WISCONSIN'S LAW OF NEGLIGENCE IS INHERENTLY INCOMPATIBLE WITH THE RESTATEMENT— SO WHY DOES THE COURT REGULARLY ADOPT RESTATEMENT PROVISIONS?

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INTRODUCTION

This essay proposes that Wisconsin's formulations of duty and causation are unique and fundamentally incompatible with the Restatement (Second) of Torts. Part I offers a theory of Wisconsin negligence. It tracks the historical roots of Wisconsin's negligence framework and distinguishes Wisconsin's approach from jurisdictions that follow the Restatement by examining two famous cases, *The Wagon Mound* and the "exploding lamp" case.[1]

Part II considers two recent Wisconsin Supreme Court decisions and argues that in each case, the Court applied sections of the Restatement that were incompatible with Wisconsin law. These cases are microcosms of a larger debate among the justices questioning whether duty should be handled differently in cases of negligent omissions as opposed to negligent acts. This essay proposes that nearly a century of settled law resolves this debate, and that Wisconsin's unique negligence analysis is strong enough to answer any difficult questions that come before it. When the Wisconsin Supreme Court resolves complicated cases by adopting unnecessary sections of the Restatement, it places the doctrinal integrity of Wisconsin's negligence framework at risk. Judges would be wise to avoid the Restatement (Second) of Torts altogether.

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1. This essay uses the term "Restatement" to refer to the Restatement (Second) of Torts unless otherwise indicated. The Third Restatement attempts to remove foreseeability from duty, despite the fact that forty-seven states including Wisconsin use foreseeability as part of their duty analysis. Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1260 (2009); *Tesar v. Anderson*, 789 N.W.2d 351, 357–358, n. 13 (Wis. Ct. App. 2010) (citing Zipurksy, *supra* note 1).Wisconsin has not adopted the "no foreseeability" approach of the Third Restatement and similarly has not abandoned foreseeability. *See, e.g., Smith v. Goshaw*, 928 N.W.2d 619, 624 (Wis. Ct. App. 2019) ("In determining whether a person had a duty in relation to a particular risk of harm, we focus on the foreseeability that the act or omission would cause harm to someone."). As the Third Restatement was finalized around 2010 and introduced several new concepts, this essay deals primarily with the familiar principles of the Second Restatement and views that treatise as the measure of the "Restatement approach."

I. BACKGROUND

Negligence is the law of how humans believe the world should work. In any given scenario, the law of negligence tells us whether one actor has a duty to conduct herself in a manner that avoids causing harm to another. Most often, whether a duty exists is framed in terms of foreseeability. When harm is foreseeable, an actor may have a duty to conduct herself so as to avoid causing harm. Whether an act or omission actually causes harm is determined by various formulations across jurisdictions in America. In most jurisdictions, causation is framed in terms of proximate cause, a loaded term which has caused considerable confusion in legal and academic circles for over a century.[2]

Duty and causation are the cornerstones of negligence law. Both function not only to determine liability, but also to limit liability. In jurisdictions that have adopted the Restatement (Second) of Torts, duty limits liability to situations where it was foreseeable that the defendant's act or omission would lead to harm to the particular plaintiff or a member of a class to which the plaintiff belonged.[3] If an ordinary person under like circumstances would not have foreseen the harm to the particular plaintiff or a member of the plaintiff's class, there was no duty and liability is precluded.[4] Similarly, proximate cause under the Restatement limits liability to harm arising only from foreseeable risks.[5] If it was foreseeable

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2. The complicated nature of both duty and proximate cause under the Restatement cannot be understated. *See, e.g.*, W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf*: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1875 (2011) ("Perhaps the most persistent impression left after having reviewed hundreds of duty cases is just how frustratingly inconsistent, unfocused, and often nonsensical is the present state of duty law. . . . Courts sometimes apply law long overturned by their superiors. Courts use reasoning and reach results diametrically opposed to decisions of their sister courts, almost as if the judges are unaware of each other's existence. Also, internal contradictions and overlapping inquiries within negligence doctrine lead to sometimes laughable opinions."); Zipursky, *supra* note 1, at 1249 ("[F]oreseeability, with its triple role and its accordion-like meaning, is clearly one of the murky concepts that has led students and scholars to think that negligence law lacks conceptual integrity."); William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 19 (1953) ("Foreseeability of risk, in short, carries only an illusion of certainty in defining the consequences for which the defendant will be liable.").

3. RESTATEMENT (SECOND) OF TORTS § 281 cmt c. (AM. L. INST. 1965) [hereinafter "Restatement"] ("In order for the actor to be negligent with respect to the other, his conduct must create a recognizable risk of harm to the other individually, or to a class of persons—as, for example, all persons within a given area of danger—of which the other is a member."); *see, e.g.*, *Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 656 (Tex. 1999) (quoting § 281 cmt c. in an analysis of duty).

4. Restatement, *supra* note 3.

5. RESTATEMENT (SECOND) OF TORTS, § 281 cmt f. (AM. L. INST. 1965) ("Where the harm which in fact results is caused by the intervention of factors or forces which form no part of the recognizable risk involved in the actor's conduct, the actor is ordinarily not liable."); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL

that an act would cause harm to a particular plaintiff, proximate cause may still preclude liability for that act if the harm that befell the plaintiff was different than the harm that could have been reasonably foreseen.[6] This principle is referred to as the "scope of the risk" doctrine.[7] The foreseeable plaintiff and scope of the risk are thorny concepts, and this essay describes specific factual scenarios that demonstrate how these doctrines might actually play out in a jury trial.

Before considering examples of how duty and causation limit liability in cases of actual injury, it is important to understand how Wisconsin's negligence framework differs from the Restatement. The Restatement's approach to duty most closely resembles then-Judge Cardozo's majority opinion in *Palsgraf v. Long Island Railway Co.*.[8] In contrast, Wisconsin is one of just two states that has explicitly adopted Judge Andrews's famous dissent.[9] Citing Andrews, Wisconsin has stated repeatedly throughout the last century that everyone owes a duty to the world at large to refrain from acts or omissions that may foreseeably cause harm.[10] When it is reasonably foreseeable that an individual's act or omission might result in harm to the interests of another, that individual is under a duty to refrain from that act or omission.[11] It does not matter whether an injury befalls a particular

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HARM § 29 (AM. L. INST. 2010) ("An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.").

6. *Supra* note 5.

7. JOSEPH W. GLANNON, THE LAW OF TORTS 240–41 (5th ed. 2015).

8. 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928).

9. *Tesar v. Anderson*, 789 N.W.2d 351, 362–63, n. 15 (Wis. Ct. App. 2010).

10. *See, e.g., Gritzner v. Michael R.*, 611 N.W.2d 906, 912, n. 3 (Wis. 2000) ("Wisconsin does not follow the majority view in *Palsgraf v. Long Island Railroad Co.*, under which the existence of a duty of care depends upon whether injury to the particular victim was foreseeable." (internal citations omitted)); *Hornback v. Archdiocese of Milwaukee*, 752 N.W.2d 862, 869 (Wis. 2008) ("Our state's recognition of a general duty to act with ordinary care, following the famous minority opinion of *Palsgraf v. Long Island Railroad Co.*, is that '[everyone] owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.' . . . Under this framework, a person is negligent '"if the person, without intending to do harm does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property."'"); *Brandenburg v. Briarwood Forestry Services, LLC*, 847 N.W.2d 395, 398 (Wis. 2014) ("[E]very person is subject to a duty to exercise ordinary care in all of his or her activities." (internal quotations omitted)).

11. *Rockweit by Donohue v. Senecal*, 541 N.W.2d 742, 747 (Wis. 1995) ("A defendant's duty is established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone." (internal quotations omitted)); *Gritzner*, 611 N.W.2d at 912 ("The first element, a duty of care, is established under Wisconsin law whenever it was foreseeable to the defendant that his or her act or omission to act might cause harm to some other person."); *Alvarado v. Sersch*, 662 N.W.2d 350, 353 (Wis. 2003) ("In Wisconsin a duty to use ordinary care is established whenever it is foreseeable that a person's act or failure to act might cause harm to some other person."); *Hoida, Inc. v. M & I Midstate Bank*, 717 N.W.2d 17, 29 (Wis. 2006) ("The existence of a duty of ordinary care encompasses what is reasonable according to facts and circumstances present in each individual case."); Wis. J.I.–Civil 1005 (2019), Fastcase ("Ordinary care is the care which

foreseeable plaintiff.[12] For purposes of establishing duty, it is enough that an ordinary person under similar circumstances as the defendant could have reasonably foreseen that the defendant's act or omission might cause harm to *someone*, anyone.[13] If there is a duty and a defendant breaches that duty, she is negligent.[14]

In addition to adopting Judge Andrews's "duty to the world," Wisconsin has abandoned proximate cause in favor of a substantial factor test.[15] Restatement jurisdictions generally limit liability to injuries that would not have occurred "but for" a defendant's act or omission.[16] Even then, liability may be precluded if a jury determines that the harm to the plaintiff was not within the scope of the risk.[17] These two doctrines, but-for causation and scope of the risk, are the Restatement's tests for "cause-in-fact"[18] and "proximate cause."[19] Wisconsin does not use but-for causation, but rather employs a "substantial factor" inquiry, first

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a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.").

Wisconsin courts do not always use consistent language, resulting in published opinions that inadvertently misstate the duty standard. For example, in *Smith v. Goshaw*, the Court of Appeals wrote: "In determining whether a person had a duty in relation to a particular risk of harm, we focus on the foreseeability that the act or omission would cause harm to someone." 928 N.W.2d 619, 624 (Wis. Ct. App. 2019). As the foregoing discussion demonstrates, the standard is not whether it was reasonably foreseeable that the act or omission *would* cause harm; it is whether it was reasonably foreseeable that the act or omission would create an unreasonable *risk* of harm.

12. *Gritzner*, 611 N.W.2d at 912 ("Wisconsin does not follow the majority view in *Palsgraf v. Long Island Railroad Co.*, under which the existence of a duty of care depends upon whether injury to the particular victim was foreseeable." (internal citations omitted)); *Stephenson v. Universal Metrics, Inc.*, 641 N.W.2d 158, 163 (Wis. 2002) ("Under [Andrews's dissent], every person owes a duty to the world at large to refrain from conduct that could cause foreseeable harm to others, even though the identity of the person harmed has not been established at the time of the conduct.").

13. *Supra* note 12; *Osborne v. Montgomery*, 234 N.W. 372, 380 (Wis. 1931) (Fowler, J., concurring) ("We base our conclusion . . . on whether the defendant should or should not have foreseen . . . that *some* harm to another was likely to result from the act or omission involved." (emphasis added)); Wis. J.I.–Civil 1005 (2019), Fastcase ("Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.").

14. *Rockweit*, 541 N.W.2d at 747 ("A party is negligent when he commits an act when some harm to someone is foreseeable." (internal quotations omitted)); Wis. J.I.–Civil 1005 (2019), Fastcase.

15. *Pfeifer v. Standard Gateway Theater, Inc.*, 55 N.W.2d 29, 33 (Wis. 1952).

16. *See* GLANNON, *supra* note 7, at 190.

17. *Supra* notes 5 and 7.

18. GLANNON, *supra* note 7, at 189–90.

19. *Id.* at 240–41.

introduced by Wisconsin Law Professor Richard V. Campbell in the late thirties.[20] The substantial factor test differs from but-for causation in at least two respects: First, there can be multiple substantial factors.[21] Second, an act or omission can be a substantial factor in an injury even if harm would have occurred despite the act or omission.[22]

Throughout the mid-twentieth century, Wisconsin courts sometimes invoked the term "proximate cause,"[23] but this use was problematic,[24] first because the substantial factor test is easily distinguished from but-for causation, but also because Wisconsin does not use the scope of the risk doctrine to limit liability. Rather, Wisconsin courts regularly apply a number of "public policy" factors to determine whether to preclude liability in a particular case.[25] This is the approach advocated by Professor Campbell,[26] who also wrote that "the term 'proximate cause' has outlived its usefulness. . . . Various legal terms have been selected for the firing

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20. Richard V. Campbell, *Duty, Fault, and Legal Cause*, 1938 WIS. L. REV. 402, 407–08 (1938); *Pfeifer*, 55 N.W.2d at 33 (citing Professor Campbell); *Fandrey ex rel. Connell v. Am. Fam. Mut. Ins. Co.*, 680 N.W.2d 345, 351 (Wis. 2004) (citing Professor Campbell) ("Early in Wisconsin jurisprudence, the term 'proximate cause' referred to two distinct concepts. The first use of the term was to describe 'limitations on liability and on the extent of liability based on [ ] lack of causal connection in fact.' . . . The first use and meaning of the term 'proximate cause' has long since been abandoned in Wisconsin in favor of the 'substantial factor' test . . . .").

21. *Morgan v. Pa. Gen. Ins. Co.*, 275 N.W.2d 660, 666 (Wis. 1979) ("The test of cause-in-fact is whether the negligence was a 'substantial factor' in producing the injury. Under this test, there can be more than one substantial factor contributing to the same result and thus more than one cause-in-fact."); Wis. J.I.–Civil 1500 (2019), Fastcase ("It is erroneous to instruct a jury that they must find that the negligence was 'the' substantial factor in causing injury.").

22. *Arbet v. Gussarson*, 225 N.W.2d 431, 435 (Wis. 1975) ("[I]t is not important that the defect did not actually cause the initial accident, as long as it was a substantial factor in causing injury as alleged in plaintiffs' complaint. . . . 'Appellant is not suing for total injuries, but for the death alleged to have been caused by the incremental injury which occurred because of the faulty seat belt.'" (internal citations omitted)).

23. *See, e.g.*, *Morgan*, 275 N.W.2d at 666 ("Legal cause in negligence actions is made up of two components, cause-in-fact and 'proximate cause,' or policy considerations.").

24. *See Osborne v. Montgomery*, 234 N.W. 372, 379 (Wis. 1931) (referring to "proximate cause" as an "objectionable term").

25. *Pfeifer*, 55 N.W.2d at 35 ("If the jury does determine that there was negligence, and that such negligence was a substantial factor in producing the injury, it is then for the court to decide as a matter of law whether or not considerations of public policy require that there be no liability."); *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568, 577 (Wis. 2009) ("The application of public policy factors to preclude recovery for negligence has a long history in Wisconsin.").

26. *Supra* Campbell, note 20 at 414 ("The scope of [the Restatement] should be extended to cover the entire set of policy problems commonly dealt with in the past under proximate cause." (internal quotations omitted)).

squad. I nominate 'proximate cause.'"[27] The Wisconsin Supreme Court eventually abandoned the term proximate cause when describing the public policy factors.[28]

Wisconsin courts may use public policy factors to limit liability notwithstanding a showing of all four elements of negligence (duty, breach, causation, and damages).[29] An oft-repeated, though not inclusive,[30] list of the factors is as follows:

> (1) the injury is too remote from the negligence;
> (2) the recovery is wholly out of proportion to the culpability of the negligent tort-feasor;
> (3) the harm caused is highly extraordinary given the negligent act;
> (4) recovery would place too unreasonable a burden on the negligent tort-feasor;
> (5) recovery would be too likely to open the way to fraudulent claims; and
> (6) recovery would enter into a field that has no sensible or just stopping point.[31]

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27. Richard V. Campbell, *Wisconsin Law Governing Automobile Accidents—Part I*, 1962 WIS. L. REV. 240, 266–67 (1962).

28. In *Fandrey ex rel. Connell v. Am. Fam. Mut. Ins. Co.*, Justice Wilcox, writing for the majority, explained that historically, "[t]he second use of the term [proximate cause] was to describe 'limitations on liability and on the extent of liability based on . . . policy factors making it unfair to hold the party [liable]." 680 N.W.2d 245, 351 (Wis. 2004); In a footnote he wrote that "[t]his discussion is not intended as an invitation to reintroduce the term 'proximate cause' into Wisconsin's legal lexicon . . . . Rather, this discussion represents an accurate historical analysis of Wisconsin's use of the term 'proximate cause' in relation to public policy factors." *Id.* at 351, n. 7.

In a concurrence joined by Justice Abrahamson, Justice A.W. Bradley interpreted the majority opinion: "I focus next on footnote 7 of the majority opinion. The majority, at times, uses the terms 'proximate cause' and 'public policy' interchangeably. This may leave the reader wondering about the continued vitality of using proximate cause to limit liability. Footnote 7, however, provides the answer. Simply put, in Wisconsin we use public policy factors, not proximate cause, to limit liability." *Id.* at 361 (A.W. Bradley, J., concurring).

29. *Alvarado v. Sersch*, 662 N.W.2d 350, 354 (Wis. 2003) ("After negligence has been found, a court may nevertheless limit liability for public policy reasons."); *Behrendt*, 768 N.W.2d at 577 ("The application of public policy factors to preclude recovery for negligence has a long history in Wisconsin."); *Id.* at 573 ("The four elements [of negligence] are '(1) [a] duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury.'").

30. *Tesar v. Anderson*, 789 N.W.2d 351, 359 (Wis. Ct. App. 2010).

31. *Behrendt*, 768 N.W.2d at 577.

Any of these factors may be invoked to limit liability.[32]

Thus Wisconsin, with the help of Professor Campbell, has implemented a straightforward negligence analysis that avoids many of the complications of the Restatement such as foreseeable plaintiff and scope of the risk.[33] Wisconsin's negligence framework has been described as an "A, B, C, D, and X" analysis,[34] where A through D (duty, breach, causation, and damages) are the elements necessary to hold an actor liable for the tort of negligence.[35] At the A stage or duty stage, courts do not ask whether it was reasonably foreseeable that harm would befall the particular plaintiff; they merely ask whether it was foreseeable that an act or omission would harm someone, anyone.[36] If harm was foreseeable, the defendant was under a duty to refrain from the act or omission.[37] At the B stage or breach stage, the jury is asked whether the defendant breached her duty; if so, the defendant was negligent.[38] At the C stage or causation stage, courts do not ask whether the particular harm that befell the plaintiff was within the scope of foreseeable risk; they merely ask the jury whether the defendant's breach was a substantial factor in the injury itself.[39] At the D stage, the jury determines damages.[40] Finally, the liability-limiting functions of the foreseeable plaintiff and the scope of the risk doctrine are replaced by "X factors,"[41] or public policy factors, in which a judge may

32. *See, e.g.*, *Kidd v. Allaway*, 807 N.W.2d 700, 706–07 (Wis. Ct. App. 2011) (precluding liability under the second public policy factor).

33. *See Pfeifer v. Standard Gateway Theater*, 55 N.W.2d 29, 33 (Wis. 1952) (adopting the substantial factor test based on Professor Campbell's "excellent article"); *see also Schilling v. Stockel*, 133 N.W.2d 335 (Wis. 1965) ("The current position of the Wisconsin court regarding duty versus public policy was discussed by Professor Richard V. Campbell . . . .").

34. Charles P. Dykman, *Common Law and Statutory Language Create Flaw in* Frostman, WIS. LAW. (Feb. 1, 2003), https://www.wisbar.org/NEWSPUBLICATIONS/WISCONSINLAWYER/Pages/article.aspx?Volume=2&ArticleID=529.

35. *Behrendt*, 768 N.W.2d at 573 ("The four elements [of negligence] are '(1) [a] duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury.'").

36. *Supra* note 11.

37. *Id.*

38. *Rockweit by Donohue v. Senecal*, 541 N.W.2d 742, 747 (Wis. 1995) ("A party is negligent when he commits an act when some harm to someone is foreseeable." (internal quotations omitted)); Wis. J.I.–Civil 1005 (2019), Fastcase.

39. *Supra* notes 20 and 28.

40. *Behrendt*, 768 N.W.2d at 573 ("The four elements [of negligence] are . . . '(4) an actual loss or damage as a result of the injury.'"); *see generally* Wis. J.I.–Civil 1700–1897 (2019), Fastcase (jury instructions for negligence damages).

41. Dykman, *supra* note 34.

conclude that despite the presence of A through D, public policy advises against imposing liability on the defendant.[42]

In case the reader finds the preceding discussion overly abstract, let us better understand the differences between the Restatement and Wisconsin approaches by considering two famous examples of real-life cases. The first case, *The Wagon Mound*,[43] would likely reach a different result in Wisconsin compared to jurisdictions that follow the Restatement. The second case, the exploding lamp case,[44] would likely reach a similar result in either jurisdiction. And lest the reader have any lingering doubts, the *Wagon Mound* and exploding lamp examples will demonstrate that the differences between the Restatement and Wisconsin approaches are significant and not simply a question of semantics.

In *The Wagon Mound*, perhaps the most famous proximate cause case aside from *Palsgraf*,[45] liability for damage to a dock resulting from a fire was precluded using proximate cause.[46] The defendant leaked oil into the waters surrounding the plaintiff's dock, where welding was in progress.[47] Ordinarily, the oil would not burn, but the unusual circumstances were such that it did.[48] The English court found that although it was foreseeable that the leaking oil would foul the dock, it was not foreseeable that it would cause a fire.[49] Thus, under the scope of the risk doctrine, the defendant was liable for damages arising from the fouling of the dock, but not for damages resulting from the fire.[50]

In Wisconsin, *The Wagon Mound* would likely come out differently. A Wisconsin court applying the Campbell analysis would find that the defendant had a duty (or "A") to avoid leaking oil into the water, because the judge[51] would conclude it was foreseeable that the act of leaking oil

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42. *Supra* note 29.

43. *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co., Ltd.* (1964) 1 Eng. Rep. 404 (PC) (appeal taken from New S. Wales SC) (hereinafter "*The Wagon Mound*").

44. *Central of Georgia Ry. Co. v. Price*, 32 S.E. 77 (Ga. 1898).

45. GLANNON, *supra* note 7, at 242–43.

46. *The Wagon Mound* (1961) 1 Eng. Rep. 404 (PC) (appeal taken from New S. Wales SC).

47. *Id.* at 406.

48. *Id.* at 406–07.

49. *Id.* at 404.

50. *Id.*

51. Zipursky, *supra* note 1, at 1251 ("[D]uty is an issue for the court, ..."); *Stephenson v. Universal Metrics, Inc.*, 641 N.W.2d 158, 163 (Wis. 2002) ("Whether such a duty exists is a question of law, ..."); *but see Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568, 573 (Wis. 2009) ("[T]he elements of duty and breach are usually presented to the trier of fact in a question asking whether the defendant was negligent, ..."); *see also Tesar v. Anderson*, 789 N.W.2d 352, 358, n. 13 (Wis. Ct. App. 2010) ("Though Wisconsin calls duty a question of law, . . . in the vast majority of cases, duty is a jury question.").

into the water might result in harm; the jury[52] would find a breach ("B"), because the defendant actually leaked oil into the water; the jury[53] would find causation ("C"), because the leaking oil was a substantial factor in causing the fire; and the jury[54] would find damages ("D"), because the dock was destroyed. Thus, the elements of negligence are met and the defendant would be liable for all of the damage to the dock.

It is true that a Wisconsin judge deciding *Wagon Mound* might nevertheless limit liability under public policy ("X" factors), but regardless of whether or not a judge could use public policy to reach a similar *result* as the English court, public policy's approach to limiting liability runs counter to the Restatement's rule-focused view that liability should be determined by the purportedly consistent application of predictable doctrines such as scope of the risk. For example, a judge might preclude liability using the third factor, finding that "the harm caused is highly extraordinary given the negligent act."[55] She might even preclude liability under the second factor, finding that "the recovery is wholly out of proportion to the culpability of the negligent tort-feasor."[56] Thus, although the elements of Wisconsin negligence (ABCD) provide for a consistent analysis of whether liability may permissibly attach, under public policy (X), the ultimate discretion to determine liability lies with the judge.[57]

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52. *Behrendt*, 768 N.W.2d at 573 ("[T]he elements of duty and breach are usually presented to the trier of fact in a question asking whether the defendant was negligent, ..."); Wis. J.I.–Civil 1005 (2019), Fastcase.

53. Wis. J.I.–Civil 1500 (2019), Fastcase.

54. *See generally* Wis. J.I.–Civil 1700–1897 (2019), Fastcase (jury instructions for negligence damages).

55. *Behrendt*, 768 N.W.2d at 577.

56. *Id.*

57. At least one state supreme court has criticized Wisconsin's approach to public policy as a form of judicial activism. *Donaca v. Curry Cnty.*, 734 P.2d 1339, 1342 (Or. 1987) ("We do not follow the quoted approach of the Wisconsin court, as we have not embraced freewheeling judicial 'policy declarations . . . .'"). However, on the contrary, this author supposes that a system which requires judges to be forthright about their normative reasons for limiting liability is a system that promotes public confidence in our justice system. The alternative promises to sow suspicion that judges manipulate legal doctrines to serve results-oriented goals under a façade of impartiality. This perception is one the legal community is all too familiar with in the realm of federal constitutional law.

Additionally, the Wisconsin Supreme Court has made it clear that judicial public policy is distinct from legislative public policy, and that public policy as it is used in negligence is a term of art which should not be mistaken for usurpation of the legislative role. In *Fandrey*, the Court wrote:

> "The legislature's determination of 'public policy' in a broader context relates to what is politically appropriate for the state as a whole. When 'public policy' is used in this context, it is true that the judiciary is limited to applying the policy the legislature has chosen to enact, and may not impose its own policy choices. . . . This stands in stark contrast to the judiciary's use of 'public policy,' formerly referred to as

In another famous case, the exploding lamp case,[58] a railroad company was not liable where it negligently dropped a passenger off at the wrong station, she was forced to spend the night at a nearby hotel, and she was injured when a lamp exploded in her room.[59] The Supreme Court of Georgia found that "the injury was occasioned by the negligence of the proprietor of the hotel or his servants in giving her a defective lamp."[60] Therefore, the negligence of the company in passing her station was not the natural and proximate cause of her injury.[61]

The exploding lamp case would likely reach a similar result in Wisconsin, although for different reasons. The exploding lamp case is an intervening cause case,[62] and in Wisconsin, public policy factors have replaced the doctrine of intervening cause.[63] Therefore, a jury could find causation by concluding that the defendant's negligent act of dropping the passenger off at the wrong station was a substantial factor in the chain of events that led to her injury. Nevertheless, this author proposes that any reasonable judge would preclude liability under the first public policy factor, "the injury is too remote from the negligence."[64] Importantly, this outcome demonstrates that public policy sometimes does function to limit liability in a manner resembling proximate cause.[65] However, as the preceding discussion has shown, this is not always the case, as the public policy factors generally grant much greater discretion to judges to determine liability than is permitted in jurisdictions that follow the Restatement.

> 'proximate cause,' which refers to the practice of limiting tort liability as part of the legal cause analysis 'on a case-by-case basis.'"

Fandrey ex rel. Connell v. Am. Fam. Mut. Ins. Co., 680 N.W.2d 245, 354 (Wis. 2004) (internal citations omitted).

58. *Central of Georgia Ry. Co. v. Price*, 32 S.E. 77 (Ga. 1898).

59. *Id.* at 77.

60. *Id.* at 77.

61. *Id.* at 77.

62. *Id.* at 77–78 ("There was the interposition of a separate, independent agency,—the negligence of the proprietor of the hotel, over whom, as we have shown, the railway company neither had nor exercised any control."); Joseph H. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 651–52 (1920) (using the exploding lamp case to illustrate the doctrine of intervening cause).

63. *Kidd v. Allaway*, 807 N.W.2d 700, 705 (Wis. Ct. App. 2011) (observing that the intervening or superseding cause doctrine "passed away with the adoption of the substantial factor test of cause-in-fact." (internal quotations omitted)).

64. *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568, 577 (Wis. 2009).

65. *See also Kidd*, 807 N.W.2d at 705 ("As used in the public policy analysis, the remoteness inquiry 'revives the intervening or superseding cause doctrine, ...'").

II. ANALYSIS

What do all of these differences between Wisconsin and the Restatement tell us about the role of the Restatement as a source of persuasive authority in Wisconsin? If only judges and litigators asked this question more often. This essay has shown that there are fundamental differences between the Wisconsin and Restatement approaches to duty and causation, but Wisconsin courts rarely acknowledge these differences when considering whether to adopt sections of the Restatement. Indeed, as the following examples will show, the Wisconsin Supreme Court is often willing to adopt Restatement provisions proffered by litigants without regard for whether those sections are compatible with the longstanding Campbell analysis.

When the Wisconsin Supreme Court resolves complicated cases by adopting unnecessary sections of the Restatement, it places the doctrinal integrity of Wisconsin's negligence framework at risk. What follows is an analysis of two cases in which the Wisconsin Supreme Court used sections of the Restatement (Second) of Torts to resolve questions of duty. The first case, *Hocking v. City of Dodgeville*,[66] applied the Restatement to hold that uphill landowners had no duty to abate the flow of water onto a plaintiff's property.[67] The second case, *Stephenson v. Universal Metrics Inc.*,[68] adopted the Restatement to preclude liability in a negligence action brought by the estate of a motorist killed in a collision with an intoxicated driver.[69] Both cases reached a proper outcome, but both did so by relying on sections of the Restatement that are fundamentally incompatible with Wisconsin law. These decisions in turn call into question nearly a century of settled negligence jurisprudence. As this essay will show, in both instances the Court could have reached the same result using the traditional Campbell analysis, without confusing the doctrine. As such, the Restatement should have played a persuasive role at best.

In *Hocking v. City of Dodgeville*, the Wisconsin Supreme Court found that § 824 of the Restatement (Second) of Torts applied in a negligence action brought by a downhill landowner whose property was damaged by a flow of water from the defendants' property.[70] The Court asked whether the defendant landowners had a duty to abate the flow of water from their property.[71] Citing to § 824 of the Restatement, the Court wrote that "[t]o prevail on their claim of negligent maintenance of a nuisance, the [plaintiffs] must first show that the defendants were negligent, which

66. 768 N.W.2d 552 (Wis. 2009).
67. *Id.* at 554.
68. 641 N.W.2d 158 (Wis. 2002).
69. *Id.* at 165.
70. *Hocking*, 768 N.W.2d at 554–55.
71. *Id.* at 560.

requires that defendants failed to act when they had a duty to act."[72] This sweeping statement of law was the catalyst for a long-winded and confusing opinion in which the Court appeared to hold that the defendants were not liable because their use of land was reasonable, and therefore, under common law rules governing the flow of surface waters, they had no duty to act.[73]

The invocation of the Restatement in *Hocking* not only led to a confusing opinion; it called into question nearly a century of settled negligence law. Wisconsin has long held that everyone owes a duty to the world at large to refrain from acts or omissions that may foreseeably cause harm.[74] This principle is hard to reconcile with the notion that a landowner is not under a duty to refrain from a foreseeably harmful omission (failing to abate a flow of water) provided their land use is "reasonable." It is true, as the Court in *Hocking* emphasized,[75] that Wisconsin recognizes situations in which there is "no duty"; but those are situations in which the harm arising from the defendant's act or omission was not foreseeable.[76] Here, harm was foreseeable, therefore there was a duty. It is not clear why the Restatement or principles of water law should alter that analysis.

Instead of muddying the waters of Wisconsin's duty jurisprudence by invoking ancient rules of land use and the Restatement, the Court in *Hocking* could have reached a similar result using the Campbell analysis:

> The defendants had a duty (or "A") because it was foreseeable that their omission, failing to abate the flow of water, would cause harm to the plaintiffs' property;
> The defendants breached that duty ("B") because they failed to abate the flow of water;
> There was causation ("C") because the flow of water was a substantial factor in harming the plaintiff's property;
> There was recoverable damage ("D") to the plaintiff's property;
> But liability should be precluded under the second and fourth public policy factors ("X"), because:
> The recovery is wholly out of proportion to the culpability of the negligent tort-feasor; and
> Recovery would place too unreasonable a burden on the negligent tortfeasor.[77]

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72. *Id.* at 555.

73. *Id.* at 558–59.

74. *Supra* notes 9–14.

75. *Hocking*, 768 N.W.2d at 559.

76. *Supra* note 11.

77. Justice Abrahamson reached a similar conclusion in her concurrence, but also invoked the Restatement, writing: "I conclude that the defendants are not liable because the private nuisance is not abatable, meaning that abatement cannot be

In another case, *Stephenson v. Universal Metrics Inc.*, the Wisconsin Supreme Court found that § 324A of the Restatement (Second) of Torts applied in a negligence action brought by the estate of a motorist killed in a collision with an intoxicated driver.[78] The defendant, a coworker of the intoxicated driver, indicated to a bartender that he would drive his intoxicated coworker home.[79] Based on these assurances, the bartender served the intoxicated individual more alcohol than he would have otherwise. [80] The defendant later declined to drive his coworker home, the coworker got behind the wheel of a car, and the fatal accident ensued.[81] The Court concluded that under § 324A of the Restatement, the defendant voluntarily assumed a duty to act as a designated driver, and that a reasonable jury could conclude he was negligent by failing to do so.[82] However, the Court also found that liability was precluded by not one, but three public policy factors.[83] One is left wondering why the Court bothered to discuss the Restatement at all. If the Court had based its analysis solely on public policy factors, it could have avoided complicating the duty analysis by introducing a loaded concept like voluntary assumption of duty.

As in *Hocking*, the unnecessary invocation of the Restatement in *Stephenson* contributed to a confusing debate over whether different rules should govern duty in cases of negligent omissions as opposed to negligent acts. This debate was most fervently on display in the 2009 case *Behrendt v. Gulf Underwriters Ins. Co.*,[84] in which Justices Abrahamson and Roggensack sparred on questions of duty in the realm of negligent omissions. Justice Abrahamson accused Justice Roggensack of fabricating different rules for duty in cases of negligent omission;[85] in turn, Justice Roggensack accused Justice Abrahamson of attempting to eliminate duty

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accomplished without unreasonable hardship or expense. Restatement (Second) of Torts, § 829 cmts. e & f." *Hocking*, 768 N.W.2d at 560 (Abrahamson, J., concurring). Although the Restatement was unnecessary in this case, Abrahamson's concurrence is a reminder that when the Restatement does not directly contradict the Campbell analysis, it may be useful as persuasive authority for applying the public policy factors.

78. *Stephenson v. Universal Metrics, Inc.*, 641, N.W.2d 158, 165 (Wis. 2002).

79. *Id.* at 160.

80. *Id.*

81. *Id.*

82. *Id.* at 164.

83. *Id.* at 169 ("First, the injury sustained in this case is wholly out of proportion to the tortfeasor's culpability."); *id.* ("Second, to allow recovery in a situation such as this would put too unreasonable a burden upon the tortfeasor."); *id.* ("Third, to allow recovery under these circumstances potentially allows the law of negligence to enter a field that has no sensible or just stopping point.").

84. 768 N.W.2d 568 (Wis. 2009).

85. *Id.* at 587 (Abrahamson, J., concurring) ("Nichols concludes, in direct contradiction to Justice Roggensack's concurrence, that in a negligence case, a defendant's conduct should not be analyzed in terms of whether the defendant had a duty to perform a specific act.").

from the negligence analysis.[86] There was some truth to both of these accusations, as should be expected. Justice Abrahamson did have a tendency to conflate duty and breach, arguing simply that "[T]he question of negligence is whether the defendant's conduct (be it an act or omission) was consistent with the standard of reasonable and ordinary care."[87] Justice Roggensack correctly responded that a number of Wisconsin cases describe situations in which there can be "no duty."[88] But Justice Roggensack took these cases too far when she cited them for the proposition that there is a heightened duty inquiry in cases of negligent omission.[89]

In reality, Wisconsin's conception of duty occupies a middle ground, and cases like *Stephenson* can be resolved without any reference to Restatement concepts like voluntary assumption of duty. In Wisconsin, an individual is under a duty to refrain from an act or omission if it is reasonably foreseeable that the act or omission might result in harm to the interests of another.[90] Therefore, in instances where it is not reasonably foreseeable that an act or omission will lead to harm, there is no duty. For example, it is not reasonably foreseeable that jumping up and down in my office might result in harm to another. Therefore, if I jump up and down and crash through my office floor, injuring my coworker in the office below, I am not liable to the building nor to my coworker. There was no duty. Similarly, if it is not reasonably foreseeable that my neighbor will suffer harm if I don't push him out of the way of an oncoming tricycle, I am not liable when he is so surprised by his miniature assailant that he falls into a window well and breaks his leg. The question is not whether I was under a special "duty to act;" the question is simply whether harm was reasonably foreseeable. This is dramatically different from the Restatement, which requires both a foreseeable plaintiff and a foreseeable risk for liability to attach.

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86. *Id.* at 594 ("Chief Justice Abrahamson takes the unusual tact of attacking a concurring opinion in her ongoing mission of attempting to eliminate the element of duty from common law negligence claims in Wisconsin.").

87. *Id.* at 581 (Abrahamson, J., concurring).

88. *Id.* at 591 (Roggensack, J., concurring) (citing *Hoida, Inc. v. M & I Midstate Bank*, 717 N.W.2d 17, 36–37 (Wis. 2006)); *see also Tesar v. Anderson*, 789 N.W.2d 352, 359, n. 13 (Wis. Ct. App. 2010) ("Owing a duty to the world does not explain whether a defendant in a Wisconsin negligence case has a duty under the circumstances of the case at hand. No Wisconsin case has held that negligence is now a three-element analysis. Duty still exists as the first element of negligence.").

89. *Id.* at 587 (Abrahamson, J., concurring) ("The concurrence relies in large part upon Justice Roggensack's *Hoida* decision to set forth an argument about the negligence standard that contradicts the analysis in *Rockweit* and *Gritzner*. Yet Nichols explicitly rejects the idea that Justice Roggensack's *Hoida* decision changed the law of negligence as it is explained in the *Rockweit* and *Gritzner* decisions.").

90. *Supra* note 11.

Finally, it is possible that concerns over duty in cases of negligent omissions arise from fears that the potential for liability will have a stifling effect on society and commerce, but under the Campbell analysis, these concerns are unnecessary. For example, one might argue that no one will buy land if they might be held liable for running water on their property, or that no one will ever offer to help a drunk friend lest they are liable for every one of their companion's subsequent acts. But this is precisely why Wisconsin has implemented judicial public policy. As this essay has shown, liability in *Hocking* could have been limited under the second and fourth factors. In *Stephenson*, the Court found that liability actually *was* precluded under the second, fourth, and sixth factors. Normative debates over duties to act and negligent omissions have no place in a framework that already grants broad discretion to judges to preclude liability wherever liability would be unjust.

Wisconsin's approach to negligence is simple, elegant, and honest. It avoids many of the problems of the Restatement. As this essay has demonstrated, Wisconsin's approach to duty and causation is fundamentally different from the Restatement. The Campbell analysis is strong enough to answer any difficult doctrinal question that comes before it, and that includes questions regarding negligent omissions and duties to act. Wisconsin courts would be wise to stick to the Campbell analysis when faced with difficult cases and avoid the Restatement (Second) of Torts altogether.

CONCLUSION

The foregoing analysis has shown that Wisconsin courts would do well to approach all negligence cases using the Campbell analysis. When courts rely on sections of the Restatement without first asking whether those sections are compatible with fundamental precepts of Wisconsin law, they risk confusing the doctrine. The Restatement, rooted in Judge Cardozo's majority opinion in *Palsgraf*, will rarely align with Wisconsin's conception of duty to the world. Furthermore, debates about differences between rules governing negligent acts and negligent omissions, arising as they do from Restatement concepts like voluntary assumption of duty, are unnecessary in a framework that grants discretion to judges to preclude liability using public policy wherever liability would be unjust. Wisconsin would do well to stick to its roots.