope” operates at the scope stage of analysis. Suppose Dave is located on the mountain only because his physician had carelessly encouraged him to ski. The breach is responsible for Dave facing risks in excess of those he would have faced had his physician given careful advice. These excess risks (that is, risks that would not be present in a hypothetical no-breach world) posed by the breach include not only the risk of exacerbating his arthritis but also any risks that are especially present in that location such as the risk of avalanche injuries. When Dave is injured by an avalanche he will have no difficulty in proving that the tortious aspect of the medical advice (concerning his arthritic leg) is a factual cause of the avalanche injury: because, but for the advice, he would not have been on the mountain. Yet if we assume that the risk of avalanche was not one relevant to the law’s concept of what makes the physician-patient relationship “special”, the failure of Dave’s physician to warn him about the risk of avalanche was not tortious. So although the tortious aspect of the physician’s conduct led to Dave facing the risk of avalanche, this was an “innocent” by-product of the breach. When harm results from such an excess but “innocent” risk the law has a choice as to whether the tortfeasor should be liable for it. As earlier noted, the modern law of negligence chooses against liability in such circumstances while the tort of deceit includes liability for such harms within the scope of that liability¹¹⁴.

PFD No.1 attempts to accommodate the law on this point (as well as the law on other distinct issues) in:

§ 29. An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious¹¹⁵.

The limited potential of this opaque provision to convey clearly the point about harm-resulting-from-an-innocent-risk is then further damaged by the Reporters troubling attempt to elaborate the point: "actors should not be held liable when the risk-producing aspects of their conduct cause harm other than that that was risked by the conduct"¹¹⁶. The problem here is obvious: *of course* avalanche injuries were "risked" by the physician's conduct - they only confront Dave because of it.

What we need is a clearer statement that not all the excess risks that the tortious aspect of the conduct posed are ones that "made the conduct tortious". An illustration of one such "innocent" excess risk is that of avalanche in the Dave hypothetical where our analysis of the "normative envelope", that is where and why a duty was owed, determined that this risk was clearly not relevant to the law's reasons for seeing the doctor-patient relationship as "special". In other words, it is by reference to the relevant "normative envelope" the law can identify and choose to exclude from the scope of liability, as the modern law of negligence has chosen to do, harm that results from one of these "innocent" excess risks.

In this duty context (e.g. the special doctor-patient relationship) is one of the reasons the conduct was unreasonable because it posed a risk of this type of harm? Was one basis of the determination that it was unreasonable conduct for the physician to encourage Dave to ski because that posed the risk that Dave would be hit by an avalanche? We must be careful here. Sometimes it will be quite clear that the relevant risk could not possibly be one of the reasons why the conduct was unreasonable: the avalanche example is such. Other classic examples include: freakishly unforeseeable hazards because by definition a reasonable person would not have anticipated any need to take precautions¹¹⁷; pure failure to warn cases because here the scope is simply determined by which risks a reasonable person would have warned about¹¹⁸; and coincidental consequences¹¹⁹ of breach because here the general type of conduct engaged in by the actor (e.g. speeding) does not generally increase the risk of the harm suffered (e.g. a tree falling onto the vehicle) so, again, a reasonable person would not be prompted to take precautions against it.

But often reasonable minds will not agree. For example, is one of the reasons why speeding in a built-up area is unreasonable because it poses a risk that a pedestrian, knocked down by that car will be treated badly by the ambulance staff called to the accident? Is one of the reasons the risk that the pedestrian might infect the ambulance worker with HIV, or chicken pox? Statements that the law of negligence seeks to "limit liability to the reasons for imposing liability in the first place"¹²⁰ and requires that the harm result "from a risk that made the conduct unreasonable" or was one "that led us to say conduct was negligent"¹²¹ sketch but cannot resolve these normative questions. The Draft's separate sections in relation to harms by¹²² and to¹²³ those who render aid to the first victim can only refer vaguely to "harm [that] arises from a risk that inheres in the effort to provide aid"¹²⁴.

Part 6: Summary:

Understandably, in a task as gargantuan as that of this Restatement, terminology has not been deployed consistently and this threatens to undermine the

user-friendliness of the end product. In my view, key “risk” notions should be explicitly defined, synonyms¹²⁵ for them should be removed and their relation to other risk notions in the Draft should be made clear. A close examination of the Preliminary Final Draft No. 1 dated April 6, 2005 suggests the following.

The notion of “an actor’s conduct creates a risk of physical harm” should be strictly confined to the context of § 7 wherein: “conduct” requires an affirmative act, being the entirety of the particular actor’s conduct at the relevant time and place without reference to the feature of that conduct which constitutes the alleged breach; and “creates a risk” means the affirmative act added a risk faced by another that would not have been present had the actor not engaged in the affirmative act, including by increasing the chance that the other will encounter some natural hazard, third party or instrumentality.

Outside the duty context the “risk” focus fundamentally shifts: it does so more broadly because we take account of risks whether created by the actor or not; and more narrowly because what drives the analysis are only what I have called “excess risks”, risks that would not be present in a no-breach world.

The breach enquiry addresses the total risks present on the facts at the time of conduct (whether created by the actor’s conduct or not) and asks whether that total exceeds the risks that would be present in a hypothetical world where the actor’s conduct is not tortious. If so, that aspect of the actor’s conduct which “poses” these excess risks breaches the obligation and is tortious. An actor might “pose” such excess risks either because he created that risks by his affirmative act where a reasonable person would not have created them (e.g. by driving at 40mph when the highest reasonable speed was 30mph) or because he failed to eliminate risks when a reasonable person would have done so (e.g. by failing to feed one’s own child).

Building on the breach analysis, the factual causation enquiry asks: did an excess risk, posed by the tortious aspect of the actor’s conduct, contribute to the occurrence of the relevant harm? If so, we say the breach was a cause of the harm.

A major role for the scope analysis is to address the possibility that not all the excess risks “posed” by the tortious aspect of the actor’s conduct are ones that “made the conduct tortious”. For example, the excess risk to Dave of an avalanche injury was “posed” by his physician’s careless encouragement to ski because in a hypothetical world where the physician’s conduct had not been tortious, Dave would not have faced this excess risk; but the avalanche risk was not one that made the physician’s conduct tortious. To distinguish between excess risks that “made the conduct tortious” and excess but “innocent” risks we apply the concerns that drive the recognition of the obligation’s “normative envelope”, yet another reason to encourage appellate courts to enunciate fully the reasoning behind their recognition of a duty relationship in the circumstances.

Finally, the “continuing risk” duty in §39 needs to be rethought and narrowed to a family of duties triggered by the “special relationship” of control over an instrumentality and akin to the families of duties that arise from control over animate things such as other persons and animals. The revised §39 should be drawn widely enough to locate both duties in relation to the control and management of the instrumentality (e.g. use, storage, entrustment) and a duty of affirmative action if that control is lost.

In preparing this paper I have yet again been struck by the breathtaking achievement of the Reporters. The suggestions in this paper have been offered in a spirit not of criticism but genuine awe for their striking contribution.

¹ The Draft implies that to create a risk is the same as posing a risk: The Scope Note to Chapter 7 p.708...

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³ § 37 Repts' Note to comment c.

⁴ Clarification of the concept of "creating a risk" will also be critical to the success of other areas of the Restatement such as recklessness (see § 2(a)) and abnormally dangerous activities (see § 20(b)(1)).

⁵ TD No.4, s.7 Comment a. Compare Note 111.

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⁷ Jane Stapleton, "Controlling the Future of the Common Law by Restatement" in *Exploring Tort Law*, Ed M. Stuart Madden (Cambridge University Press, 2005) 262-294.

⁸ Yet, oddly the same incoherent idea persists. See for example Reporters Note to § 7, comment 1: "One useful characterization of whether an actor has created a risk as distinguished from whether a pure affirmative duty is at issue is to consider whether, if the actor had never existed, the harm would not have occurred."

⁹ Repts' Note to § 37, comment c: "an affirmative act creating a risk of harm".

¹⁰ Here and throughout this article I am ignoring the possibility that a factor is a factual cause even though it fails the but-for test: on the most convenient meaning of factual "causation" in the law see Missouri xxx. E.g. X puts large bomb under your chair timed to explode at noon, so does Y. Each "created" a risk to you relative to no-tort world.

¹¹ § 37, comment c; § 39, comment c, p.742 lines 11-13.

¹² Whether commercially (§ 37, comment c) or non-commercially (§ 39, comment d, p.744 lines 18-20).

¹³ §19, Illustration 1.

¹⁴ § 41, comment h; § 41, Repts' Note on comment h.

¹⁵ §7, comments a and c; § 41, comment d.

¹⁶ § 37, comment d.

¹⁷ § 20, comment k, Illustration 2.

¹⁸ § 39, comment c.

¹⁹ § 39, comment c.

²⁰ § 39, comment c (building material); § 42, comment c, Illustration 2 (furnace).

²¹ § 19, Repts Note to comment e.

²² § 19, Repts Note to comment g; § 39, comment d.

²³ § 37, comment d.

²⁴ § 40, Repts' Note on comment m... *Vigil v. Payne* 775

²⁵ § 37 Repts' Note to comment b.

²⁶ § 40, Repts' Note on comment m.

²⁷ § 40, Repts' Note on comment m citing *Vigil v. Payne*, 725 P.2d 1155 (Colo. Ct. App. 1986).

²⁸ See § 19.

²⁹ See § 37, comment d. See also § 37 Repts' Note to comment b suggesting that where an invitee was enticed by the landowner to jump into a pond on the property and the landowner knew that his invitee was drowning, "the landowner would have a duty of reasonable care, under § 7, so long as the landowner was a cause of the invitee's decision to go into the pond".

³⁰ Repts' Note on s.37 comment c.

³¹ *Dobbs* 855

³² See also surgeon who omits to sterilize his instruments; the engineer who omits to shut off steam (*Cardozo in Moch*); and §37, Illustration 2.

³³ "An actor need not know that his or her conduct has created a risk of harm for the duty provided in this Section to exist. Before a *breach* of the duty occurs, however, an objectively foreseeable risk of harm must exist.": § 39, comment d

³⁴ A separate point is that, on one reading of § 7: if the act is completed with care (e.g. the friend did not know and could not reasonably have known of the adulterated state of the food) the duty is satisfied and vanishes; so if the friend later discovers the food is adulterated any affirmative duty to warn the neighbour must be found elsewhere than § 7. See below at Note 61.

³⁵ Repts' Note to § 37, comment c.

³⁶ Consider: D1 stores his bicycle unlocked in his driveway, X1 steals the bicycle and due to his erratic driving there is a traffic accident in which V1 is injured; D2 stores his gun in the top drawer of his desk, X2 steals it and shoots V2; D3 peels an orange in a park and falls asleep, then X3, a child, picks up D3's fruit peeler and injures V3 [cite me at PACE]; and X4 gains entry to the premises of D4 (who is dozing on her front porch) through her front door which has no lock, then , over the low backyard fence X4 gains entry to the neighboring property of V4 which he vandalizes. On the situation when there actor's provision of access to the instrumentality under his control was innocent, see text at Note 96.

³⁷ See for example §10, comment f: "...a person who turns over a firearm to a child who lacks special training and experience is subject to tort liability under the rules relating to negligent entrustment. Even leaving a firearm at a location where an inexperienced child can gain access to it can expose the person to tort liability".

³⁸ Actually there are other problems with characterizing the conduct...xxx

³⁹ comment c to § 37.

⁴⁰ See also "the actor's conduct might have played a role in creating the risk to the injured party, such as by opening a business in a dangerous area (thereby requiring the exercise of reasonable care with regard to those risks). In these cases, the source of the duty of reasonable care is § 7... As the example of the business in a dangerous area reveals, whether a case is governed by § 7 can be problematic, requiring an inquiry into what would have happened if the actor's conduct, such as opening a business, had never occurred. Numerous possible scenarios, requiring significant speculation, might be conjured in answering this hypothetical inquiry. This Section obviates the need for such inquiries. Regardless of whether the actor played any role in the creation of the risk, those with a special relationship have a duty of reasonable care". § 40, comment c...753-4; "for those cases in which it is unclear whether the risk is one created by the actor's conduct, see Comment c, this Section avoids the need to engage in the difficult inquiry into what would have happened if the actor had never engaged in its business or other operations", § 40, comment h [757]; "the provision of an affirmative duty in this Chapter avoids difficult inquiries of whether the employer in some way created the risk of harm by conducting the employer's business or whether the harm would have occurred even in the absence of the employer's business", § 41, Repts' Note on comment e.

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⁴² Comment n to § 40

⁴³ On which see also the situation where a shopkeeper refuses to accede to an armed robber's request that the shopkeeper turn over his money (because the shopkeeper refused to accede, an instance of violence occurred that injured a customer) referred to in § 7, Repts' Note on comment c.

⁴⁴ bailment book page 4

⁴⁵ the court did in *Johnston v. Harris*, 198 N.W.2d 409 (Mich. 1972)

⁴⁶ § 40, Repts' Note on comment m

⁴⁷ § 37 Repts' Note to comment c; §41(b)(1)

⁴⁸ Or the taking charge in §44

⁴⁹ For example compare analysis of whether the relevant relationships were "special" in *Harper v. Herman* and *Farwell v. Keaton*

⁵⁰ See respectively: § 7(b); Scope Note to Chapter 7 and § 39 comment b. This means that even if an actor's carelessness caused foreseeable physical harm to another, he will not be liable. Contexts include public authority defendants, social host-third party, land possessor-trespasser, physician-third party, a product supplier in relation to recalling products later revealed to be defective and a prescription drug manufacturer in relation to warning patient directly.

⁵¹ See e.g. §40, comment o

⁵² See e.g. §40, comment g.

⁵³ See for example *Tresemmer v. Barke*, 150 Cal. Rptr. 384 (Ct. App. 1978) which the Reporters discuss under §39 but which would more conveniently be categorized along with the other affirmative duties of a physician in §40. Where the defendant had created a continuing peril to a stranger by an affirmative completed act which came within the reach of the §§ 40-44, the duty will arise smoothly under those sections and there is no need to resort to §39. For example, if an employer subjected his employee to such extreme demands that even after those demands cease and the employee comes off duty, a risk of harm to others exists, for example, because of the employee's exhausted state: here the employer comes under an affirmative duty (for example to provide transport for the employee rather than allow him to drive in his state (compare § 41, Repts' Note on comment e).

⁵⁴ So misleading to say that Chapter 7 exceptions impose a duty to take action to prevent or ameliorate the risk of harm "created by others": § 37, comment b.

⁵⁵ §40, comment f, Illustration 1.

⁵⁶ See §40(b)(3) and comment j thereto.

⁵⁷ For example is friendship sufficient to trigger a duty:

⁵⁸ Cross –refer to when it was done innocently...

⁵⁹ At which time the actor may not even realise he is creating a risk...

⁶⁰ *Maldonado v. S. Pac. Transp. Co.*, 629 P.2d 1001 (Ariz. Ct. App. 1981).

⁶¹ “...even if a court declines to apply § 7 because the friend’s lending conduct has ceased and is not *currently* creating the risk. Consequently, this Section is most often invoked when an actor engages in a discrete, nontortious act that creates a continuing risk of harm and causes harm at a later time.”: see §39, comment d.

⁶² A rule the Reporters seek to capture in §37

⁶³ Emphasis added. §39, comment *c*

⁶⁴ See also the problematic reliance on this notion in § 10(c) and §21, comment *g*. Compare the more coherent usage in § 21, comment *g*; § 22, comment *f*; 29 comment *l*.

⁶⁵ Illustration 1 to § 39.

⁶⁶ Illustration 3 to § 39.

⁶⁷ Illustration 5 to § 39.

⁶⁸ § 39, comment *d*. the neighbor who subsequently discovers that the food she lent was adulterated would have a duty at that time to exercise reasonable care, normally by informing the neighbor of the situation.

⁶⁹ § 39, comment *d*.

⁷⁰ Illustration 2 to § 39.

⁷¹ Illustration 4 to § 39.

⁷² § 39, comment *c*

⁷³ menus

⁷⁴ § 40, Illustration 1.

⁷⁵ § 40, Illustration 2

⁷⁶ Ditto, for example, relationship of landlord re common areas, surrounds etc

⁷⁷ Compare the narrow conception of the school-student relationship in *Kimberly S.M. ex rel. Mariann D.M. v. Bradford Cent. Sch.*, 649 N.Y.S.2d 588 (App. Div. 1996) a case cited at § 40 Repts’ Note to comment *f* where the court held no common-law duty owed by school aware of sexual abuse of student by relative during the summer and outside school premises; and the more expansive conception of the clinical psychologist-patient relationship in §41 Illustration 3 (Dr. Strand, a clinical psychologist, becomes aware, during the course of counselling, that a patient, Lester, is sexually abusing his eight-

year-old stepdaughter, Kelly. Dr. Strand does not communicate this information to Kelly's mother or appropriate officials of the state department of social services or take any other steps to prevent Lester's continuing his sexual assaults on Kelly. Dr. Strand owed a duty of reasonable care to Kelly and is subject to liability for the harm due to Lester's continuing abuse of her.)

⁷⁸ ...see text below

⁷⁹ Emphasis added. §39, comment *c*

⁸⁰ §39, comment *c*

⁸¹ See criticism of this usage of "create" below

⁸² §39, comment *c*.

⁸³ See text at Note 78

⁸⁴ Even if a reasonable person would have warned a stranger of such a risk, the doctor will not be subject to liability because he has not breached a duty

⁸⁵ as well as the specific allegation of breach in an individual case

⁸⁶ Cross-refer to § 11. Disability, comment e: "the physically disabled person...is expected to adopt extra precautions to respond to the extra level of risk that the person creates or incurs on account of the disability. "

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⁸⁸ Duty in Maldonado p.138;also shows how it governs scope under revised 39: railroad not liable if unassisted hobo is mugged by another hobo but is liable if he bleeds to death from injury due to train

⁸⁹ A nice example, cited at 719, is *Menu v. Minor*, 745 P.2d 680 (Colo. Ct. App. 1987): Motorist and passenger sued taxi company to collect damages arising after car driven by the motorist ran into abandoned car, driver of which had been picked up by taxi and driven to unidentified location. The Court of Appeals of Colorado held that the taxi company did not owe a duty to the plaintiffs absent evidence that taxi company's failure to notify police or its transportation of motorist from scene created peril or changed nature of already existing risk.

⁹⁰ Similarly a person who transports college students "during spring break to a seaside resort" may increase the risk of certain harms to them (e.g. injuries from a mugging or sexually transmitted diseases) and would be a factual cause if any of these risks eventuated, but his conduct in increasing these risks does not attract an affirmative duty to protect the students from those risks because he has no control over the instrumentality by which the harms might occur (i.e. the mugger, the sexual partner and so on). Compare §39, comment *c*.

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⁹³ Another is that it avoids the danger of having to see the 39 duty as dependent of foreseeability: the affirmative actor, person in relationship, person who made undertaking or took charge knows the existence of these relevant facts that trigger duty but 39 duty would be too wide unless predicated on foreseeability. Reporters reject foreseeability as element of duty in s.7 comment j

⁹⁴ S.39, REPORTERS' NOTE to Comment c.

⁹⁵ *Minahan v. W. Wash. Fair Ass'n*, 73 P.3d 1019 (Wash. Ct. App. 2003). Technically this case need not be analysed under s.39 because the plaintiff and defendant were not strangers. Thus a court might decide their relationship was sufficiently "special" to trigger a duty. Then the question would arise as to whether the relevant risk was one in enough to

⁹⁶ See text above at Note 36.

⁹⁷ I.e. the duty division no longer drives the architecture Though there can be some influence on breach. In determining whether an actor failed to exercise reasonable care under all of the circumstances pursuant to § 3, the fact that the actor played no role in creating the risk is [merely] a relevant circumstance. See § 40, Comment *d.*: Chapter 7 Scope Note

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¹⁰⁰ "in certain circumstances, tort law imposes on a person an affirmative duty to intervene to protect another against a risk of harm that the person's conduct has not itself created. See Chapter 7: §3, comment c

¹⁰¹ §3, comment b ("A defendant is held liable for negligent conduct primarily because that conduct creates a risk of harm"). See also §3, comment e ("insofar as this Section identifies primary factors for ascertaining negligence, it can be said to suggest a "risk-benefit test" for negligence, where the "risk" is the overall level of the foreseeable risk created by the actor's conduct"). Oddly, comment c to §3 contemplates cases where the breach did not create the risk ("...The fact that the actor's conduct did not create the risk is a relevant circumstance in determining unreasonableness"). Similarly, § 18 confines its discussion of breach in negligent failure to warn cases to where the conduct of the defendant "creates a risk of physical harm" thereby failing to cover the high-profile *Tarasoff* situation.

¹⁰² Thus § 34, comment d...envisages a “the risk of harm created by another’s...omissions” ..but compare § 34, comment e “In some cases, the risk that makes conduct tortious is one created by another person’s conduct. Thus, in Illustration 1, Rogers is negligent because of the risk of an assault on one of its guests

¹⁰³ §29, comment e.

¹⁰⁴ As in § 30, comment a “the critical inquiry is whether the risks posed by the tortious conduct...”

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¹⁰⁷ Cross refer

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¹⁰⁹ Cite Richard Wright. See Illustration 3 to § 29: Richard, a hunter, finishes his day in the field and stops at a friend’s house while walking home. His friend’s nine-year-old daughter, Kim, greets Richard, who hands his loaded shotgun to her as he enters the house. Kim drops the shotgun, which lands on her toe, breaking it. Although Richard was negligent for giving Kim his shotgun, the risk that made Richard negligent was that Kim might shoot someone with the gun, not that she would drop it and hurt herself (the gun was neither especially heavy nor unwieldy). Kim’s broken toe is outside the scope of Richard’s liability, even though *Richard’s tortious conduct was a factual cause of Kim’s harm*. [emphasis added]

¹¹⁰ Robertson

¹¹¹ Missouri. This means that whenever a breach is a but-for factual cause of an injury then *from the perspective of the “no-breach” world*, it is tempting to say that the breach had “created the risk” of this outcome (which we now know it caused) because the breach was responsible for this excess risk. For example, from a no-breach world, we might be tempted to say that a parent’s failure to feed a baby “created a risk” that the baby starve to death. We have seen that the Reporters succumbed to this temptation in Tentative Draft No.4 (“TD No.4”) and in so doing injected incoherence in to their notion of “creating” a risk. See above text at Note 5.

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¹¹³ Contrast the earlier scope rule for neg in Re Pol; contrast deceit Fottler

¹¹⁴ In intentional torts such as deceit/fraud we may want to draw the scope of liability for consequences of the fraud very widely to encompass consequences even when unforeseeable or even coincidental because we want to deter future fraudulent activity which by its nature is advertent and which can therefore respond to signals established by the law drawing the scope of liability for the consequences of the fraud very widely [contrast how this is not possible when the conduct is inadvertent such as inadvertent speeding which brings a car next to a tree when it falls.]Fottler; smith new court

¹¹⁵ See also § 34.

¹¹⁶ s.29 Repts Note to comment b .For a comparable troublesome opaque statement see words of Denning, L.J. in *Roe v. Minister of Health* [1954] 2 Q.B.66 at p. 85, "within the risk created by the negligence."

¹¹⁷ *Palsgraf; Re Pol*

¹¹⁸ Occams razor

¹¹⁹ The Reporters carve out space to address this particular application of § 29 in § 30.

¹²⁰ [Dobbs 446].

¹²¹ [Dobbs 446]

¹²² § 35.

¹²³ § 32.

¹²⁴ § 32.

¹²⁵ I urge the Reporters to remove phrases such as "risk arising from the breach"