The American Law Institute (ALI) promulgated the Restatement (Second) of Torts in 1965. It has had a significant impact on the development of Texas tort law; the Supreme Court of Texas has cited it approximately 300 times.\(^1\) The ALI recently issued a new volume in its third restatement of tort law, volume one of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010).\(^2\) This volume focuses primarily on negligence law. To date, at least two states — Nebraska and Iowa — have adopted the conceptual approach set out in this new Restatement. Many of its provisions, however, differ substantially from current Texas law. The Supreme Court of Texas will have to decide to what extent it will allow the third Restatement to reshape Texas negligence law and to what extent it will ignore the new Restatement and reaffirm existing doctrines.

## DUTY

It is black-letter law that the threshold inquiry in a negligence case is duty.\(^3\) Under current Texas law, whether a defendant owes a duty to a plaintiff is generally a question of law for the court to decide based on the individualized facts of each case.\(^4\) Judge Learned Hand famously proposed an algorithm for determining the existence of a duty that included three variables: (1) the probability of loss (P); (2) the gravity of the potential loss (L); and (3) the burden of taking adequate precautions against such loss (B). The defendant would have a duty whenever B < PL.\(^5\)

Texas law takes into account more variables and is, therefore, more flexible or amorphous, depending upon one’s point of view. The court examines the facts of the case at bar and determines whether that particular defendant owed a duty to that particular plaintiff under those particular facts. The considerations include “social, economic, and political questions and their application to the facts at hand.” Key factors to consider include but are not limited to “risk, foreseeability, and likelihood of injury weighed against the social utility of the actor’s conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant.”\(^6\) Although the calculus varies from case to case, three general categories of factors often predominate: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy considerations.\(^7\) Foreseeability of the risk, which is obviously case specific, is usually considered to be the single most important consideration.\(^8\)

Under Texas law, whether a duty exists is almost always a question of law for the court; the jury usually plays no part in this determination.\(^9\) Further, the court is not overly troubled
by the precedential effect of its ruling because it is by its very nature case specific. Particularized duties fit in well with the modern juridical tendency to try to “do justice” to the individual parties in light of the unique facts of each lawsuit. It is for this reason that modern litigation features extensive electronic and traditional discovery, choice of law determinations made on an issue-by-issue basis depending upon which state has the most significant contacts with respect to each issue, and similar fact-intensive characteristics. In this age of tort reform, courts are well aware that a particularized no-duty ruling can be a way to police the proverbial “runaway jury.” Many a Texas plaintiff has stumbled over the duty hurdle in recent decades.

The new Restatement takes a very different approach to determinations of duty. It begins by setting out a broad general duty: “An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.” There are very few exceptions. A court can decide that a defendant has no duty, and, hence, no liability to the plaintiff only in the “exceptional case” where it can articulate policy reasons for carving out categorical exceptions that are based upon categories of actors or patterns of conduct, as opposed to exceptions based upon foreseeability or any other factor particular to the case. For example, a court may find that a social host owes no duty to refrain from serving alcohol to her guests, not because that particular social host should not be held liable as a matter of law to that particular plaintiff under the particular circumstances of that particular case, but rather because on policy grounds all social hosts should be insulated from liability to all plaintiffs under all (or at least almost all) circumstances.

Relieving a defendant of a general duty only in exceptional circumstances may be an appropriate approach to the duty issue in negligence suits. When a court says that a defendant has “no duty,” the question should be “no duty to do what?” The answer is “no duty to act as a reasonable person would act under the same or similar circumstances.” Here is a good example of why we have lost so much by allowing the “eight fundamental legal relations” first presented by Wesley Newcomb Hohfeld almost a century ago to slip out of our legal toolbox. Using Professor Hohfeld’s terminology and accompanying analytical framework as it was meant to be used — to sharpen the formulation of the issue under analysis — we know that saying that a defendant has no duty to do X is the analytical equivalent of saying that the defendant has a privilege to refrain from doing X. Thus, saying that a defendant has no duty to act as a reasonable person would act under the same or similar circumstances is the analytical equivalent of saying that the defendant has a privilege to act other than as a reasonable person would act under the same or similar circumstances. There are situations where it is perfectly appropriate for a court to grant a defendant such a privilege, but it is certainly an exceptional privilege — which is precisely why it is arguably appropriate that the new Restatement only provides for “no duty” holdings in “exceptional cases.”

The Restatement, therefore, severely restricts the role that the duty requirement plays in placing limits on liability in the context of a negligence claim. In its place is a new “scope of the risk” limitation: “An actor’s liability is limited to those physical harms that result from the risks that made the actor’s conduct tortious.” This is a fact specific inquiry that is entrusted to the jury. The jury should be told to go back to the reasons it found that the defendant engaged in negligent conduct. If the harms risked by that conduct include the general sort of harm suffered by the plaintiff, the defendant may be liable for the plaintiff’s harm. Under the Restatement, this scope of the risk limitation is the proper conceptual home for foreseeability, although the Restatement elected to frame the limitation in other terms.

The Reporters’ Note to Section 29 makes several suggestions for appropriate jury instructions. For example: You must decide whether the harm to the plaintiff is within the scope of the defendant’s liability. To do that, you must first consider why you found the defendant negligent. … You should consider all of the dangers that the defendant should have taken reasonable steps … to avoid. The defendant is liable for the plaintiff’s harm if you find that the plaintiff’s harm arose from the same general type of danger that was one of those that the defendant should have taken reasonable steps … to avoid. If the plaintiff’s harm, however, did not arise from the same general dangers that the
defendant failed to take reasonable steps … to avoid, then you must find that the defendant is not liable for the plaintiff’s harm.22

Or:
To decide if the defendant is liable for the plaintiff’s harm, think about the dangers you considered when you found the defendant negligent. … Then consider the plaintiff’s harm. You must find the defendant liable for the plaintiff’s harm if it arose from one of the dangers that made the defendant negligent. … You must find the defendant not liable for harm that arose from different dangers.23

However the jury instructions read, this is an issue for the jury, unless reasonable minds could not differ as to whether the type of harm suffered by the plaintiff is among the harms the risks of which made the defendant’s conduct negligent in the first place.24 In this regard the Restatement is much closer to Judge William Andrews’ dissent in Paligraf than to Chief Judge Benjamin Cardozo’s majority opinion.25

BREACH

Texas juries are usually instructed that a defendant breaches his or her duty whenever he or she fails “to use ordinary care, that is, fail[s] to do that which a person of ordinary prudence would have done under the same or similar circumstances or [does] that which a person of ordinary prudence would not have done under the same or similar circumstances.”26 The Restatement takes a similar approach: “A person acts negligent-ly if the person does not exercise reasonable care under all the circumstances.”27

CAUSATION

Texas law requires a plaintiff to prove that the defendant’s breach of his or her duty to the plaintiff is the proximate cause of the plaintiff’s harm. Proximate causation consists of cause-in-fact and foreseeability.28 There is some uncertainty as to the precise parameters of the cause-in-fact requirement. It is likely, although not completely clear, that traditional “but for” causation has been supplanted recently by “substantial factor” causation.29 The 2010 edition of Texas Pattern Jury Charge 2.4 reads: “Proximate cause” means a cause that was a substantial factor in bringing about an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

That formulation contains a combination of both the “substantial factor” test and the “but for” test. However, the “but for” language — “without which the harm would not have occurred” — will usually be superfluous because with very rare exceptions the set of “substantial factor” causes is a subset of the set of “but for” causes. In other words, it would be highly unusual to have a cause that is a substantial factor in bringing about an event that does not also qualify as a “but for” cause of that event.30

The Restatement, however, turns its back on “substantial factor” causation in favor of “but for” causation.31 It does not even use the term in the situation where “substantial factor” causation got its start — two independent causes combine to produce a single harm, either of which would have been sufficient to produce the harm in the absence of the other.32 In such a situation the Restatement considers both causes to be “but for” causes of the harm,33 but then creates an exception for causes that make only a “trivial contribution” to the set of “but for” causes.34

In any event, under Texas law the foreseeability analysis for proximate causation is the same as it is for duty.35 In contrast, under the Restatement, foreseeability no longer plays a role in causation;36 indeed, the very term “proximate causation” is frowned upon.37 As discussed earlier, foreseeability has been moved in the Restatement to the scope of liability limitation put before the jury.38

It is worth taking a brief look at a special set of causation issues — those that arise in proving causation in toxic tort cases. The Supreme Court of Texas has divided toxic tort causation into “general causation” and “specific causation.”39 General causation addresses whether a substance is capable of causing a particular illness or injury in the general population; specific
causation asks whether that substance caused a particular individual’s (the plaintiff’s) illness or injury.40

Texas law appears to treat general causation and specific causation as two separate elements of a plaintiff’s cause of action.41 Failure to prove either one is probably fatal.42 In contrast, the new Restatement treats them as components of a unitary causation requirement.43

Further, the Supreme Court of Texas has addressed the evidentiary role that epidemiological studies can play in proving general and specific causation.44 This is a complex issue deserving of an article all its own. At the risk of oversimplification, however, the Court appears at times to treat studies showing a relative risk of over 2.0 which are statistically significant at a confidence level of 95 percent as probative of general causation only,45 and Texas intermediate appellate courts have often followed its lead.46 The Restatement, however, posits that such studies are probative of both general and specific causation.47

CONCLUSION
The Supreme Court of Texas recently ducked the new Restatement, at least in part on the grounds that it had not yet been published by the American Law Institute.48 Defense lawyers will probably generally view the Restatement as a case of “something wicked this way comes.”49 Plaintiffs’ lawyers, on the other hand, will probably generally see it as a treasure trove of arguments designed to give Texas jury verdicts more respect than they currently receive. Neutrals will perhaps view the controversy more along the lines of “truths in and out of favor.”50 In any event, there is little doubt that in the near future practitioners will make sure that the Supreme Court of Texas has to squarely confront the Restatement (Third) of Torts: Liability for Physical and Emotional Harm and decide what role, if any, it will play in Texas law.

NOTES
1. Casemaker search conducted on Nov. 16, 2011.
2. Volume 2 will contain chapters covering affirmative duties, emotional harm, landlord-tenant liability, and liability of actors who retain independent contractors. It has not been published as of the date of this writing. This article focuses on the six chapters contained in Volume 1.
5. Id.
10. See, e.g., Greater Houston Trans., Co., 801 S.W.2d at 525.
11. Humble Sand & Gravel, Inc., 146 S.W.3d at 182 (Tex. 2004) (identifying only one instance — a railroad’s duty to protect its employees from injury under the FELA — where the determination of a duty may be a fact issue for the jury).
13. Restatement §7(b).
16. Id. at 32.
17. Restatement §29.
18. Restatement §29 cmt. f.
19. Restatement §29 cmt. d.
20. Id.
23. Id.
24. Restatement §29 cmt. q.
26. PJC 2.1.
27. Restatement §3.
29. Id. at 222–3.
33. Restatement §27.
34. Restatement §36.
35. See, e.g., Del Lago Partners, Inc., 307 S.W.3d at 774.
36. Restatement §29 cmt. b.
38. Restatement §29 cmt. j.
40. Id.
42. Id. at n. 21.
43. Restatement §29 cmt. c; see also Joseph Sanders, The Controversial Comment C: Factual Causation in Toxic-Substance and Disease Cases, 44 Wake Forest Law Review 1029, 1030–1 (2009).
44. See, e.g., Havner, 953 S.W.2d at 716–724.
45. See, e.g., Havner, 953 S.W.2d at 717 (“This is an oversimplification of statistical evidence relating to general causation, as we discuss below, but it illustrates the thinking behind the doubting of the risk requirement.”) (emphasis added).
46. See, e.g., Minnesota Mining & Manufacturing Co v. Atterbury, 978 S.W.2d 183, 190 (Tex. App.—Texarkana 1998) (“The [Havner] court held that scientifically reliable epidemiological studies that suggest the risk of injury or condition is more than doubled is sufficient evidence of general causation to pass a legal sufficiency review.”) (emphasis in original), pet. denied.
47. Restatement §29 cmt. c.
49. William Shakespeare, Macbeth, Act IV, scene 1 (“By the pricking of my thumbs, something wicked this way comes.”); see also Ray Bradbury, Something Wicked This Way Comes (1962).
50. Robert Frost, “The Black Cottage,” North of Boston (1914) (“Most of the change we think we see in life is due to truths being in and out of favor.”).

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