
DUTY UNDER NEGLIGENT BREACH OF CONTRACT CLAIMS

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ABSTRACT

When a nonparty to a contract is injured, either physically or economically, by a breach of contract, courts struggle with whether and how a duty to that nonparty is imposed on the defendant. For example, suppose a customer is injured by a loose light fixture in a store. While the store contracted with an electrician to fix the light, it was the electrician's negligent performance of the contract that caused the customer to be injured. Because the customer is not a party to the breached contract that caused the injury, the customer must attempt to sue the electrician in tort. This Article explores whether the electrician owes the customer a duty, and if so, the foundation of that duty.

In exploring this question, several bases of duty are covered. The ideas of misfeasance (acting poorly) versus nonfeasance (no action whatsoever) and their relationship to the duty question are examined. In addition, this Article discusses privity and foreseeability. Finally, the Third Restatement of Torts is reviewed, specifically Sections 42 and 43, as they encompass the negligent breach of contract claim.

After reviewing these various approaches to the duty problem under a negligent breach of contract claim, this Article notes that most of the approaches emphasize the plaintiff's reaction to the defendant's action. The Third Restatement follows this by imposing a duty in a negligent breach of contract claim if the defendant knows that the undertaking "will reduce the risk of physical harm to which a third person is exposed."¹ The emphasis is placed on the plaintiff's position. To decide whether there is a duty, one must look at how the third person is affected by the defendant's behavior. Focusing on plaintiffs requires defendants to consider the effects of their actions on others, and this should result in more careful behavior and a reduction in the possibility of physical harm. This should also more effectively deter defendants from acting in a negligent manner. Therefore, the Article concludes that a focus on how the

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1. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43 (2012).

plaintiff is affected by the defendant's position or conduct is the approach most beneficial to society in determining a duty under a negligent breach of contract claim.

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I. INTRODUCTION

When a nonparty to a contract is injured, either physically or economically, by a breach of contract, courts struggle with whether and how a duty to that nonparty plaintiff is imposed on the defendant.² For example, suppose a builder contracts with the government to build a school.³ The builder fails to properly connect a gas line, and the school's maintenance supervisor is injured as a result.⁴ The builder breached the contract by failing to properly connect the gas line, but the maintenance supervisor is not a party to the contract whose breach caused the supervisor's injury.⁵ Thus, the maintenance supervisor must attempt to sue the builder in tort.⁶ If the maintenance supervisor cannot sue the builder, the maintenance supervisor may be unable to recover damages from any entity. Because the contract with the builder was between the builder and the government, the maintenance supervisor may be precluded from

2. See, e.g., *Evans v. Otis Elevator Co.*, 168 A.2d 573, 575-76 (Pa. 1961); *Hanson v. Blackwell Motor Co.*, 255 P. 939, 939 (Wash. 1927); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051, 1053 (N.Y. 1916).

3. *Hand v. Harrison*, 108 S.E.2d 814, 815 (Ga. Ct. App. 1959).

4. *Id.*

5. *Id.* at 815-16.

6. See *id.* at 816.

seeking redress from the school by governmental immunity.⁷ The maintenance supervisor, an innocent victim, thus may be forced to look to the builder for recompense for the injuries.⁸ But does the builder owe the maintenance supervisor a duty, even though the maintenance supervisor is not a party to the contract under which the builder was performing? Modern law says yes, but historically courts have grappled with the reasons why this duty should be owed.⁹

Traditionally, courts have held that the contracting party did not owe a duty to the third party.¹⁰ One reason for this determination was that there was no privity between the plaintiff and the defendant.¹¹ In addition, if a third party was injured due to the nonperformance of the contractual duty (nonfeasance), the plaintiff could not recover under a negligence theory.¹² However, if the defendant partially performed under the contract, and the performance was so poorly done that the third party was injured (misfeasance), the plaintiff *could* recover under a negligence theory.¹³

Some courts have abandoned not just privity but also the nonfeasance/misfeasance dichotomy.¹⁴ In place of those principles, in determining whether the defendant owed a duty to the plaintiff—the outsider to the contract—some courts have analyzed whether the plaintiff or the harm were foreseeable.¹⁵ For example, in one case, the plaintiff was charged with a heinous crime based on a mistake the crime lab made in

7. See, e.g., GA. CODE ANN. § 50-21-23(b) (West 2012) (“The state waives its sovereign immunity only to the extent and in the manner provided in this article and only with respect to actions brought in the courts of the State of Georgia.”).

8. See, e.g., *Hand*, 108 S.E.2d at 816.

9. See, e.g., *Evans v. Otis Elevator Co.*, 168 A.2d 573, 575–76 (Pa. 1961); *Hanson v. Blackwell Motor Co.*, 255 P. 939, 939 (Wash. 1927); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051, 1053 (N.Y. 1916).

10. E.g., *Hand*, 108 S.E.2d at 816; *Anderson v. Fox Hill Vill. Homeowners Corp.*, 676 N.E.2d 821, 823 (Mass. 1997); *Hanson*, 255 P.2d at 939.

11. E.g., *Eadens ex rel. Estate of Eadens v. N.Y. Shipbuilding Corp.*, 382 F.2d 263, 264 (3d Cir. 1967).

12. See *Anderson*, 676 N.E.2d at 823.

13. See Jean Elting Rowe & Theodore Silver, *The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth Through the Twentieth Centuries*, 33 DUQ. L. REV. 807, 852 (1995); see, e.g., *Anderson*, 676 N.E.2d at 823; *MacPherson*, 111 N.E. at 1055.

14. See, e.g., *Cantwell v. Allegheny Cnty.*, 483 A.2d 1350, 1353–54 (Pa. 1984); *Evans*, 168 A.2d at 575–76.

15. See *Cantwell*, 483 A.2d at 1354; *Evans*, 168 A.2d at 575–76.

interpreting the evidence.¹⁶ The crime lab's contract to analyze the evidence was with the county, and the court found there was no duty supporting the plaintiff's negligence claim against the crime lab because it was not foreseeable that the crime lab's services would be used to protect criminal suspects.¹⁷

Now, the law may be abandoning foreseeability as part of the duty analysis. The Third Restatement of Torts has omitted foreseeability in favor of an approach that assumes one almost always owes a duty.¹⁸ The authors of the Third Restatement write, "Despite widespread use of foreseeability in no-duty determinations, this Restatement disapproves that practice and limits no-duty rulings to articulated policy or principle"¹⁹ These varied theories in exploring duty under a negligent breach of contract claim evolved to focus on an analysis of the potential effect of the defendant's behavior or position on the plaintiff.²⁰ For example, in eventually imposing liability in nonfeasance cases, courts looked at whether the plaintiff's position was altered by the defendant's existence.²¹

This Article explores the underpinnings of the duty analysis in a negligent breach of contract claim. In the duty analysis, the preferred approach is to examine how the plaintiff responds to the defendant's actions (not looking solely at the defendant's position, whether that position was one of misfeasance or nonfeasance. When a duty determination is made under a negligent breach of contract claim, the analysis should focus on how the defendant's actions affected the plaintiff. Keeping the focus on the plaintiff, the innocent party that was injured, should encourage people to think about how their actions could affect others, which should lead to more prudent behavior. Criticisms of this approach are that it is too nebulous for potential defendants to know when

16. *Cantwell*, 483 A.2d at 1352.

17. *Id.* at 1354.

18. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) (2010) ("*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." (emphasis added)); W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 741-42 (2005).

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

20. *See id.* § 43.

21. *Rowe & Silver*, *supra* note 13, at 851-53.

a duty will be imposed on them and that it brings foreseeability back into the duty equation, which the Third Restatement abandoned.

Part II of this Article discusses the relevant differences in tort and contract law, as both are implicated in a negligent breach of contract action. Part III explores misfeasance and nonfeasance. Privity is discussed in Part IV. In Part V, the Article examines, within the scope of foreseeability, the recently adopted Third Restatement's modifications to the Second Restatement's positions regarding duty and negligent breach of contract. Finally, Part VI analyzes how duty has evolved to focus on the plaintiff, rather than the defendant, and concludes with an explanation of why this is a positive development.

II. DIFFERENCES BETWEEN TORT AND CONTRACT LAW

The particular issue of whether a nonparty to a contract can recover for injuries suffered due to a breach of that contract implicates both tort and contract issues.²² Tort law is about the principle that people should act reasonably, and when they do not, they should compensate those who they foreseeably injure.²³ Contract law, on the other hand, provides a means by which people can bargain and enforce those bargains.²⁴ It does not "independently evaluate the reasonableness of each party's conduct," as is done under tort law.²⁵

When an outsider to a contract sues one of the contracting parties due to that party's poor or nonexistent performance under the contract, an issue arises of whether the breach can also be a tort, especially if it was an implied contract term that was breached.²⁶ The consequences of this decision encompass not only types of damages recoverable (e.g., punitive damages) but also whether lack of privity or express disclaimers will be available as defenses.²⁷

22. See, e.g., *Hand v. Harrison*, 108 S.E.2d 814, 816 (Ga. Ct. App. 1959); *Hanson v. Blackwell Motor Co.*, 255 P. 939, 939 (Wash. 1927).

23. VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS* 1-2, 132 (11th ed. 2005); see also William Powers, Jr., *Border Wars*, 72 TEX. L. REV. 1209, 1210 (1994).

24. 1 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 1:1, at 7-8 (4th ed. 2007); Powers, *supra* note 23, at 1210-11.

25. Powers, *supra* note 23, at 1211.

26. *Id.* at 1215-16.

27. *Id.* at 1216.

Although contracting parties can agree on terms, some contractual duties are not per se bargained for, such as a good faith performance requirement.²⁸ A good faith performance requirement could be interpreted as a duty to act reasonably.²⁹ The breach of a duty to act reasonably sounds more like a tort than a contractual breach, and thus tort law ends up supplanting contract law.³⁰ Even though the courts could question every contract term under this principle, they instead focus only on “whether *certain* aspects of a contracting party’s behavior were reasonable.”³¹

Judges may limit their inquiries out of respect for the contract law principle that the parties to the contract agree and consent to the limits in the contract.³² But when there is not a contractual relationship, judges use tort law to sort out the parties’ obligations.³³

One of these situations is when the performance under the contract is so defective that it injures someone not a party to the contract.³⁴ Tort law must fill in here, as there is no contract between the injured plaintiff and the defendant; but for tort law to step in under the cloak of negligence, there must first be a duty owed to the plaintiff from the defendant.³⁵ In the 1800s, contractual parties began to grapple with duty under a negligent breach of contract claim.³⁶ The negligent breach of contract claim arose when two entities were bound by a contract, but then a third entity was injured by an “imperfect, but unintentional misperformance” under the contract.³⁷ When sued by the third entity under a negligence theory, the defendant would argue that the contract limited its duty solely to the other party to the contract, and therefore no duty was owed to the third entity.³⁸

Because duty is necessary to hold a defendant liable for negligence,³⁹

28. *Id.* at 1215.

29. *See id.* at 1217.

30. *Id.*

31. *Id.*

32. *See id.* at 1224.

33. *See id.* at 1224–25.

34. *See id.*; *see, e.g.*, *Hand v. Harrison*, 108 S.E.2d 814, 815 (Ga. Ct. App. 1959).

35. *See* SCHWARTZ ET AL., *supra* note 23, at 403.

36. *See* Rowe & Silver, *supra* note 13, at 834.

37. *Id.* (quoting Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 55 (1934)).

38. *Id.*

39. Duty is one of the traditional four elements comprising negligence; the

it is important to look at the underpinnings of duty through the years. That necessarily includes an analysis of the roles of misfeasance, nonfeasance, and privity.

III. MISFEASANCE AND NONFEASANCE

In this Part, duty is explored under both the misfeasance and nonfeasance categories. Regarding nonfeasance, attention is paid as to why liability has not been imposed in the past and why liability should be imposed, especially considering the Third Restatement's position on nonperformance of an obligation.⁴⁰

Under the Second Restatement, in determining whether the defendant is liable to the plaintiff for negligence, regardless of whether it stems from a contractual performance, the court first determines "whether the defendant owed a duty at all."⁴¹ The duty question is based on fairness—would reasonable people agree that a duty should be owed in a certain situation?⁴²

Misfeasance and nonfeasance play an important role in determining whether such a duty exists in a negligent breach of contract matter, because typically one is not under a duty to another unless one does something poorly (misfeasance) to create that duty, as opposed to not doing anything (nonfeasance) and thus not assuming a duty.⁴³ Of course, there are numerous exceptions to the nonfeasance rule, but they are beyond the scope of this Article.⁴⁴ According to Jean Elting Rowe and Theodore Silver, rather than nonfeasance, a more accurate term is nonexistence.⁴⁵

other three are breach, causation, and damages. SCHWARTZ ET AL., *supra* note 23, at 132.

40. See *supra* notes 18–20 and accompanying text.

41. Cardi, *supra* note 18, at 751. Then, if there was a duty, "the judge must define the scope of that duty in the form of a standard of care." *Id.*

42. See, e.g., *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 46 (Colo. 1987) (en banc).

43. Rowe & Silver, *supra* note 13, at 850 (quoting Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1026–27 (1928)).

44. Those exceptions include: (1) when there is a special relationship between the defendant and plaintiff; (2) when the defendant causes harm or creates risk to the plaintiff; (3) when the defendant assumes a duty of care; or (4) when the defendant begins to offer assistance. 2 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 405, at 654 (2d ed. 2011).

45. See Rowe & Silver, *supra* note 13.

Rather than setting forth the more complicated explanation that one should not owe a duty to modify that which would happen regardless of one's existence, courts and commentators discussed a failure to act rather than a failure to exist.⁴⁶ In most early cases involving a failure to perform under a contract, this failure to act was described as nonfeasance.⁴⁷ As a consequence, nonfeasance became a foundation upon which to find no duty in a negligent breach of contract claim.⁴⁸

The important analysis regarding misfeasance and nonfeasance in relation to duty is looking at the behavior that caused the injury.⁴⁹ If the defendant's behavior progressed to the point that doing nothing would cause an injury, then there is a duty owed to the plaintiff.⁵⁰ If the defendant's behavior only resulted in constraining a benefit, then there is not a duty.⁵¹

In the context of a negligent breach of contract claim, another difference between misfeasance and nonfeasance arises from the principle that "no man can authorize another to do a positive wrong."⁵² The theory is that the contracting party that committed the misfeasance owes a duty to the noncontracting person injured by that behavior, because to do otherwise would allow the party's bad behavior to be permitted by virtue of the contract with the other entity.⁵³ Another way to look at the situation is to consider that one's poor behavior cannot be approved by contract.⁵⁴ By committing the bad behavior, the party to the contract establishes a duty to nonparties to the contract.⁵⁵

Although misfeasance permitted application of a duty, nonfeasance traditionally did not.⁵⁶ A distinction was made between the two under the theory that the defendant could not be forced to compensate someone the defendant did not agree to be bound to when the defendant did not take

46. *Id.* at 828–32 & nn.92–96.

47. *Id.* at 816.

48. *Id.* at 814–15.

49. *See id.* at 838 (quoting *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 898 (N.Y. 1928)).

50. *H.R. Moch Co.*, 159 N.E. at 898.

51. *Id.*

52. *Bissell v. Roden*, 34 Mo. 63, 66–67 (1863).

53. *See id.* at 67.

54. *Id.* at 66.

55. *Id.*

56. *See id.* at 66–67; *Rowe and Silver*, *supra* note 13, at 814–15.

any action.⁵⁷ This was because one could not be compelled to act by another who he did not “become directly bound or amenable [to] for his conduct,”⁵⁸ (i.e., owe a duty to under tort law). There was no negligence liability for nonfeasance because there was no duty to act.⁵⁹

Dan B. Dobbs provides two reasons why courts in the past would not impose tort liability for a failure to act under a contract. First, the only duty owed could not be separated from the contractual undertaking.⁶⁰ Second, the law would not recognize a contract involving a gratuitous undertaking that did not have consideration supporting it.⁶¹ Theoretically, because the duty could not be enforced in contract, which is where the duty arose, then “it should not be enforced in tort either.”⁶² If one believes the principle that tort duties are created by law, however, then contracts are still relevant to the duty question.⁶³ The court could use the contract at issue to determine the scope of the duty—a tort duty which may not even exist without the contract.⁶⁴ It is the existence of a contractual undertaking that implies the tort duty.⁶⁵

Eventually, the thinking evolved to imposing tort liability upon those who did not perform their obligations under a contract, at least in some circumstances.⁶⁶ There are many reasons why courts began imposing liability in nonfeasance cases.⁶⁷

First, Section 90 of the Second Restatement of Contracts permits enforcement of some gratuitous promises, noting that consideration can be replaced by the plaintiff’s reliance.⁶⁸ And if a promise without

57. *Bissell*, 34 Mo. at 66–67.

58. *Id.*

59. Rowe & Silver, *supra* note 13, at 829.

60. 2 DOBBS ET AL., *supra* note 44, § 411, at 681–82.

61. *Id.* § 411, at 682; *see also* 3 WILLISTON & LORD, *supra* note 24, § 7:1, at 8.

62. 2 DOBBS ET AL., *supra* note 44, § 411, at 682.

63. *See id.* § 411, at 682–83.

64. *Id.* § 411, at 682.

65. *Id.*

66. *See id.* § 411, at 682–83 (“If the promise is enforceable in contract, and relates to physical safety of persons or things, then there is no universal objection to enforcing it in tort.”).

67. *Id.*

68. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. f (1981). For a discussion of the relationship between consideration and legally enforceable contracts, *see* David Gamage & Allon Kedem, *Commodification and Contract Formation*:

consideration can be enforced under contract law, especially a promise regarding physical injury, then it should be enforced under tort law as well.⁶⁹

Second, tort law and contract law have different rules.⁷⁰ Tort law's principles may justify requiring action when contract law's principles do not permit mandating action.⁷¹

This second reason is especially persuasive because contract law focuses on economic relationships while tort law focuses (although not exclusively) on injuries.⁷² In addition, “[c]ontract obligations are prima facie strict; the plaintiff need not prove that the defendant negligently breached the contract, only that he breached it.”⁷³ Tort law, however, is not so constrained and can limit an obligation to a duty of care.⁷⁴ Thus, the courts can limit liability in tort to “where [they] think it appropriate. While a contract obligation might impose liability for any kind of harm, including pure economic harm, courts can limit the obligation imposed by tort law, even when that obligation is rooted in a promise or undertaking.”⁷⁵ The Second Restatement of Torts limited the obligation regarding undertakings so that it only applied to physical harms.⁷⁶ This excluded most contract cases from a duty under the Second Restatement.⁷⁷ Requiring both physical harm and “negligence protect[s] against excessive tort liability for

Placing the Consideration Doctrine on Stronger Foundations, 73 U. CHI. L. REV. 1299 (2006).

69. 2 DOBBS ET AL., *supra* note 44, § 411, at 683.

70. *Id.* Although tort and contract law have different rules, the lines between the two areas are blurred. Israel Gilead, *Non-Consensual Liability of a Contracting Party: Contract, Negligence, Both, or In-Between?*, 3 THEORETICAL INQUIRIES L. 511, 513 (2002).

71. *See* 2 DOBBS ET AL., *supra* note 44, § 411, at 684–85.

72. *Id.* § 411, at 683.

73. *Id.* Dobbs states that one is liable for failing to perform a contractual obligation even if one “reasonably tried to perform.” *Id.*

74. *Id.*

75. *Id.*

76. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

77. 2 DOBBS ET AL., *supra* note 44, § 411, at 683–84. The Third Restatement might continue this exclusion, as comment h to Section 43 states the “[s]ection does not [contemplate] whether a duty exists when a person suffers only economic harm.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43 cmt. h (2012).

gratuitous promises.”⁷⁸

Thus, there are compelling reasons for imposing liability in nonfeasance situations. Section 90 of the Second Restatement of Contracts provides for enforcement of some gratuitous promises,⁷⁹ and if contract law does not prohibit enforcement of such a promise, then there is no reason not to enforce it under tort law as well, especially when the injury relates to physical harm.⁸⁰ Also, tort law is sufficiently different from contract law to permit liability in nonfeasance cases because tort law is especially attuned to situations involving physical harm, and obligations imposed by tort are not as constrained as those imposed by contract.⁸¹

Even if there are good reasons for imposing a duty in the face of nonfeasance, the Third Restatement of Torts “might reject liability in many cases.”⁸² That is because the Third Restatement proposes “[a] restrictive view of increased risk,” which “holds that there is no increased risk unless the defendant’s nonperformance made the risk greater than it would have been if the defendant had undertaken nothing at all.”⁸³ The example Dobbs gives is a broken traffic light.⁸⁴ The defendant’s promise to fix the light “does not by itself make the signal more dangerous than it would have been if the defendant had not undertaken repair.”⁸⁵ Under this restrictive view, there is no duty between the defendant that committed nonfeasance by failing to fix the light and the injured party.⁸⁶

This may result in a noncompensable injury. It hardly seems just for an innocent driver to incur the expenses of an injury—and suffer physical harm—on the sole basis that the broken traffic light was just as broken before the defendant attempted to fix it.⁸⁷ But it is also not fair to impose a duty on a defendant who did not alter the status quo, even if that status

78. 2 DOBBS ET AL., *supra* note 44, § 411, at 684–85.

79. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. f (1981).

80. *See* 2 DOBBS ET AL., *supra* note 44, § 411, at 863.

81. *See supra* text accompanying notes 71–75.

82. 2 DOBBS ET AL., *supra* note 44, § 412, at 688.

83. *Id.*; *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43 cmt. d (2012).

84. 2 DOBBS ET AL., *supra* note 44, § 412, at 687.

85. *Id.* § 412, at 688.

86. *Id.*

87. *Id.* § 412, at 687 (“Where the defendant promises a city to repair a malfunctioning traffic signal, his failure to act on the promise creates a definite risk of harm to travelers from readily foreseeable intersection collisions.”).

quo produced an injury. The drafters of the Third Restatement have decided that the better course is to refrain from holding defendants liable if they did not change the landscape that existed before the plaintiff was injured.⁸⁸

This would seem to encourage neglect in the performance of contractual obligations, but a defendant who performed inadequately would still have to answer a breach of contract claim brought against it by the other contracting party.⁸⁹ Thus, the failure to perform adequately is deterred by contract law, and performance that increases a risk is deterred by tort law.⁹⁰ The criticism of this is that the innocent injured person may not receive compensation for the harm that befell her if the defendant did nothing and if that inaction did not increase the risk of harm.⁹¹

The innocent injured party may not be entirely without a remedy. There are still several ways that one who engages in nonfeasance can owe a duty to others who are not parties to the contract under a negligent breach of contract claim. Reliance is one of those ways: if anyone “relies on the defendant’s undertaking to provide better safety, that by itself is sufficient to trigger a duty of reasonable care to perform his undertaking or to effect a safe withdrawal from it.”⁹²

Another way that a duty can be found is if the defendant specifically assumes a duty owed by one to another.⁹³ The defendant will be found to owe a duty even if the two circumstances described above, increased risk and reliance, are not present, if that defendant decides to take over “another’s duty of care for the plaintiff’s physical safety.”⁹⁴ This situation is one in which the defendant contracts to perform the other’s duty, and thus, it makes sense for the defendant to be liable to the nonparty, because by specifically agreeing to accept the duty, the defendant could—or had every opportunity to—foresee the injury to the nonparty.⁹⁵ If this was not the

88. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. o (2010) (stating the general rule that liability should be imposed only “when the actor’s conduct or course of conduct results in greater risk to another than the other would have faced absent the conduct”).

89. *See id.* § 42.

90. *See* 2 DOBBS ET AL., *supra* note 44, § 412, at 687–88.

91. *See supra* text accompanying note 87.

92. 2 DOBBS ET AL., *supra* note 44, § 412, at 688.

93. *Id.* § 412, at 689.

94. *Id.* § 412, at 690.

95. *See id.* § 412, at 690–91.

case, and the defendant was not “held to the duty he has assumed, . . . [then] the plaintiff’s rights would have been determined by the contract of two other people to which he was not a party.”⁹⁶

Despite its talk of increased risk, the Third Restatement of Torts does permit the imposition of a duty when there is nonfeasance.⁹⁷ Comment e to Section 42 of the Third Restatement states that even if nothing is done in furtherance of a promise, it can still be an “undertaking”⁹⁸ that imposes a duty upon the defendant.⁹⁹ The authors of the Third Restatement decided that “[i]f contract law provides a remedy for mere promises, tort law should also do so when breach of the promise causes personal injury or property damage.”¹⁰⁰ If the defendant’s behavior causes someone to relinquish other protections, then a duty based on a promise is established, whether the defendant’s behavior was an action or a promise.¹⁰¹

This emphasizes that the important analysis is how others act in reaction to the defendant.¹⁰² Duty arises when others take some action because of the defendant’s behavior.¹⁰³ This is a fair way to determine duty, because a defendant should be responsible to another if the other bases his actions on the defendant’s actions. Not only is it just, but it also encourages people to think about how others will respond to them. Encouraging this reflection should lead to more prudent behavior.

Although not a nonfeasance case, this is in line with the *Glanzer v. Shepard* opinion, one of the first rejecting the privity requirement for pure economic loss.¹⁰⁴ In *Glanzer*, the buyer of beans sued the weigher of beans

96. *Id.* “In addition, when the defendant contracts to fulfill A’s duty to the plaintiff, the plaintiff may look like a creditor beneficiary entitled to sue for a breach of the contract that leads to her injury.” *Id.* § 412, at 691.

97. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 42 cmt. e (2012).

98. Black’s Law Dictionary defines “undertaking” as “[a] promise, pledge, or engagement.” BLACK’S LAW DICTIONARY 1665 (9th ed. 2009).

99. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 42 cmt. e.

100. *Id.*

101. *Id.*

102. *See id.*

103. *See id.* § 42(b).

104. *Glanzer v. Shepard*, 135 N.E. 275, 276 (N.Y. 1922); Albert L. Wheeler, III, *Real Estate Appraisal Malpractice Liability to Nonprivity Third Parties: Questioning the Applicability of Accountant Liability to Third Party Cases*, 25 REAL PROP. PROB. & TR. J. 723, 727 (1991) (noting that *Glanzer* was the first case to permit recovery of an

because the weigher reported an incorrect weight, causing the buyer to pay more for the beans than he should have been obligated to pay.¹⁰⁵ The contract to weigh the beans was between the seller of beans and the weigher of beans, not between the buyer and the weigher.¹⁰⁶ The court found the weigher had a duty in tort to the buyer, even though the contract was between the weigher and the seller, because the weigher knew the buyer would take action based on what the weigher reported.¹⁰⁷ Thus, duty was imposed because of the weigher's knowledge of how others would react to the performance of the contractual obligation.¹⁰⁸

Similarly, the Third Restatement provides that if a plaintiff acts based on the defendant's actions, even if the defendant's action is as simple as making a promise, then the defendant owes the plaintiff a duty.¹⁰⁹ The difference between the two situations is that the *Glanzer* case involved a misfeasance, a misweighing, while the Restatement is addressing nonfeasance, those situations in which the only action is making the promise.¹¹⁰ This distinction is not important, however, because the critical factor in determining whether a duty exists is *how others acted* based on the defendant's behavior, not whether the defendant acted at all.¹¹¹ There is no principled difference between action and inaction.¹¹²

The crucial analysis regarding duty in a negligent breach of contract claim has become one of how others react to the defendant.¹¹³ Before the law evolved, the duty question could be reduced to one idea in misfeasance and nonfeasance cases: if the plaintiff would have suffered injury, even if the defendant did not exist, then the defendant was not the cause of the

economic loss sans privity).

105. *Glanzer*, 135 N.E. at 275.

106. *See id.*

107. *Id.* at 275–77.

108. *See id.* at 276 (“They knew that the beans had been sold, and that on the faith of their certificate payment would be made.”).

109. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 42 cmt. e (2012).

110. Compare *Glanzer*, 135 N.E. at 276, with RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 42 cmt. e.

111. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 42(b).

112. 2 DOBBS ET AL., *supra* note 44, § 411, at 680–81.

113. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43(c).

risk.¹¹⁴ The theory rests on the principle that there is no duty to change what would have happened if the result would have occurred without the defendant.¹¹⁵

For example, suppose that a fire is burning a building, but there is no water available to put out the fire despite a contract between the city and the water company for the water company to provide water.¹¹⁶ The building would still have burned if there was no water company because the water company did not prevent water from being available; it simply failed to provide water that was not available in the first instance.¹¹⁷

On the other hand, consider the matter in which the defendant car manufacturer contracted with a dealer to sell a car and, due to the defendant's negligence in assembling the car, the person who bought the car from the dealer was injured.¹¹⁸ The defendant owed a duty to the car owner because the plaintiff's injury would not have occurred but for the car company's existence.¹¹⁹ The risk arose due specifically to the defendant, and therefore the defendant incurred a duty to the plaintiff.¹²⁰ It was the car company that made the car defective.¹²¹ If the car company did not exist, then the plaintiff would not have been injured because the defective car would not have existed.¹²²

After the publication of Rowe and Silver's article setting forth this theory, the Third Restatement of Torts attempted to do away with most limitations on duty, including the misfeasance and nonfeasance distinction.¹²³ In discussing the Third Restatement's switch to recognizing a duty in most instances, W. Jonathon Cardi noted "the long-recognized principle that one generally owes a duty to avoid affirmatively causing

114. See Rowe & Silver, *supra* note 13. This also describes factual causation, or as it is often referred to, but-for causation. RESTATEMENT THIRD OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. b.

115. Rowe & Silver, *supra* note 13.

116. See *id.* at 853 (citing *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 896 (N.Y. 1928)).

117. *Id.* (interpreting the holding of *H.R. Moch Co.*).

118. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916).

119. See *id.* at 1053.

120. Rowe & Silver, *supra* note 13, at 853; see *MacPherson*, 111 N.E. at 1053.

121. *MacPherson*, 111 N.E. at 1053.

122. See Rowe & Silver, *supra* note 13, at 853.

123. See discussion *infra* Parts IV.B., V.B.

physical harm to others.”¹²⁴ Before this, however, the law was quite different, especially regarding matters covered by a contract between the defendant and someone other than the plaintiff.¹²⁵

IV. PRIVACY

In the past, privity was used to answer the question of whether a duty should exist between the promisor and the injured person who was not a party to the contract.¹²⁶ Privity refers to the “relationship between or among the contracting parties.”¹²⁷ Thus, one could not be in privity with another unless one entered into a contract with the other.¹²⁸

At first, when there was no privity and the injured person was not a party to the contract, the injured person could not sue regarding a breach of that contract.¹²⁹ This changed, however, and the third party beneficiary doctrine was developed as an exception to the privity requirement.¹³⁰ This doctrine, in its basic sense, “arises when a promisor agrees with a promisee to render a performance to a third party instead of to the promisee.”¹³¹ The doctrine was used to eliminate privity’s necessity or, alternatively, was used to find that there was privity because of third-party-beneficiary status.¹³² Regardless of the justification, the end result was that the beneficiary was treated exactly like a party to the contract regarding enforcing the contract.¹³³ Before this thinking gained popularity, however, many courts

124. *Cardi, supra* note 18, at 751.

125. *See infra* Part IV.A.

126. *See* 13 WILLISTON & LORD, *supra* note 24, § 37:1, at 4-5 (citations omitted).

127. *Id.* § 37:1, at 4.

128. *See id.*

129. *See, e.g., Eadens, ex rel. Estate of Eadens v. N.Y. Shipbuilding Corp.*, 382 F.2d 263, 264 (3d Cir. 1967); *Hanson v. Blackwell Motor Co.*, 255 P. 939, 939 (Wash. 1927); *Hand v. Harrison*, 108 S.E.2d 814, 816 (Ga. Ct. App. 1959).

130. 13 WILLISTON & LORD, *supra* note 24, § 37:1, at 14 (quoting *N. Nat’l Bank of Bemidji v. N. Minn. Nat’l Bank of Duluth*, 70 N.W.2d 118, 123 (Minn. 1955)).

131. *Id.* § 37:1, at 19 (“Determining whether an enforceable third party beneficiary contract exists requires two additional steps: First, the technical prerequisites of a third party beneficiary contract must be examined, applied, and, of course, met. Second, the several varying classes of cases in which third parties have, or may have, an interest in an agreement made between two or more other contracting parties must be analyzed and differentiated.”).

132. *Id.*

133. *Id.*

did require privity as a precondition to third-party recovery.¹³⁴

A. *Privity's Early Requirement*

An oft-cited early case that stands for the requirement of privity is *Winterbottom v. Wright*.¹³⁵ In *Winterbottom*, a mail coach injured the coachman, who sued to recover.¹³⁶ The plaintiff alleged negligent maintenance of the coaches by the defendant, who had a contract with the Postmaster General to supply, maintain, and repair the coaches.¹³⁷ Because the defendant's contract with the postmaster was the only source of the defendant's duty and the plaintiff was a stranger to that contract, the defendant did not owe a duty to the plaintiff.¹³⁸ Without that privity there was no duty, and without duty, there was no recovery for the plaintiff from the defendant.¹³⁹

Courts followed *Winterbottom*, even as cars replaced coaches. In *Hanson v. Blackwell Motor Co.*, decided in 1927, the plaintiffs were injured in a car accident, and they sued the defendant, who had contracted with the car's owner to fix the car.¹⁴⁰ The Washington Supreme Court held that the defendant did not owe a duty to the plaintiffs that arose independent of the contract.¹⁴¹ The court stated that if the defendant breached only the contract, then the defendant was only liable to the other contracting party.¹⁴² If the defendant breached a duty that was separate from the contract, however, the defendant could not use the contract's existence as a way to block liability to a nonparty to the contract.¹⁴³

The court was concerned about the lack of limitations on who could sue for performance under a contract.¹⁴⁴ Without constraining the litigation

134. *See id.*

135. *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402 (Exch.) 404; 10 M. & W. 109, 109–10; *see MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1054 (N.Y. 1916); *Hanson v. Blackwell Motor Co.*, 255 P. 939, 939 (Wash. 1927); Rowe & Silver, *supra* note 13, at 834–35.

136. *Winterbottom*, 152 Eng. Rep. at 403; 10 M. & W. at 109–10.

137. *Id.*

138. *Id.* at 404–05; 10 M. & W. at 114–16.

139. *Id.*

140. *Hanson*, 255 P. at 939.

141. *Id.* at 941.

142. *Id.* at 939.

143. *Id.*

144. *Id.* at 939–40.

to only those who were parties to the contract, there would be no limitations whatsoever on possible plaintiffs.¹⁴⁵ The court was also concerned that allowing actions by nonparties would deter people from entering into contracts because doing so would create liability to people they did not intend to be liable to.¹⁴⁶ Additionally, the parties to the contract would lose control over their contract if nonparties could acquire a right to have that contractual duty performed.¹⁴⁷ Thus, privity was required.¹⁴⁸

As the *Hanson* court's concerns demonstrate, privity does serve a useful purpose; it helps the parties to a contract know to whom they would be liable.¹⁴⁹ Eventually, however, other concerns became more important than this, evident in the principle that "privity of contract no longer confines the scope of tort duties."¹⁵⁰ One of the first cases to do away with privity also involved an injury from an automobile and preceded *Hanson* by more than a decade.

B. Privity Abandoned

In 1916, the New York Court of Appeals decided *MacPherson v. Buick Motor Co.*¹⁵¹ The plaintiff in this case bought the car from a dealer, and the dealer bought the car from a defendant manufacturer.¹⁵² When the plaintiff was injured by the car's collapse due to a faulty wheel, the plaintiff sued the manufacturer.¹⁵³ In finding that the plaintiff had a viable negligence claim against the defendant, Judge Cardozo, writing for the majority, determined that a duty could arise even without privity of contract between the plaintiff and the defendant.¹⁵⁴ If it is "reasonably certain" that the product will injure someone if it is negligently made, then

145. *See id.*

146. *See id.* at 939.

147. *See id.*

148. *See id.* at 940; *see also* Winterbottom v. Wright, (1842) 152 Eng. Rep. 402 (Exch.) 405; 10 M. & W. 109, 115.

149. *Hanson*, 255 P. at 940–41.

150. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43 cmt. d (2012).

151. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). This is also an important case in the history of products liability law, which is beyond the scope of this Article.

152. *Id.* at 1051.

153. *Id.*

154. *Id.* at 1053.

it is “a thing of danger.”¹⁵⁵ If the product is not only a thing of danger but the manufacturer also knows that people other than the purchaser will use it, “then, *irrespective of contract*, the manufacturer of this thing of danger is under a duty to make it carefully.”¹⁵⁶

The court stated that there must be knowledge of a “probable danger,” not merely a “possible danger.”¹⁵⁷ More than a possibility of danger is needed to impose a duty not tied to the contract.¹⁵⁸ The law will impose a duty, even if a contract does not, when one can foresee that its negligence will physically injure another.¹⁵⁹ The court seemed to mock the defendant’s argument that it was only liable to the dealer, stating that “[t]he dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect.”¹⁶⁰

In dismissing the defendant’s argument, the court noted that the world was changing, stating that “[p]recedents drawn from the days of travel by stagecoach do not fit the conditions of travel [today].”¹⁶¹

Here, the court could be referring indirectly to the *Winterbottom* case and implying why *Winterbottom* should no longer be followed.¹⁶² Although the danger must still be imminent, the things that cause the danger may change as new inventions become commonplace.¹⁶³ Later in the opinion, the court does discuss *Winterbottom*, noting that the defendant in *Winterbottom* was not the manufacturer and that a duty other than that found in the contract was not discussed.¹⁶⁴

Toward the end of the case, the *MacPherson* court discusses a hypothetical contractual situation and opines that the defendant would owe a duty to the nonparties to the contract.¹⁶⁵ The hypothetical situation is one

155. *Id.*

156. *Id.* (emphasis added).

157. *Id.*

158. *Id.*

159. *See id.*

160. *Id.*

161. *Id.*

162. *See id.*

163. *Id.*

164. *Id.* at 1054.

165. *Id.*

in which a lessor leases a building knowing the lessee is going to use it to entertain the public.¹⁶⁶ In that circumstance, the lessor can foresee people other than the lessee being injured, “and *foresight* of the consequences involves the creation of a duty.”¹⁶⁷

This leads to the importance of foreseeability in creating a duty. In a sense, the *MacPherson* court replaced privity with foreseeability.¹⁶⁸ It declined to follow *Winterbottom*, which used privity to limit the number of potential plaintiffs, and instead decided that the number of potential plaintiffs can be limited by foreseeability—if the defendant could foresee the plaintiff as part of a class of people that would probably be injured by its negligent manufacture of the car, then the defendant owed a duty to that class of people.¹⁶⁹

Another oft-cited early case doing away with the privity requirement is the *Glanzer* case, discussed in Part III, *supra*.¹⁷⁰ As noted in Part III, a buyer of beans sued a weigher of beans, alleging the weigher reported an incorrect weight, causing the buyer to pay more for the beans than he should have.¹⁷¹ The contract to weigh the beans was between the seller and the weigher, not between the buyer and the weigher.¹⁷² The *Glanzer* court imposed liability, even without a contract between the buyer and the weigher, and even though the case only involved an economic injury, not a physical injury.¹⁷³ In finding that the buyer could sue the weigher, the court

166. *Id.*

167. *Id.* (emphasis added) (citing *Junkermann v. Tilyou Realty Co.*, 108 N.E. 190, 190 (N.Y. 1915)).

168. *See id.* at 1053–54.

169. *Compare id.* at 1054–55, with *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402 (Exch.) 405; 10 M. & W. 109, 115.

170. *Glanzer v. Shepard*, 135 N.E. 275 (N.Y. 1922).

171. *Id.* at 275.

172. *Id.*

173. *See id.* at 275–76. The Third Restatement does not address whether there is a duty in cases involving only economic injury. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43 cmt. h (2012). Although pure economic injury may involve issues regarding the economic-loss rule, this Article does not address the economic-loss rule because it generally does not apply when entities other than parties to the contract are injured. *See, e.g.*, *Crum v. Johns Manville, Inc.*, 19 So. 3d 208, 216 (Ala. Civ. App. 2009) (“[T]he economic-loss rule does not prevent a tort action when the injury caused is personal or is to property other than the complained-of product.”); *but see Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 503–506 (Iowa 2011) (deviating from the general rule and barring a plaintiff’s claim under the economic loss rule where the plaintiff and defendant where

noted that the weigher held itself “out to the public as skilled and careful in their calling.”¹⁷⁴ The weigher knew the beans were sold and that payment would be based upon its measurement of the weight.¹⁷⁵ The purpose of the weigher telling the buyer the beans’ weight was to have the buyer pay a certain amount to buy the beans.¹⁷⁶ When the weigher agreed to weigh the beans, he agreed to weigh them accurately for everyone whose behavior would be determined by the beans’ weight.¹⁷⁷ Lack of privity no longer mattered; instead, the controlling fact was that others based their behavior on the defendant’s weighing of the beans.¹⁷⁸

Both the *Glanzer* and *MacPherson* cases demonstrate the importance of being able to predict who a negligent contractual performance will injure.¹⁷⁹ Many courts followed the New York Court of Appeals in using foreseeability, rather than privity, to find a duty between the contracting party and a nonparty plaintiff.¹⁸⁰ The next Part discusses foreseeability and how it is now losing favor, at least in some circles, in determining whether a duty exists.

V. FORESEEABILITY

Foreseeability has played a role in determining whether a duty exists since before *Palsgraf v. Long Island Railroad Co.*¹⁸¹ That influence may be waning, however, as the Third Restatement of Torts attempts to do away with foreseeability in the duty determination.¹⁸²

not in a contractual relationship). This Article focuses on when a party to the contract injures items or people that are not parts of or parties to the contract.

174. *Glanzer*, 135 N.E. at 275–76.

175. *Id.* at 276.

176. *Id.*

177. *Id.*

178. *See id.*

179. *See id.*; *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053–54 (N.Y. 1916).

180. *Cardi, supra* note 18, at 740, 743; *see Paul M. Hellegers, Making Sense of the Economic Loss Rule in Construction Cases: Does the Draft Restatement (Third) of Torts Help? Part One*, CONSTRUCTION LAW., Fall 2013, at 23, 27 (noting that courts used foreseeability to determine duty, particularly in the 1960s through the 1980s).

181. Both *MacPherson* and *Glanzer* were decided by the New York Court of Appeals before *Palsgraf*. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928); *Glanzer*, 135 N.E. at 275–76; *MacPherson*, 111 N.E. at 1054–55.

182. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. j (2010); *see also* discussion *infra* Part V.B.

A. Foreseeability's Role

John Stuart Mill's utilitarian philosophy was the genesis of imposing duty based on foreseeable harm.¹⁸³ According to William H. Hardie, Jr., when people began doubting the existence of God during the Enlightenment, they needed something else upon which to base their morality.¹⁸⁴ That other source became foreseeability: "The morality of an action depends on its foreseeable consequences"¹⁸⁵ Because the morality of an act depended on what one could predict would happen as a result of that act, the duty to act reasonably was derived from foreseeability.¹⁸⁶

Courts thus relied on foreseeability.¹⁸⁷ The defendant owed the plaintiff a duty to act with reasonable care if the defendant could predict the injury or the class of people who could be injured.¹⁸⁸ Foreseeability was enshrined in section 324A of the Second Restatement of Torts, which encompasses, among other things, the negligent breach of contract action.¹⁸⁹

Two cases in particular discuss the importance of foreseeability in imposing a duty upon a contracting party to a nonparty to the defendant's contract. The cases illustrate the necessity of a foreseeable plaintiff. The first is *Evans v. Otis Elevator Co.*¹⁹⁰ In this case, an employee was injured on an elevator, and the employer had a contract with the defendant requiring the defendant to maintain and inspect the elevator.¹⁹¹ The court struggled with how to determine that the defendant owed a duty to the nonparty plaintiff, noting that typically privity is required for liability.¹⁹²

183. William H. Hardie, Jr., *Foreseeability: A Murky Crystal Ball for Predicting Liability*, 23 CUMB. L. REV. 349, 349 (1993).

184. *Id.*

185. THE PHILOSOPHY OF JOHN STUART MILL: ETHICAL, POLITICAL AND RELIGIOUS 49 (Marshall Cohen ed., 1961).

186. Hardie, *supra* note 183, at 349.

187. Cardi, *supra* note 18, at 740, 743.

188. *Id.* at 740.

189. RESTATEMENT (SECOND) OF TORTS § 324A (1965) (stating one owes a duty if he "undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things"); *see also* *Cantwell v. Allegheny Cnty.*, 483 A.2d 1350, 1353-54 (Pa. 1984).

190. *Evans v. Otis Elevator Co.*, 168 A.2d 573 (Pa. 1961).

191. *Id.* at 574-75.

192. *See id.* at 575.

The essence of the defendant's contractual undertaking, while not establishing privity with the plaintiff, may, however, lead to the law placing a duty on the defendant to fulfill the defendant's obligation so that others who are not parties to the contract are not injured.¹⁹³ Although it may appear that the contract creates the duty, the *Evans* court said that "it is the law which imposes the duty because of the nature of the undertaking in the contract."¹⁹⁴ The nature of the contract provides the foreseeability. If the contract requires the defendant to examine and inspect elevators periodically, then the defendant should be able to predict that people using the elevator, who are not parties to the contract, could get hurt if the defendant breached the contract by not examining and inspecting the elevators.¹⁹⁵

The defendant's duty to nonparties to the contract is determined "by the nature and scope" of the obligations the defendant agreed to within the contract.¹⁹⁶ The court held that the defendant is liable to nonparties, "regardless of any privity of contract, who" are injured by the defendant's failure to properly inspect the elevator, which was the defendant's obligation under the contract.¹⁹⁷ Because the defendant failed to discover the defective condition of the elevator, the defendant breached its duty to the plaintiff.¹⁹⁸

The second case also arose in the context of an injured worker and was decided by the same court as *Evans*, only 45 years later. In *Farabaugh v. Pennsylvania Turnpike Commission*, the court held that a construction manager could be liable for the death of the general contractor's employee, despite no contractual privity between the construction manager and the employee.¹⁹⁹ The duty arose from the contract between the construction manager and the general contractor because the construction manager took an active role in overseeing safety issues under the contract.²⁰⁰ The court once again relied on foreseeability, stating that the construction manager could foresee that workers on the construction site could be

193. *Id.*

194. *Id.*

195. *Id.* at 575–76.

196. *Id.* at 576.

197. *Id.*

198. *Id.* at 578.

199. *Farabaugh v. Pa. Tpk. Comm'n*, 911 A.2d 1264, 1283–84 (Pa. 2006).

200. *Id.*

injured by the manager neglecting to perform the contractual safety role.²⁰¹ Due to that foreseeability, the construction manager did have a duty to the workers to fulfill his contractual obligations.²⁰²

The *Evans* and *Farabaugh* courts did not preclude the plaintiffs from bringing suit under a negligence theory merely because there was no privity between the plaintiffs and the defendants.²⁰³ Instead, the courts relied on foreseeability in privity's place, even though the defendants' obligations arose under the contracts.²⁰⁴ As discussed earlier, privity was used to limit the number of potential plaintiffs because courts worried that without some limitation, people would not enter into contracts if they could not predict to whom they would be liable if they failed to adequately perform those contractual obligations.²⁰⁵ Privity was abandoned after the courts determined that foreseeability could serve as this limitation.²⁰⁶

Foreseeability has been split into two categories: foreseeability of the plaintiff and foreseeability of the type of harm.²⁰⁷ Foreseeability of the plaintiff—as illustrated in the *Evans* and *Farabaugh* cases—refers to whether the plaintiff belongs to the category of people that the contracting party could foresee being injured by a failure to properly perform the contractual obligations.²⁰⁸ “The more foreseeable the plaintiff, so the reasoning goes, the greater the reason to hold the defendant liable.”²⁰⁹ In addition to whether the plaintiff is foreseeable, foreseeability regarding the

201. *Id.*

202. *Id.* at 1284.

203. *Id.* at 1283–84; *Evans*, 168 A.2d at 576.

204. *Farabaugh*, 911 A.2d at 1283–84; *Evans*, 168 A.2d at 575–76.

205. *See supra* notes 141–150 and accompanying text.

206. *See* Cardi, *supra* note 18, at 757 (“The more foreseeable the plaintiff, . . . the greater the reason to hold the defendant liable.”).

207. *Compare* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99–101 (N.Y. 1928) (articulating foreseeability from the plaintiff's perspective), *with id.* at 101–05 (Andrews, J., dissenting) (articulating foreseeability in relation to the type of risk). *See also* Cardi, *supra* note 18, at 757.

208. *See* Cardi, *supra* note 18, at 758–59; John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1828 (1998); *see also Farabaugh*, 911 A.2d at 1283–84 (“[I]t was foreseeable that a failure to perform properly . . . could result in injuries to the workers on the site.” (emphasis added)); *Evans*, 168 A.2d at 575–76 (“[A] normal and natural result of . . . failure to properly perform . . . might result in injury . . . to third persons, including the owner's employees.” (emphasis added)).

209. *Cardi, supra* note 18, at 757.

type or manner of injury is also considered in determining duty.²¹⁰ Foreseeability of the plaintiff and foreseeability of the manner of the injury were famously debated by Judge Cardozo and Judge Andrews in *Palsgraf*.²¹¹

In determining whether a duty exists in a negligent breach of contract case, courts' reasoning evolved from a simple privity analysis to a more complicated foreseeability analysis. Despite this evolution, however, when it comes to duty, foreseeability may suffer the same fate as privity regarding negligent breach of contract claims.

B. *The Departure from Foreseeability*

Although the courts came to rely on foreseeability,²¹² the Third Restatement decided to abandon it in determining whether a duty exists. "Despite widespread use of foreseeability in no-duty determinations, this Restatement disapproves that practice and limits no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder."²¹³ By asking for an articulated policy supporting a no-duty holding, the Third Restatement does away with a foreseeability analysis.²¹⁴ According to Dobbs, this view "has been quickly gaining acceptance."²¹⁵ Dobbs sets forth six reasons why critics object to using foreseeability to determine duty.²¹⁶ First, he asserts that foreseeability is a fact-specific exercise, and meaningful duty determinations require policy analyses that do not lend themselves to fact-specific inquiries.²¹⁷ Second, foreseeability could shift the focus of the duty determination away from relevant policies without taking into account an "individual assessment of negligence."²¹⁸ Third, viewing foreseeability in

210. *Id.* at 760.

211. *Compare Palsgraf*, 162 N.E. at 101, *with id.* at 103 (Andrews, J., dissenting).

212. *See* Cardo, *supra* note 18, at 740, 743.

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

214. 2 DOBBS ET AL., *supra* note 44, § 256, at 20; *see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. j.

215. 2 DOBBS ET AL., *supra* note 44, § 256, at 20.

216. *Id.* § 256, at 20–21.

217. *Id.* § 256, at 20.

218. *Id.* (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL &

terms of duty is duplicative because it is considered when determining proximate cause and scope of risk issues.²¹⁹ Fourth, the jury, not the judge, should determine foreseeability, and thus the judge usurps the jury's role in using foreseeability to decide whether a duty exists.²²⁰ Fifth, trying to parse out different concepts of foreseeability based on whether the issue is decided by the judge or the jury "is likely to carry unnecessary complications and deep confusions."²²¹ Finally, Dobbs's last objection to the use of foreseeability to determine duty is that judges tend to hide their discretion or bias toward a particular ruling under the foreseeability label.²²² Removing foreseeability from the duty determination will prevent judges from hiding behind it.²²³

Apparently agreeing with these criticisms, the Third Restatement adopted a "duty to all" approach, unless there are special circumstances.²²⁴ The general duty approach is found in Section 7 of the Third Restatement, and has also influenced Sections 42 and 43 of that Restatement, which cover negligent breach of contract claims and similar situations.²²⁵ Comment d to Section 43 states, "[A]n actor who creates a risk of harm while performing under a contract is subject to a duty of reasonable care to others."²²⁶ Foreseeability is not mentioned.

The omission of foreseeability may be best studied by comparing the Third Restatement with the Second. Section 43 of the Third Restatement will be compared directly with the Second Restatement's Section 324A to

EMOTIONAL HARM § 7 cmt. j).

219. *Id.* § 256, at 21.

220. *Id.*

221. *Id.*

222. *Id.* This reason has been criticized. Alani Golanski, *A New Look at Duty in Tort Law: Rehabilitating Foreseeability and Related Themes*, 75 ALB. L. REV. 227, 265, 267 (2011–2012) ("It is strained to assume that courts' policy-driven duty analyses verge on subterfuge. . . . If clearer articulation of true motivating reasons is the goal, then this is an issue that may be addressed separately from the foreseeability question; courts can simply resolve to say what they mean.").

223. *See* 2 DOBBS ET AL., *supra* note 44, § 256, at 21.

224. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 (2010); *see id.* § 7 cmt. a ("No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases."); *see also supra* note 18 and accompanying text.

225. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7; *see id.* §§ 42–43.

226. *Id.* § 43 cmt. d.

demonstrate the changes between who the section applies to and the effect of increased risk.²²⁷ Section 43 states the following:

An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to which a third person is exposed has a duty of reasonable care to the third person in conducting the undertaking if:

(a) the failure to exercise reasonable care increases the risk of harm beyond that which existed without the undertaking,

(b) the actor has undertaken to perform a duty owed by the other to the third person, or

(c) the person to whom the services are rendered, the third party, or another relies on the actor's exercising reasonable care in the undertaking.²²⁸

Section 324A from the Second Restatement states:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.²²⁹

The most drastic changes from Section 324A in the Second Restatement to Section 43 in the Third Restatement concern to whom the section applies and the effect of increased risk.²³⁰ Section 43 begins by

227. *Id.* § 43 cmt. a.

228. *Id.* § 43.

229. RESTATEMENT (SECOND) OF TORTS § 324A (1965).

230. *Compare* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43 (2012), *with* RESTATEMENT (SECOND) OF TORTS § 324A. The

stating that it encompasses the defendant “who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to which a third person is exposed.”²³¹ Section 324A, on the other hand, refers to defendants “who undertake[], gratuitously or for consideration, to render services to another which [they] should recognize as necessary for the protection of a third person.”²³² To impose a duty, the Third Restatement requires defendants to know that their contractual actions will reduce the risk,²³³ whereas to impose a duty under the Second Restatement, only a needed undertaking to protect the nonparty is required.²³⁴ The comment to Section 43 addresses this new knowledge requirement by stating that the “requirement is satisfied if the actor knows or should know that the undertaking reduces the risk of harm to a class of persons that includes the third-person victim.”²³⁵

Thus, the defendant’s liability to persons not parties to the contract is not limited “to cases in which the defendant intended to provide protection for the plaintiff.”²³⁶ If the conduct increased the risk, induced reliance, or the actor “assume[d] [a] duty already owed by another, it is enough that the defendant knows or should know that his undertaking will also reduce the risk of physical harm to others” for the imposition of a duty.²³⁷

Third Restatement did not change those aspects of the Second Restatement regarding liability (1) when the contracting party agreed to accept a duty owed to the nonparty by the other contracting party and (2) when one relies on the contracting party to use reasonable care in performing the obligation. Compare RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43(b)–(c), with RESTATEMENT (SECOND) OF TORTS § 324A(b)–(c). Comment e to Section 43 further expounds on the reliance aspect by stating that the person making the promise could be liable for making the situation appear safe or leading others to believe other action is not needed. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43 cmt. e. In addition, exactly who relies on the defendant and how they rely on the defendant are irrelevant. *Id.*

231. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43.

232. RESTATEMENT (SECOND) OF TORTS § 324A.

233. 2 DOBBS ET AL., *supra* note 44, § 412, at 691–92 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43 cmt. f).

234. See RESTATEMENT (SECOND) OF TORTS § 324A cmt. b.

235. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43 cmt. f.

236. 2 DOBBS ET AL., *supra* note 44, § 412, at 691.

237. *Id.* § 412, at 691–92 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43 cmt. f).

Using language such as “knows or should know” seems to reference foreseeability. How can one “know” that his or her actions will lessen the possibility of an injury without foreseeing such a thing? Can one know something will happen without foreseeing it? *Black’s Law Dictionary* defines knowledge as “[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact.”²³⁸ Foreseeability is defined as “[t]he quality of being reasonably anticipatable.”²³⁹

By examining these definitions, we can see that there is a difference, albeit a subtle one, between foreseeability and knowledge. Foreseeability is about prediction; knowledge is about current awareness. For example, suppose that a neighbor sees intruders entering a home by opening an unlocked door at night while the owners are not inside their home. The neighbor now knows that entering through an unlocked door, at night, when the owners were not inside the house, is how the intruders gained access. With this knowledge, the neighbor may be able to predict (i.e., foresee) that criminals would enter his house when he steps in his front yard to get the mail at night, leaving his front door unlocked, but he does not know that this is indeed going to happen.²⁴⁰

This distinction is so subtle that it is curious why the authors of the Third Restatement bothered to make it. Perhaps it is because they are loath to have judges continue to make duty determinations and thereby remove cases from juries.²⁴¹ By removing the word “foreseeability” from the duty determination, perhaps the authors are envisioning judges leaving it to juries to debate whether the defendant should be liable, rather than judges taking the cases away from juries under the pretext of a foreseeability determination regarding duty.²⁴²

The Third Restatement also takes pains to point out that the duty imposed in Section 43 is not limited to those situations involving contracts. Comment h states that if there is a contract involved, the contract does not

238. BLACK’S LAW DICTIONARY 950 (9th ed. 2009).

239. *Id.* at 721.

240. See generally B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 694 (1992) (discussing how knowledge of a defective condition aiding the commission of a crime can lead to foreseeability of that crime).

241. Cf. 2 DOBBS ET AL., *supra* note 44, § 256, at 21.

242. Cf. *id.*

create the duty.²⁴³ Instead, Section 43 imposes a duty without regard to the existence of a contract, but if there is a contract, it can help differentiate “the existence and scope of an undertaking.”²⁴⁴ If the contractual obligation “makes risk or reliance unforeseeable . . . and if the defendant’s duty arises solely from his undertaking, [then] the scope of his undertaking can limit the scope of his duty.”²⁴⁵

Another difference between the Second Restatement and the Third Restatement is that the Second Restatement stated the actor was liable if the actor’s behavior simply increased the risk of harm,²⁴⁶ but the Third Restatement added a qualifier.²⁴⁷ Under the Third Restatement, the risk must be increased “beyond that which existed without the undertaking” to impose liability.²⁴⁸ “‘Increased risk’ means that the undertaking creates greater risk than the risk that existed in the absence of the undertaking.”²⁴⁹

Sections 42 and 43 of the Third Restatement reflect its differing approach to determining duty from the Second Restatement. Rather than staying with the Second Restatement’s position on duty in the context of a negligent undertaking, the Third Restatement incorporated its general duty approach into Sections 42 and 43, explicitly stating that the actor does owe a duty of reasonable care.²⁵⁰ This duty is imposed if the defendant “knows or should know that the services will reduce the risk of physical harm to which a third person is exposed.”²⁵¹ Once again, the emphasis is on the plaintiff’s position.²⁵² To decide whether there is a duty, one must look at how the third person is affected by the defendant’s behavior.²⁵³ If the

243. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43 cmt. h (2012).

244. *Id.* Dobbs contends that this can affect duty. 2 DOBBS ET AL., *supra* note 44, § 412, at 692.

245. 2 DOBBS ET AL., *supra* note 44, § 412, at 692.

246. RESTATEMENT (SECOND) OF TORTS § 324A(a) (1965).

247. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43(a).

248. *Id.*

249. *Id.* § 43 cmt. d; *see also id.* § 42 cmt. f.

250. *Compare* RESTATEMENT (SECOND) OF TORTS § 324A cmt. b, *with* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 42 & cmt. d, 43 & cmt. d.

251. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43.

252. *See id.* §§ 42–43.

253. *See id.*

defendant's behavior reduces the chance that the plaintiff will be hurt, then the defendant owes a duty.²⁵⁴

One example of this is the elevator case from Part V.²⁵⁵ If the defendant has a duty to inspect and maintain an elevator, complying with that duty will prevent injuries because an inspection would uncover potentially dangerous flaws, and maintenance would prevent flaws from materializing.²⁵⁶ The contractual duty—inspecting and maintaining elevators—reduces the possibility of physical harm, and therefore the defendant has a duty to strangers to the contract.²⁵⁷

Foreseeability may play a part here—despite the Third Restatement's protestations to the contrary—in the language regarding whether the defendant knew or should have known the effect of the defendant's undertaking, but nonetheless the focus is on how the plaintiff is affected by the defendant's behavior. As observed in the *Glanzer* case, there was a duty, despite a lack of privity, because the buyer of beans took action based on the bean weigher's performance of the contractual obligation.²⁵⁸

VI. ANALYSIS AND CONCLUSION

In the past, as courts struggled to determine whether to impose a duty in a negligent breach of contract case between a party to the contract and the plaintiff–nonparty to the contract, they used various theories. Privity was relied upon to limit the number of plaintiffs to which one could be liable simply by entering into a contract.²⁵⁹ This was also seen as a way to encourage people to enter into contracts.²⁶⁰ Privity gave way to a foreseeability determination, but foreseeability was also used to limit plaintiffs to a particular class or type of harm that was suffered.²⁶¹ Rather than concerning themselves solely with injured plaintiffs seeking recompense for injuries, the courts used foreseeability to limit the number of potential plaintiffs and thus, encourage people to enter into contracts by

254. *See id.*

255. *Evans v. Otis Elevator Co.*, 168 A.2d 573 (Pa. 1961).

256. *See id.* at 575–76.

257. *See id.*

258. *Glanzer v. Shepard*, 135 N.E. 275, 276–77 (N.Y. 1922).

259. *Hanson v. Blackwell Motor Co.*, 255 P. 939, 939–40 (Wash. 1927).

260. *See id.* Some have argued that the privity requirement even “helped spur the industrial revolution forward.” Barbara L. Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 *BUFF. L. REV.* 181, 192 (1991).

261. *See Card*, *supra* note 18, at 740.

providing this limitation on liability.

Lately, under the Third Restatement of Torts, there is a move toward a general duty but with the recognition that in a negligent breach of contract-type case, that duty is imposed only if the risk of physical injury is reduced by the defendant's behavior pursuant to the contract.²⁶² The Third Restatement is attempting to do away with a foreseeability analysis when making a duty determination.²⁶³ As was discussed above, however, Section 43 does require knowledge that the undertaking will reduce the risk of physical harm to the plaintiff.²⁶⁴ This moves the analysis toward a reflection on how the plaintiff is affected by the defendant's behavior, as it requires assessing the plaintiff's position. For example, suppose a carpenter was hired to fix a loose step. If the carpenter, in attempting to fix the loose step, made the step more dangerous, then Section 43 imposes a duty upon the carpenter.²⁶⁵

Some may argue that the focus is still on the defendant because of the language in Section 43 regarding the defendant's knowledge.²⁶⁶ But this is only the beginning of the analysis. The first sentence states that the duty is imposed on a defendant who either knows or should know that his or her undertaking will diminish the risk of harm, but the section continues that this duty may be imposed when the requirement contained in subsection (a) is met.²⁶⁷ Subsection (a) requires that the defendant's "failure to exercise reasonable care increases the risk of harm."²⁶⁸ Thus, both the defendant's knowledge and the increased risk may impose a duty under a negligent breach of contract claim.²⁶⁹

Looking at duty through the lens of the plaintiff's position in response to the defendant's action may seem too nebulous a standard to impose. An argument could be made that it would be difficult for anyone to know how their actions are going to affect third persons, including third persons who

262. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43(a) (2012).

263. *Id.* § 7 cmt. j.

264. *Id.* § 43.

265. See *id.* § 43 cmt. d (defining increased risk).

266. Section 43 states, "An actor who undertakes to render services to another and *who knows or should know* that the services will reduce the risk of physical harm . . . has a duty of reasonable care . . ." *Id.* § 43 (emphasis added).

267. *Id.*

268. *Id.* § 43(a).

269. *Id.* § 43.

are not only strangers to the contract, but quite possibly strangers to the defendant as well. This argument is answered by returning to the Third Restatement's position that, in most cases, a duty is owed. Rather than trying to mold conduct in relation to specific possible plaintiffs, the defendant can instead assume that the defendant does owe a duty to all strangers to the contract. This should result in the defendant's increased attention to acting cautiously when fulfilling contractual responsibilities.

The study of duty under the misfeasance and nonfeasance theories indicates why the most important analysis is that of the plaintiff's reaction to the defendant. Imposing a duty in both misfeasance and nonfeasance situations depended on the plaintiff's situation. If the plaintiff would not have been injured but for the defendant's existence, then a duty was imposed.²⁷⁰ Once again, the emphasis was on the plaintiff's situation in relation to the defendant's action or inaction.

Returning to the loose step example, whether the step is more dangerous is a determination of the plaintiff's position—is the step more likely to injure the plaintiff now than it was before? This is not an analysis of the defendant's position, as the level of dangerousness of the step is determined by looking at the step's previous condition and then comparing that prior condition to its condition after the defendant's performance under the contract.²⁷¹ It is also a review of the circumstances from the plaintiff's perspective, and not simply a review of the surroundings themselves, as it considers an increase in the risk of harm, which necessarily entails considering a person coming onto the situation.²⁷²

Focusing on the plaintiff requires the defendant to consider the effect of his or her actions on others, and this should result in more careful behavior and a reduction in the possibility of physical harm. This should also more effectively deter the defendant from acting in a negligent manner than determining duty from the defendant's perspective.

270. See Rowe & Silver, *supra* note 13, at 851.

271. The concept that this review does not involve the defendant is highlighted by comment f to Section 43, which states, "The actor need not know who the third person is who is subject to risk." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43 cmt. f. The analysis does not include the defendant's knowledge of who could be harmed, just whether that risk of harm was increased. *See id.*

272. Note that Section 43 only applies to those cases involving physical harm. *Id.* § 43.

Thus, although the ways of approaching the duty question in a negligent breach of contract case may have varied in the past, the Third Restatement has pushed the duty analysis toward an approach which is most beneficial to society: the ultimate consideration being the effect of the defendant's position or action upon the plaintiff.