The new restatement's top 10 tort tools

The Restatement (Third) of Torts: Liability for Physical and Emotional Harm *contains many clarifications and modifications that you can use to your clients' advantage. Here's a quick look at the most important updated provisions.*

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Trial lawyers handling tort cases have a powerful new tool: the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm.* Thirteen years in development, it is now largely finished. State supreme courts and federal courts already have cited some of its provisions, and its influence is only going to grow.

In the early 1990s, the American Law Institute decided to update the *Restatement (Second) of Torts.* Most of that restatement had been published in 1965, during a time when contributory negligence and joint and several liability existed and strict products liability was only a twinkle in reporter William Prosser's eye.

But no Prosser was on the scene 30 years later to undertake the entire revision of torts. So instead of creating a single revised restatement, the institute began a series of discrete projects that, together, would comprise the *Restatement (Third) of Torts.* The first project was to update products liability with what had been learned in the 30 years since §402A set off the strict products liability revolution. That project came to fruition in 1998 with the publication of the *Restatement (Third) of Torts: Products Liability,* with its controversial requirement of a reasonable alternative design to prove a design defect.[1]

The second piece, *Apportionment of Liability,* was published two years later. It addresses comparative fault ("comparative responsibility" in the restatement vernacular), joint and several (and several) liability, contribution, and indemnity.

That brings us to the third piece in the third restatement sequence. In 2005, seven chapters were finally approved; they were part of a proposed final draft entitled "Liability for Physical Harm." The project was extended to cover two related areas: "pure" emotional harm and land possessors' duties. The inclusion of emotional harm caused a name change: *Restatement (Third) of Torts: Liability for Physical and Emotional Harm.* Chapters one through six, which cover definitions of the bases for tort liability, negligence, duty, strict liability (other than strict products liability), factual cause, and scope of liability (proximate cause), were published in December 2009.

Chapter 7, on the limited affirmative duties to rescue or protect someone else; Chapter 8, on emotional harm; and Chapter 9, on land possessors' duties, also have been approved but await the drafting of a final chapter on the liability of employers of independent contractors.[2] These chapters will be part of a second volume of the physical and emotional harm restatement, but that remains several years off.[3]

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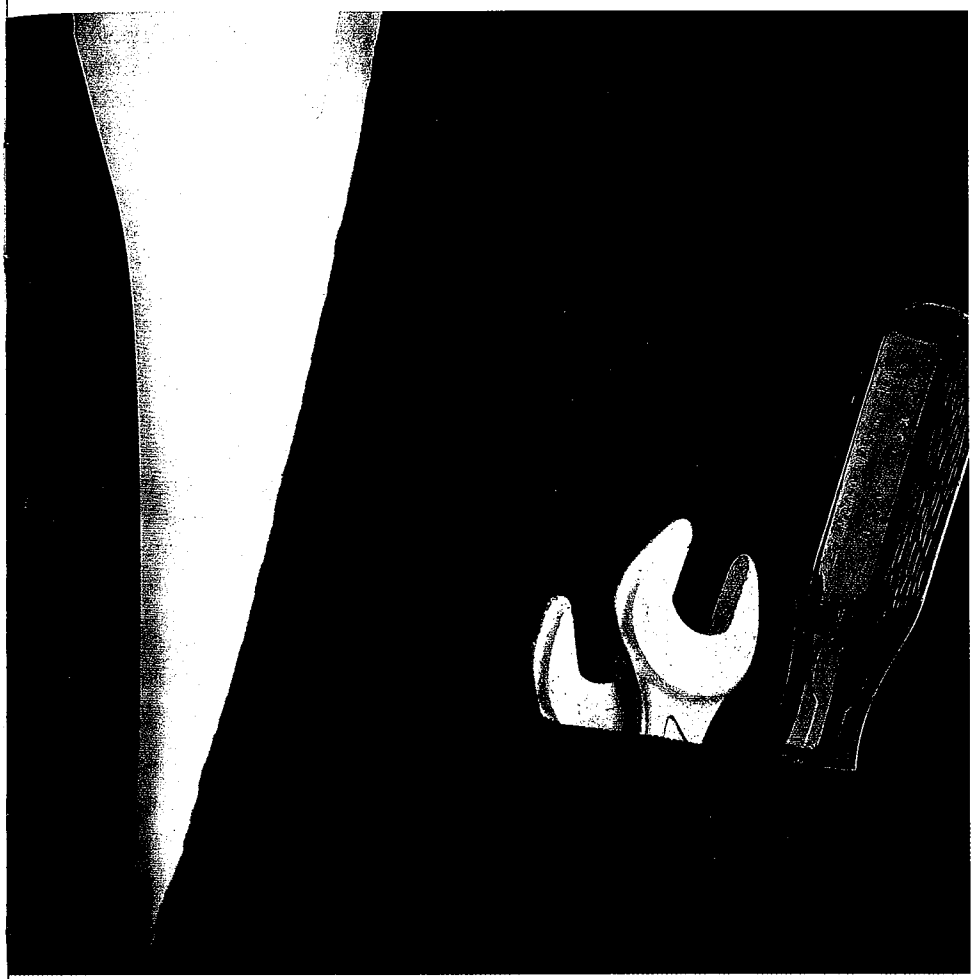

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The third restatement can be a powerful persuasion tool. Any lawyer involved in tort litigation should be aware of several important provisions in the new restatement and how they differ from those in the second restatement. Here are the 10 most important.

1. The duty to use reasonable care as the default rule. Cases are sometimes dismissed because a court determines that the defendant owed no duty to the plaintiff or because the injury-causing event was not foreseeable. Whether a duty exists and what it consists of are questions of law for the court, and courts are more comfortable declaring that no duty exists than finding that no reasonable jury could find negligence. When a court does the latter, it is treading on the right to trial by jury in a way that a "no-duty" determination does not. "Foreseeability" determinations often provide similar comfort to courts when used as a surrogate for "duty." This is dubious reasoning, as the analytical framework and rules of the new restatement make clear.

First, the third restatement completes the circle of evolution of legal theory, concluding that as a general default rule, all people have a duty of reasonable care not to create a risk to others. With the exception of unusual categories of cases, "an actor's duty to exercise reasonable care does not require attention from the court."[4] This means that except for a small subset of cases, a duty of reasonable care ordinarily exists or, at least, is the starting point for any analysis of that issue.

Second, the restatement explains that the categories of cases in which a no-duty determination is permissible are only those exceptional cases in which a countervailing policy justifies modifying the default duty of reasonable care. Thus, §37 explains that when a defendant has had no role in putting the plaintiff at risk (has not created a risk), he or she ordinarily has no duty to rescue or take precautions to protect that person.[5]

Third, the restatement bars the use of foreseeability for duty determinations.[6] Foreseeability is important for negligence, as risk must be foreseen before precautions are required. But if duty is about a *category* of cases—such as the liability of social hosts or homeowners with regard to professional rescuers on their property—then nothing very useful can be said about foreseeability, since it depends on the specific facts of the case.

Finally, to protect jury prerogative, §8 of the third restatement makes plain that negligence usually is a question of fact for the jury. Stated another way, no-duty determinations cannot be based on the specific facts of a case but instead must address a "particular category of recurring facts."[7] No-duty determinations should not be a "ticket for a single ride."[8]

Already, the Arizona Supreme Court has relied on the third restatement (and an article that makes this case) to hold that foreseeability should not be considered in determining whether a duty exists.[9] The Iowa Supreme Court went even further in *Thompson v. Kaczinski*, a case decided last November.[10]

Two homeowners left a disassembled trampoline on their property. Several weeks later a severe storm came through and, because it was not secured, blew the trampoline onto an adjacent road. On the road, the plaintiff swerved to avoid the obstacle, lost control of his car, and was injured in the resulting accident.

The trial court granted summary judgment, reasoning that the defendants had no duty to the plaintiff because of the unforeseeability of the risk. The Iowa Court of Appeals affirmed but the supreme court reversed, holding similarly to the Arizona Supreme Court that foreseeability was relevant only to breach—such

as negligence—but not to whether there was a duty of reasonable care in the first place. Beyond that, the court adopted the third restatement's view that a duty of reasonable care ordinarily exists for anyone who creates a risk of harm to others.[11]

These holdings barring foreseeability in duty determination prohibit a common practice in which courts use the malleability of foreseeability to declare that the harm was unforeseeable, so the defendant had no duty. That confuses duty with breach, which the restatement goes to significant efforts to avoid. The *Kaczinski* decision adopting an ordinary duty of reasonable care for those creating risks goes a long way toward ensuring that juries, not judges, will decide the case based on the facts and whether the defendant's conduct was unreasonable.

The third restatement completes the circle of evolution of legal theory, concluding that as a general default rule, all people have a duty of reasonable care when they act, so as to not create a risk to others.

2. Legal causation. "Proximate cause" is sometimes used to mean factual cause, sometimes used to mean scope of liability, and sometimes used to mean both, which leads to unnecessary confusion. It also results in juries being instructed on an issue not in dispute, as frequently the only issue is factual causation, yet approved instructions combine both facets of proximate causation.

The third restatement disentangles proximate cause, separating it into its two components, factual cause and scope of liability. Separate chapters address each distinct subject.[12] The factual cause chapter adopts a "but for" standard for factual causation, while the scope of liability chapter employs a "harm within the risk" test that is similar but not identical to the popular foreseeability test.[13] In *Kaczinski,* the Iowa Supreme Court adopted both of these provisions from the third restatement.[14]

Notably, §34 declares that so long as the harm that occurred arose out of the risks that made the defendant negligent, superseding causes have no role to play. For example, a company specializing in equipment for security personnel sells a defective walkie-talkie designed for law enforcement and security personnel. If a private security guard using that equipment is accosted by thieves but cannot contact backup personnel because of a defect in his walkie-talkie, the manufacturer will be liable as a matter of law for the harm the guard suffered, and the intervention of the thieves is not a superseding cause.[15]

3. Proof of causation by toxic substances. In most traumatic injury cases, proof of causation is relatively straightforward. Not so with disease injuries, especially those involving toxic substances. In such cases, causation often is not obvious, not well understood, and difficult to prove. In the early 1980s, courts began to struggle with developing "rules" for such proof. The results have been conflicting, inconsistent, and, at times, arbitrary.

Section 28, comment c, seeks to clear the air. It not only contains a framework for the different aspects of toxic causation, but its Reporters' Notes also cite extensively to cases, articles, and references on scientific evidence.

Toxic-substance cases often involve statistical and group-based scientific studies. Finding proof of causation usually involves a two-step process that relies on expert testimony to establish that the substance was capable of causing the disease (general causation) and that the substance actually caused the plaintiff's disease (specific causation). While the third restatement does not address the admissibility of such expert opinions, it provides important guidance concerning the sufficiency of that evidence.

Rather than propose bright-line rules, the third restatement recognizes that whether an inference of causation is appropriate is a matter of informed judgment, not scientific certainty; scientific analysis is informed by numerous factors (commonly known as the Hill criteria); and, in some cases, reasonable scientists can come to differing conclusions.[16] Regarding epidemiologic studies, the third restatement cautions against any threshold requirement.

In the case of specific causation, the restatement recognizes that juries generally should be permitted to infer causation if group studies establish that exposure to the substance results in an incidence of disease that is more than twice an unexposed group[17] or other potential causes can be ruled out by a "differential etiology." Until there is better understanding of biological mechanisms for disease development, and therefore more accurate proof, this comment will provide important guidance on how courts should approach such cases.

4. Reasonable medical proof. Many courts hold that expert opinion must be expressed in terms of medical or scientific "certainty." Requiring certainty seems to impose a criminal-law-like burden of proof that is inconsistent with civil burdens of preponderance of the evidence to establish a fact. Such a requirement is also problematic at best because medical and scientific communities have no such "reasonable certainty" standard. The standard then becomes whatever the

attorney who hired the expert tells the expert it means or, absent that, whatever the expert imagines it means.

Section 28, comment e, of the restatement criticizes this standard and makes clear that the same preponderance standard (or "more likely than not" standard), which is universally applied in all aspects of civil cases, also applies to expert testimony.

5. Affirmative duties. As §37 of the new restatement recognizes, someone who has not created a risk of harm to another generally has no duty of care to that other person. But the restatement sets out new relationships in which an "affirmative" duty of care might arise, such as in the case of conduct creating a continuing risk of harm, §39; under certain special relationships, §§40 and 41; when an actor undertakes to render services to another, §§42 and 43; and in the case of taking custody of another, §44. Of particular note in §40 is the recognition of new relationships imposing an affirmative duty of reasonable care to protect, including a school's relationship with its students and a landlord's with its tenants.

Section 41, dealing with duties to third parties, reflects the California Supreme Court's seminal decision in *Tarasoff v. Regents of the University of California*, which requires a psychotherapist who knew or should have known that a patient posed a danger to a third party to take reasonable steps to notify the third party of the danger.[18] Comment g to §41 also contains an extensive discussion of a non-mental-health physician's duty to third parties.

6. Statutes as the basis for affirmative duties. A new provision takes account of the prevalence of statutes that impose affirmative duties to protect others. Consider a statute requiring a health care professional to report suspected child abuse. Although he or she would not have a common law duty of care to the child, §38 counsels that courts should consider such statutes in deciding whether to adopt an affirmative duty in a tort action.[19]

7. Land possessor duties. The third restatement breaks important new ground in land possessor duties. First, §51 adopts a unitary standard of reasonable care for almost all entrants on land. This constitutes a major departure from the first and second restatements, which followed the historic approach of differentiating duties based on the status of entrants.

Since the second restatement, jurisdictions generally have split on this question, with half using historic status-based categories and the other half adopting a unitary standard of reasonable care under the circumstances. Consistent with its reasonable care default rule, the third restatement adopts the more modern, reformist position of a unitary standard.

Second, it proposes a visionary way of dealing with the vexing problem of trespassers under a unitary standard. Prescribing rules to deal with trespassers, who by definition enter land without consent, creates a clash between the principles of tort (requiring reasonable care to protect others) and property (which provides freedom to use private property as the owner wishes).

One of the principal objections to a unitary standard has been imposing a reasonable care standard for trespassers who come on the land for reasons that are offensive or repugnant to the land possessor—such as criminal or malicious activity or intentional misconduct directed at the land possessor or his or her family. While reasonable care generally has been acceptable for innocent, inadvertent, or child trespassers, requiring land possessors to exercise care for "flagrant" trespassers flies in the face of common sense, and many states have excluded all trespassers from the unitary standard for that reason. Section 52 distinguishes among trespassers, categorizing them as ordinary trespassers and "flagrant" trespassers. It provides that the only duty to the latter is to not act in an intentional, willful, or wanton manner that causes harm to the trespasser.

Many courts hold that expert opinion must be expressed in terms of medical or scientific 'certainty.' This is problematic because medical and scientific communities have no 'reasonable certainty' standard.

This concept comes from a synthesis of decisions, not from a majority or plurality rule. A flagrant trespasser is not a bright-line concept but one that is left to develop in future cases. But it does have the advantage of a reasoned, progressive approach that avoids the confusing array of classes of trespassers that are sprinkled throughout decisions and, at the same time, recognizes that not all trespassers are alike.

8. Negligent infliction of emotional distress. The second restatement contained no provisions for liability for negligently inflicting stand-alone emotional harm; the only provision for recovery for such harm was for intentionally inflicted harm. The third restatement reflects developments since 1965, and §§47 and 48 permit recovery for people who suffer severe emotional harm—both those in the zone of danger and bystanders who perceive serious physical harm to a close family member. This provision includes a catchall suggesting that in categories of cases in which it is especially foreseeable that a rea-

sonable person would suffer serious emotional harm, courts may permit such a claim. Telegrams containing erroneous reports of a family member's death are one such historical category; a modern example would be a hospital permitting a newborn to be abducted.

9. Res ipsa loquitur. Plaintiffs sometimes rely on the doctrine of res ipsa loquitur to prove negligence. In many instances, courts dealing with those claims impose "rules," such as requiring that the defendant be in "exclusive control" of the "instrumentality," excluding expert testimony on liability, and denying the claim if the plaintiff attempts to prove specific acts of negligence.

The third restatement clears the air by making explicit that res ipsa is only another appropriate form of circumstantial evidence enabling proof of negligence. It implies that the court does not know, and may never know, what actually happened in the individual case but that because of the type or category of the accident, it is more likely than not due to negligence.

Under §17, juries would be allowed to infer negligence if the accident was of "a type . . . that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member."[20] For example, a defendant parks his car at the top of an inclined driveway, and the car rolls down the driveway, injuring a pedestrian. Even though the defendant was not in possession of the car at the time, res ipsa loquitur is appropriate and would permit the jury to infer that the defendant's negligence caused the plaintiff's harm.[21]

Gone would be the ancillary rules—so it would not matter that the defendant was not in exclusive control at the precise moment of the accident, that the plaintiff introduced expert testimony to establish that the accident was of a type or category that normally does not happen in the absence of negligence, or that the plaintiff attempted to prove a specific act of negligence on the defendant's part. And, as the restatement makes clear, because this type of claim ordinarily derives from common knowledge and experience (sometimes augmented by expert testimony), the case usually will go to the jury.

10. Abnormally dangerous activity. The second restatement listed five factors to be considered in determining whether an activity qualified as abnormally dangerous and therefore subject to strict liability. Those factors had become largely outdated in actual practice.

The third restatement returns to the first restatement's two-requirement approach: that the activity must be one that is not common and that creates a significant risk of harm even when all reasonable precautions are taken.[22] For example, consider a manufacturing company, located in an otherwise largely residential community. Its manufacturing process produces a toxic chemical that is stored on-site until it can be shipped for proper disposal. The company complies with all applicable regulatory requirements and exercises reasonable care to contain the byproduct chemical it stores. Nevertheless, when the storage bins are opened, sudden wind gusts may disperse the chemicals throughout the neighborhood, which can cause serious illness.

This activity might be declared abnormally dangerous by a court and therefore subject to strict liability.[23] Strict liability for engaging in abnormally dangerous activity plays a small role in the contemporary tort system, but this clarification will simplify how courts deal with such claims.

The new restatement accomplishes other updates beyond these 10 provisions. It reflects many of the legal reforms the past 40 years have seen, tweaks many aspects of tort law, contains hard-headed analysis and justification, and is filled with copious citation to leading court decisions and legal scholarship of the modern era.

While it does not govern law per se until the courts adopt it, given the deference accorded to restatements, it will have a profound impact on tort law development and is a work that trial lawyers would be well advised to review and use. ■

Notes

1. *See* Larry S. Stewart, *Strict Liability for Defective Product Design: The Quest for a Well-Ordered Regime,* 74 Brooklyn L. Rev. 1039, 1043–45 (2009).

2. Employer liability is already covered, in part, in *Restatement (Third) of Agency* §§2.04 and 7.07 (2006).

3. In the meantime, all of the third restatement can be found on Westlaw or Lexis. Hard copies of the nine approved chapters also are available from the American Law Institute in Philadelphia (*see* www.ali.org) and some large law libraries.

4. *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* §6 cmt. b (2010) [hereinafter *Third Restatement*]; *see also Restatement (Third) of Agency* §7.

5. *Third Restatement* §37.

6. *Id.* §7 cmt. j.

7. *Id.* §7 cmt. i.

8. *See* W. Jonathan Cardi & Michael D. Green, *Duty Wars,* 81 S. Cal. L. Rev. 671, 729 (2008).

9. *Gipson v. Kasey,* 150 P.3d 228, 231 (Ariz. 2007).

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

11. *Id.* at 835; *Third Restatement* §7.

12. *See June v. Union Carbide Corp.,* 577 F.3d 1234, 1239–44 (10th Cir. 2009) (commenting on separation of legal cause into factual causation and scope of liability).

13. *Third Restatement* §29.

14. 774 N.W.2d at 836–39.

15. *Third Restatement* §34 illus. 7.

16. This comment was informed by a groundbreaking joint conference with the National Academy of Sciences, in which the reporters discussed this issue with five distinguished scientists. Reporters' Note §28 cmt. c.

17. A doubling of incidence is not a bright-line test and in some cases may not be sufficient by itself. On the other hand, less than a doubling of incidence does not mean there is no specific causation so long as there is other evidence that the plaintiff's disease was more likely than not caused by the agent.

18. 551 P.2d 334 (Cal. 1976).

19. The restatement also explains the difference between a statute used for negligence per se purposes and used to impose a tort duty. *See Third Restatement* §38 cmt. d.

20. The new products liability restatement contains a similar res ipsa provision. *Restatement (Third) of Torts: Products Liability* §3 (1998).

21. *Third Restatement* §17 illus. 2.

22. *Third Restatement* §20(b).

23. *Third Restatement* §20 illus. 2.