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The “Peripheral Plaintiff”: Duty Determinations in Take-Home Asbestos Cases

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THE “PERIPHERAL PLAINTIFF”: DUTY DETERMINATIONS IN TAKE-HOME ASBESTOS CASES

Yelena Kotlarsky*

Since the 1970s, litigation concerning the dangers of asbestos in the workplace has transformed from a few workers’ compensation claims to hundreds of thousands of lawsuits against companies in nearly every industry. While the typical plaintiff in these claims is an employee injured while handling asbestos at the worksite, a new class of “peripheral plaintiffs” has recently emerged. These plaintiffs consist of family members who are exposed to asbestos after inhaling the dust that saturates an employee’s person and clothing. The family members then bring claims against the employers and the owners of the premises claiming that they were negligent in allowing the workers to carry asbestos home when the danger of asbestos was well known.

The highest courts of six states stand divided on whether an employer or premises owner owes a duty to these third-party plaintiffs to protect them from asbestos-related harm. Two states have relied heavily on the foreseeability of the harm to hold that landowners and employers do owe a duty to third-party plaintiffs. On the other hand, four states have focused on a range of factors, like the lack of a relationship between the parties and the need to constrain asbestos litigation, to hold that landowners and employers do not owe a duty to third-party plaintiffs.

This Note examines the interstate conflict and concludes that all six courts have engaged in an unclear and unnecessarily fact-specific analysis of duty. It argues that the Third Restatement’s method of determining duty represents a clearer approach, because it sends factual questions to the jury and encourages courts to take “no duty” decisions more seriously.

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INTRODUCTION

Over the course of Anthony Olivo’s thirty-seven-year career as a pipe welder, he routinely came into contact with asbestos in materials like pipe covering and gaskets.¹ At the end of every work day, Mr. Olivo came home, took off his clothing, and left it next to the washing machine located in the basement of the home that he shared with his wife Eleanor.² Every evening, Mrs. Olivo would wash these clothes so that her husband could

1. *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1146 (N.J. 2006).

2. *Id.*

wear them the next day.³ Sixteen years after Mr. Olivo retired, doctors diagnosed Mrs. Olivo with mesothelioma,⁴ and she died shortly afterward.⁵ Mr. Olivo then brought a wrongful death action against, among other defendants, the owners of the premises on which he worked.⁶

These types of “take-home” asbestos cases are coming on the heels of hundreds of thousands of claims and decades of litigation about the dangers of asbestos exposure.⁷ Asbestos was once lauded for its fire-resistant properties,⁸ but became heavily regulated when researchers discovered that inhalation of its fibers could lead to a wide range of respiratory diseases, including cancer.⁹

Backed by epidemiological studies and supported by strict regulations of asbestos in the workplace promulgated by the Occupational Safety and Health Administration (OSHA), many employees who had been exposed to asbestos at their workplace felt empowered to bring claims.¹⁰ By 1997, these employees began suing everyone from asbestos manufacturers to more “peripheral defendants,”¹¹ like premises owners and third-party product manufacturers, in what the Supreme Court called an “asbestos-litigation crisis.”¹²

More recently, asbestos litigation has seen the growth of not only the “peripheral defendant,” but also the “peripheral plaintiff.”¹³ These plaintiffs consist of family members who become exposed to asbestos from inhaling asbestos dust on an employee’s person or work clothes, and who bring claims against employers and premises owners for negligence.¹⁴ State courts stand divided on whether employers and premises owners owe

3. *Id.*

4. “Mesothelioma” is a cancer that affects the lining of the chest or abdomen. *See Fact Sheet: Asbestos Exposure and Cancer Risk*, NAT’L CANCER INST., <http://www.cancer.gov/cancertopics/factsheet/Risk/asbestos> (last visited Sept. 21, 2012); *see also infra* notes 118–20 and accompanying text.

5. *Olivo*, 895 A.2d at 1146.

6. *Id.*

7. *See* STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION COST AND COMPENSATION: AN INTERIM REPORT vi (2002), *available at* http://www.rand.org/content/dam/rand/pubs/documented_briefings/2005/DB397.pdf; *see also infra* notes 154–58 and accompanying text.

8. *See* John E. Craighead et al., *Mineralogy of Asbestos*, in ASBESTOS AND ITS DISEASES 23, 23 (John E. Craighead & Allen R. Gibbs eds., 2008); *see also infra* notes 95–100 and accompanying text.

9. *See generally* John E. Craighead, *Diseases Associated with Asbestos Industrial Products and Environmental Exposure*, in ASBESTOS AND ITS DISEASES, *supra* note 8, at 39, 39 (detailing the different diseases suffered by workers who handled asbestos in various industries); *see also infra* notes 117–29 and accompanying text.

10. *See* Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 259 (2006); *see also infra* notes 106–09, 145 and accompanying text.

11. *See* Mark A. Behrens & Frank Cruz-Alvarez, *A Potential New Frontier in Asbestos Litigation: Premises Owner Liability for “Take Home” Exposure Claims*, MEALEY’S LITIG. REP.: ASBESTOS, July 5, 2006, at 1; *see also infra* notes 159–70 and accompanying text.

12. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

13. *See* Behrens & Cruz-Alvarez, *supra* note 11, at 1; *see also infra* Part II.C.

14. *See* Mark A. Behrens, *What’s New in Asbestos Litigation?*, 28 REV. LITIG. 501, 545–49 (2009); *see also infra* notes 179–86 and accompanying text.

a duty to take-home asbestos plaintiffs to protect them from asbestos-related diseases.¹⁵

This Note addresses the state conflict regarding whether employees and premises owners owe a duty to these “peripheral plaintiffs.” Part I begins by giving an overview of the negligence cause of action and then examines different approaches courts have taken when deciding duty. Part II details the history of asbestos and the exponential growth of asbestos litigation. Part III discusses the conflict among six state courts regarding whether employers and premises owners owe a duty of reasonable care toward take-home asbestos plaintiffs. Finally, Part IV argues that all six courts employed the wrong standard they determined duty, and advocates the method proposed by the *Restatement (Third) of Torts*.

I. THEORIES OF LIABILITY FOR ASBESTOS EXPOSURE

When a court faces an asbestos personal injury claim, it must decide whether the defendant—either an employer, premise owner, or manufacturer—negligently exposed the plaintiff to harm from asbestos-containing products or was strictly liable for producing those products.¹⁶ Part I.A describes the basic elements of negligence: duty, breach, causation, and injury. Part I.B explains the element of duty in greater detail, examining the factors that courts have used in their determinations of duty. Finally, Part I.C looks at the cause of action for strict liability.

A. *The Basics of Negligence*

Plaintiffs who suffer an injury as a result of asbestos exposure need to prove that the defendant was negligent—meaning that the defendant failed to exercise reasonable care toward them.¹⁷ Accordingly, plaintiffs must satisfy the four prima facie elements of negligence: duty, breach, causation, and injury.¹⁸ The plaintiff must prove that the defendant owed a duty of

15. *Compare* *Price v. E.I. Dupont de Nemours & Co.*, 26 A.3d 162 (Del. 2011) (holding that employers do not owe a duty to take-home asbestos plaintiffs), *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208 (Ga. 2005) (holding that employers do not owe a duty to take-home asbestos plaintiffs), *In re Certified Question from Fourteenth Dist. Ct. App. of Tex.*, 740 N.W.2d 206 (Mich. 2007) (holding that premises owners do not owe a duty to take-home asbestos plaintiffs), and *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d 115 (N.Y. 2005) (holding that premises owners do not owe a duty to take-home asbestos plaintiffs), with *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006) (holding that premises owners owe a duty to take-home asbestos plaintiffs), and *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008) (holding that employers owe a duty to take-home asbestos plaintiffs).

16. *See Price*, 26 A.3d at 166–67 (discussing the standard for negligence); *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 497–500 (Wash. 2008) (discussing the standard for strict products liability).

17. *E.g., Price*, 26 A.3d at 166–67; *Satterfield*, 266 S.W.3d at 355.

18. *See* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 72 (Dennis Patterson ed., 2010). One potentially confusing aspect of negligence is that the term carries two meanings: negligent behavior and negligence as a cause of action. Thus, while a person’s behavior could be negligent, this does not mean that he is liable for the tort of negligence, because he may not have a duty to the person harmed

care to a person like the plaintiff, that the defendant breached that duty, and that this breach caused the plaintiff’s harm.¹⁹

1. Duty

“Duty” in negligence cases examines the standard of reasonable conduct that defendants must engage in to avoid harming others.²⁰ Duty is essentially an obligation to observe a particular course of action in relation to others.²¹ For example, drivers owe a duty to other people who use the roads: to not cause them physical harm.²² Courts will often consider whether the defendant should have foreseen that his conduct would cause harm to the plaintiff.²³ In addition to considering whether the defendant could foresee causing harm to the plaintiff, courts recognize a duty based on a “special relationship” between the defendant and the plaintiff.²⁴ Whether a defendant owed a duty to the plaintiff is a question of law determined by a judge.²⁵ This Note will discuss duty in greater detail in Part I.B below.

2. Breach

If a judge determines that the defendant owed a duty to the plaintiff, the jury then decides whether the defendant breached that duty.²⁶ A defendant breaches his duty if he fails to conform to the reasonable standard of care under the circumstances.²⁷ Breach exists as a separate element from duty, and a plaintiff must independently satisfy breach to allow a negligence claim to go forward.²⁸

or his negligent behavior may not have been a proximate cause of the plaintiff’s injury. *See* DAN B. DOBBS, *THE LAW OF TORTS* § 114, at 269 (2000).

19. *See* GOLDBERG & ZIPURSKY, *supra* note 18, at 72; *see also* RESTATEMENT (SECOND) OF TORTS § 281 (1965).

20. *See* WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 53, at 324 (4th ed. 1971); *see also* GOLDBERG & ZIPURSKY, *supra* note 18, at 77–78.

21. *See* PROSSER, *supra* note 20, § 53, at 324.

22. GOLDBERG & ZIPURSKY, *supra* note 18, at 77; *see also* PROSSER, *supra* note 20, § 53, at 324 (noting that a driver has a duty to an approaching car to “moderate his speed, to keep a proper lookout, or to blow his horn”).

23. *See* GOLDBERG & ZIPURSKY, *supra* note 18, at 78; *see also infra* notes 59–62 and accompanying text (discussing the prevalence of foreseeability in duty determinations).

24. *See* GOLDBERG & ZIPURSKY, *supra* note 18, at 82; *see also infra* notes 52–54 and accompanying text.

25. *See* GOLDBERG & ZIPURSKY, *supra* note 18, at 77; RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 (2005).

26. *See* PROSSER, *supra* note 20, § 37, at 207. Judges can sometimes decide breach as a matter of law but only when no reasonable jury would determine otherwise. *Id.*; *see also* *Mair v. C & O R.R.*, 851 F.2d 829, 832 (6th Cir. 1988) (holding that the lower court erred in sending the question of breach to the jury when no reasonable juror would find that the defendant breached its duty of care to the plaintiff).

27. *See* PROSSER, *supra* note 20, § 30, at 143; DOBBS, *supra* note 18, § 114, at 270.

28. *See* 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, 744 (2005) (noting that if a defendant owed a duty to the plaintiff, but did not breach that duty, no negligence will be found. Additionally, if the defendant acted unreasonably, but had no duty to the plaintiff, then the defendant also would not be negligent).

Juries take into account a myriad of factors when they determine breach.²⁹ In considering the reasonable standard of care under the circumstances, foreseeability often plays a large role.³⁰ A defendant did not breach his duty of care if a reasonable person³¹ could not have foreseen the harm or could not have reasonably avoided it.³² Juries can also consider whether the usefulness of a defendant's conduct outweighs the risks it creates for others;³³ in other words, juries weigh the costs and benefits of a particular course of action. If the probability and extent of the harm outweigh the utility of the risk-creating conduct, then a defendant has acted unreasonably and breached his duty of care.³⁴

3. Causation

A plaintiff cannot prove his case for negligence without demonstrating that the defendant's conduct caused the plaintiff's harm.³⁵ A plaintiff needs to establish both factual causation and proximate causation.³⁶ A defendant's conduct is a cause-in-fact of the plaintiff's harm if it was a "substantial factor" in bringing about that harm.³⁷ However, the defendant's actions are not a cause-in-fact if the plaintiff would have suffered the harm regardless of the defendant's actions.³⁸

After the jury establishes that the defendant's conduct caused the plaintiff's harm, it must still determine whether the defendant should be

29. See PROSSER, *supra* note 20, § 31, at 146–49; see also GOLDBERG & ZIPURSKY, *supra* note 18, at 87–88 (noting that juries will apply a different standard of care to, for example, a physician and a child).

30. See DOBBS, *supra* note 18, § 143, at 334; see also PROSSER, *supra* note 20, § 43, at 250 (noting that an individual is not expected to take precautions against harms that he cannot foresee).

31. See PROSSER, *supra* note 20, § 32, at 150 (explaining that the reasonable person is "[a] model of all proper qualities, with only those human shortcomings and weaknesses which the community will tolerate on the occasion").

32. See DOBBS, *supra* note 18, § 143, at 334; Cardi, *supra* note 28, at 745.

33. See DOBBS, *supra* note 18, § 144, at 337; PROSSER, *supra* note 20, § 32, at 148 ("Against [the] probability, and gravity, of the risk, must be balanced in every case the utility of the type of conduct in question.").

34. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). Judge Learned Hand proposed this analysis when he articulated that the burden of precaution must be less than the probability multiplied by the damages ($B < PL$). *Id.* Judges do not typically instruct juries on the Hand formula, which is used mostly by judges in determining motions for a directed verdict or summary judgment. Instead, juries are instructed on probability and on commensurate care, both of which are important for a cost/benefit analysis. Moreover, oftentimes lawyers will make cost/benefit arguments before the jury in court. DOBBS, *supra* note 18, § 145, at 342 n.6.

35. See PROSSER, *supra* note 20, § 30, at 143; see also RESTATEMENT (SECOND) OF TORTS § 281(c) (1965).

36. See GOLDBERG & ZIPURSKY, *supra* note 18, at 94; see also PROSSER, *supra* note 20, § 42, at 244.

37. See PROSSER, *supra* note 20, § 41, at 240; see also RESTATEMENT (SECOND) OF TORTS § 431.

38. See GOLDBERG & ZIPURSKY, *supra* note 18, at 95 (noting that if the plaintiff "would have suffered the injury anyway, even if the defendant had not been careless," no cause-in-fact exists).

held responsible for that harm.³⁹ The consequences of a person's unreasonable conduct are potentially limitless, and if the law held him accountable for all of these consequences he would be subjected to boundless liability.⁴⁰ Thus, to constrain liability, courts have decided to deny liability when "the harm that resulted from the defendant's negligence is so clearly outside the risks he created that it would be unjust or at least impractical to impose liability."⁴¹ Proximate cause represents the scope of the defendant's liability, and asks whether the defendant should have foreseen the type of harm that befell the plaintiff.⁴² Even if the defendant breached his duty of care by acting unreasonably and caused the plaintiff's injury, he can avoid liability if the consequences of his conduct were too remote or too unusual.⁴³ Just as the jury determines breach, the jury considers the question of proximate cause as well.⁴⁴

4. Injury

A negligence claim cannot survive if the plaintiff has not suffered an injury.⁴⁵ Unlike criminal law, tort law does not impose liability for careless conduct if it has not harmed another individual.⁴⁶ The different harms that tort law recognizes as "injuries" include "physical harms, property destruction, emotional distress, and economic loss."⁴⁷

B. The Details of Duty

As this Note will discuss in Part III below, courts that face take-home asbestos cases stand divided on whether an employer or premises owner owes a duty to third-party plaintiffs to protect them from harm.⁴⁸ Even if a

39. See PROSSER, *supra* note 20, § 41, at 244; see also GOLDBERG & ZIPURSKY, *supra* note 18, at 103–09.

40. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984); see also RESTATEMENT (SECOND) OF TORTS § 430.

41. See DOBBS, *supra* note 18, § 180, at 443.

42. See Cardi, *supra* note 28, at 748–49; see also GOLDBERG & ZIPURSKY, *supra* note 18, at 106–07.

43. See Cardi, *supra* note 28, at 749. A good example of this is *Allison v. City of Fredericksburg*, 71 S.E. 525 (Va. 1911), in which the court held that it was unforeseeable that after bruising her leg by stepping into a hole on a plank bridge, the plaintiff would develop cancer that would necessitate amputation of the leg. *Id.* at 527. The defendant breached its duty of care by not maintaining the bridge, but the consequences were so remote that no proximate causation existed. *Id.* at 527.

44. See KEETON ET AL., *supra* note 40, § 45, at 321; see also PROSSER, *supra* note 20, § 41, at 240. A judge should only determine proximate cause as a matter of law if "the issue is so clear that reasonable men could not differ." *Id.*

45. See PROSSER, *supra* note 20, § 30, at 143–44; see also GOLDBERG & ZIPURSKY, *supra* note 18, at 72.

46. See PROSSER, *supra* note 20, § 30, at 143–44 ("Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it . . . except in the case of some individual whose interests have suffered.").

47. See GOLDBERG & ZIPURSKY, *supra* note 18, at 135. Courts will also sometimes recognize an increased chance of developing an illness, or a decreased chance of survival as a result of the defendant's conduct, as an injury as well. *Id.*

48. See *infra* Part III.

defendant has acted unreasonably and caused harm to the plaintiff, a court can only hold the defendant liable for his actions if he owed a duty to the plaintiff.⁴⁹ Duty represents the only element of negligence that is a question of law for a judge to decide, and without this element a court cannot find negligence.⁵⁰

Courts can consider a variety of different factors when determining whether a defendant owes a duty of reasonable care to a plaintiff.⁵¹ These factors include the “foreseeability of harm to [the plaintiff], the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, and the policy of preventing future harm.”⁵² Some factors weigh more heavily than others in certain contexts. For example, when the Fifth Circuit decided whether manufacturers of asbestos owed a duty to warn users of the product’s hazards, it held that even when the utility of the product is high enough to justify putting it on the market, its dangerous nature compels a duty to warn.⁵³

Another important factor that weighs heavily in courts’ determinations of duty is the presence—or absence—of a “special relationship” between the parties.⁵⁴ Examples of “special relationships” include doctor-patient, school-student, hotel-guest, and airline-passenger.⁵⁵ In these situations, the law has recognized that because of the nature of the relationship between the parties, a duty should be imposed on the defendant to take reasonable care to avoid harm to the plaintiff.⁵⁶

One of the traditional distinctions that courts draw when determining whether a duty exists is whether the defendant’s actions in relation to the plaintiff constituted misfeasance—an affirmative act—or nonfeasance—a

49. See PROSSER, *supra* note 20, § 56, at 340–43 (noting that a court will typically not find an individual liable for failing to come to a person’s aid, because one ordinarily does not have a duty to protect another from harm).

50. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 (2005); GOLDBERG & ZIPURSKY, *supra* note 18, at 77.

51. See *Cardi*, *supra* note 28, at 751–55; see also PROSSER, *supra* note 20, § 53, at 325–26 (“[D]uty’ is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”).

52. *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958).

53. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973) (“The rationale for this rule is that the user or consumer is entitled to make his own choice as to whether the product’s utility or benefits justify exposing himself to the risk of harm.”).

54. See GOLDBERG & ZIPURSKY, *supra* note 18, at 82; see also RESTATEMENT (SECOND) OF TORTS § 314A cmt. b (1965) (noting that a duty arising from a special relationship represents an exception to the general rule that a person does not have a duty to protect others from harm).

55. See GOLDBERG & ZIPURSKY, *supra* note 18, at 82.

56. See John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of Macpherson*, 146 U. PA. L. REV. 1733, 1832–44 (1998) (“The relationship between defendant and plaintiff actually can be used to explain why we expect defendants to take precautions against certain kinds of harm to a plaintiff . . .”).

failure to act.⁵⁷ Courts are more reluctant to find that a duty exists when the defendant has not engaged in an affirmative action that harmed the plaintiff, but has simply failed to act to prevent the plaintiff from harm.⁵⁸ The reason for this could be that “by ‘misfeasance’ the defendant has created a new risk of harm to the plaintiff, while by ‘nonfeasance’ he has at least made his situation no worse.”⁵⁹ A court will generally only recognize a duty if it determines that the defendant’s actions constituted a failure to warn the plaintiff of a risk when a “special relationship” existed between the parties.⁶⁰

Foreseeability also represents a pervasive element in courts’ determinations of duty.⁶¹ In most states, courts will determine whether the defendant owed a duty of care to the plaintiff by asking whether the risk, the injury, or the person injured were reasonably foreseeable.⁶² In the context of asbestos litigation, plaintiffs’ attorneys often present evidence that the defendants knew asbestos was dangerous and should have foreseen that contact with asbestos could lead to an increased chance of illness.⁶³ As a result, plaintiffs’ attorneys argue that defendants have a duty to protect the plaintiffs from exposure or, at the least, to warn them of the harm associated with handling asbestos.⁶⁴

Some scholars, as well as the *Third Restatement*, have criticized the pervasiveness of foreseeability in courts’ duty analyses.⁶⁵ They state that

57. See PROSSER, *supra* note 20, § 56, at 338–39 (“In the determination of the existence of a duty, there runs through much of the law a distinction between action and inaction.”); see also GOLDBERG & ZIPURSKY, *supra* note 18, at 118–19.

58. See RESTATEMENT (SECOND) OF TORTS § 314 (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”).

59. PROSSER, *supra* note 20, § 56, at 339. Courts will typically not impose a duty on an individual to rescue another person from a harm he has not created. For example, an “expert swimmer, with a boat and a rope at hand, who sees another drowning before his eyes, is not required to do anything at all about it, but may sit on the dock, smoke his cigarette, and watch the man drown.” *Id.* at 340.

60. See RESTATEMENT (SECOND) OF TORTS § 314A; see also *supra* notes 54–56 and accompanying text.

61. See Cardí, *supra* note 28, at 740; see also GOLDBERG & ZIPURSKY, *supra* note 18, at 78 (stating that the “notion of reasonably foreseeable victims . . . is today a standard doctrinal test for determining to whom a duty of care is owed”).

62. See, e.g., Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1258 n.47 (2009) (citing the highest state courts of forty-five states for the proposition that foreseeability represents a vital inquiry in their determinations of duty).

63. See Kevin Leahy, *Asbestos Exposure and the Law in the United States*, in ASBESTOS AND ITS DISEASES, *supra* note 8, at 346, 358 (“The notion of industry participants working together in collusion to prevent a full realization of the known and knowable hazards of asbestos . . . became standard fare in all jury trials.”); see also *infra* Part III.

64. *E.g.*, *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006); *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d 115 (N.Y. 2005); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008).

65. See Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039, 1046 (2001) (stating that foreseeability is “so open-ended [that it] can be used to explain any decision, even decisions directly opposed to each other”); see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. j (2005) (stating that courts should

courts use foreseeability to engage in fact-specific determinations that should be left for the jury to examine when it considers breach and proximate cause.⁶⁶ These scholars conclude that when courts analyze foreseeability they overstep their role by deciding questions of fact, because whether a defendant could foresee harm to a particular plaintiff or class of plaintiffs necessarily involves a factual inquiry.⁶⁷ These fact-specific decisions do not set a clear standard for courts to follow in future cases that involve slightly different facts.⁶⁸ Further, courts will sometimes use concepts like foreseeability to disguise the policy decisions that inform their opinions,⁶⁹ because a holding overtly based on policy determinations treads too closely on the territory of the legislature.⁷⁰

The *Third Restatement* attempts to solve these perceived inadequacies by suggesting a different standard by which courts should determine duty.⁷¹ Section 7(a) states that, “[a]n actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm,”⁷² thereby establishing a default duty of reasonable care when the defendant’s conduct was a cause-in-fact of the plaintiff’s injury.⁷³ Thus, under the *Third Restatement’s* approach, courts should not consider fact-specific criteria, like foreseeability, because they can presume that a duty exists.⁷⁴ This would leave questions of foreseeability to the jury.⁷⁵

The *Third Restatement*, however, does not presuppose duty in every circumstance. Section 7(b) states that, “[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting

leave determinations of foreseeability to the jury); *Cardi*, *supra* note 28, at 743 (noting that foreseeability has a “schizophrenic existence” in negligence law).

66. *See* *Cardi*, *supra* note 28, at 774–78; *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. j.

67. *See* *Cardi*, *supra* note 28, at 741 (noting that one of the problems with courts’ use of foreseeability in duty is that “it operates as a vehicle by which judges decide questions traditionally reserved for the jury”); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. j.

68. *See* William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 18–19 (1953) (noting that the case law about reasonable foreseeability is a “rope of sand, and offers neither certainty nor convenience”).

69. *See* *Cardi*, *supra* note 28, at 763 n.122 (“When judges refuse to recognize a duty in the teeth of foreseeable harm to others, they are making an exception, on public policy grounds, to the broad duty to avoid conduct threatening foreseeable harm to others.” (citing *Kelley*, *supra* note 65, at 1045)); *see also* Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 LA. L. REV. 1509, 1523 (1993) (“[J]udges should not rely on, or hide behind, words like: direct, remote, foreseeable, unforeseeable . . . and whatever other magic mumbo jumbo courts could use to obfuscate the policies that were really at the heart of their decisions.”).

70. *See* *Cardi*, *supra* note 28, at 767 (“[F]oreseeability feels safer than naked, legislative-like policy decisions.”).

71. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7.

72. *Id.* § 7(a).

73. *See id.* reporter’s note cmt. a.

74. *Id.*

75. *See id.* cmt. j; *see also* *Cardi*, *supra* note 28, at 794 (stating that if courts adopt the *Third Restatement*, then foreseeability will “no longer [be] a presumed matter for the judge, but a presumed matter for the jury”).

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.”⁷⁶ This encourages courts that find no duty to state their policy concern explicitly in order to increase transparency in their decision-making process.⁷⁷ The provision does, however, state that courts should only reach a finding of no duty based on policy concerns “in exceptional” cases.⁷⁸ Courts can also deny liability by deciding breach and proximate cause as a matter of law,⁷⁹ which forces courts to consider whether no reasonable jury would have decided otherwise—a deferential standard.⁸⁰

As this Note will discuss in Part III, whether a court focuses on the relationship between the parties, the foreseeability of harm, or the characterization of the defendants’ actions as nonfeasance often proves determinative.⁸¹ Unlike employees, take-home asbestos plaintiffs do not have a special relationship with either the employers or the premises owners.⁸² Therefore, courts that focus on this aspect of duty often find that there is no duty.⁸³ Similarly, if the court characterizes the actions of the defendants as nonfeasance because they failed to warn their employees instead of actively maintaining an unsafe environment, it will also find that no duty existed.⁸⁴ On the other hand, as this Note will mention in Part II.A below, many employers knew about the hazards of asbestos, and after 1972 OSHA set forth regulations that governed asbestos exposure.⁸⁵ Courts point to these facts when stating that the risk of harm to take-home asbestos plaintiffs was foreseeable, and that employers and/or premises owners should have taken steps to decrease this risk.⁸⁶

C. The Basics of Strict Liability

Strict liability describes when an actor faces liability solely as a result of causing harm to another individual, without an inquiry into whether he

76. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7(b).

77. *See id.* reporter’s note cmt. j (“[A]rticulating the policy or principle at stake will contribute to transparency, clarity, and better understanding of tort law.”).

78. *Id.* § 7(b).

79. *Id.* § 7 cmt. i.

80. *Id.*

81. *See infra* Part III. The Supreme Court of New Jersey and the Tennessee Supreme Court focused on foreseeability and found that a duty existed to take-home asbestos plaintiffs. *See infra* Part III.A. The New York Court of Appeals, the Delaware Supreme Court, the Michigan Supreme Court, and the Supreme Court of Georgia, on the other hand, used lack of a relationship and nonfeasance to deny that a duty existed. *See infra* Part III.B.

82. *See infra* Part III.B.1–3 (discussing the opinions of the New York Court of Appeals, the Michigan Supreme Court, and the Supreme Court of Georgia, which all stress that the defendants owed no duty to third-party nonemployees).

83. *See infra* Part III.B.1–3.

84. *See infra* Part III.B.1, 4 (discussing the opinions of the New York Court of Appeals and the Delaware Supreme Court).

85. *See infra* notes 106–09 and accompanying text.

86. *See infra* Part III.A.1–2 (discussing the opinions of the Supreme Court of New Jersey and the Tennessee Supreme Court).

behaved in a reasonable manner under the circumstances.⁸⁷ Courts have adopted this concept regarding product defects.⁸⁸ Justice Roger J. Traynor of the Supreme Court of California articulated the basis for this theory in his concurring opinion in *Escola v. Coca Cola Bottling Co. of Fresno*⁸⁹:

Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks.⁹⁰

Manufacturers stand in the best position to know the dangers of defectively produced goods, making it their responsibility to ensure the safety of the product when handled by consumers.⁹¹ Therefore, to bring a successful strict product liability claim, a plaintiff must only prove that he suffered an injury caused by the defendant's dangerously defective product in the normal course of using that product.⁹² As this Note will discuss in Part II.B, product liability suits against the manufacturers of asbestos experienced enormous success when the hazards of the product became well known.⁹³

II. HISTORY OF ASBESTOS: FROM "MAGIC MINERAL" TO "OCCUPATIONAL HEALTH DISASTER"

The magical qualities of asbestos, the mineral that refuses to burn, were known as far back as the days of Charlemagne who supposedly amazed his guests when he threw a tablecloth made with asbestos into the fire and retrieved it unscathed.⁹⁴ Part II.A of this Note details the history of asbestos use and how the mineral's positive qualities became overshadowed by the severe health hazard it creates for anyone who regularly handles it. Part II.B recounts the growth of asbestos litigation: what started as a relatively small number of workers' compensation claims soon ballooned to

87. See RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965); see also PROSSER, *supra* note 20, § 75, at 494.

88. See RESTATEMENT (SECOND) OF TORTS § 402A ("One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer . . ."); see also GOLDBERG & ZIPURSKY, *supra* note 18, at 284–88.

89. 150 P.2d 436 (Cal. 1944).

90. *Id.* at 443.

91. See *id.* When the *Restatement (Second) of Torts* adopted this view, the theory of strict product liability became a "national standard." Leahy, *supra* note 63, at 354.

92. See GOLDBERG & ZIPURSKY, *supra* note 18, at 274–76; see also RESTATEMENT (SECOND) OF TORTS § 402A.

93. See *infra* notes 142–58 and accompanying text; see also GOLDBERG & ZIPURSKY, *supra* note 18, at 271 (noting that product liability suits became a "staple of tort litigation" and were brought as a result of injuries from, among others products, "foodstuffs, vehicles, appliances, drugs, cosmetics, tobacco, alcohol, weapons, airplanes, boats, asbestos, construction materials, paints, fertilizers, medical devices, [and] tools").

94. See IRVING J. SELIKOFF & DOUGLAS H. LEE, ASBESTOS AND DISEASE 5 (1978).

hundreds of thousands of claims against companies in every industry. Moreover, the defendants have grown more “peripheral,” moving from asbestos manufacturers, to premises owners, to third-party product manufacturers. Lastly, Part II.C introduces the emergence of “peripheral plaintiffs,” individuals who were indirectly exposed to asbestos by employees who worked around the mineral on a daily basis.

A. Overview of Asbestos

The term “asbestos” refers to several naturally occurring minerals, including chrysotile, crocidolite, amosite, anthophyllite, tremolite, and actinolite that exist as bundles of fibers.⁹⁵ These fibers have durable and fire resistant qualities, and can be woven together.⁹⁶ Due to these characteristics, companies mined asbestos extensively and used it in a variety of different industries.⁹⁷ The building and construction industries used it pervasively for insulation, fireproofing, roofing, and sound absorption.⁹⁸ The shipbuilding industry used asbestos to insulate boilers, steam pipes and hot water pipes.⁹⁹ The automobile industry used it in vehicle brake shoes and clutch pads.¹⁰⁰

Although asbestos has extremely useful properties, researchers discovered that the minerals posed serious health hazards.¹⁰¹ Reports of a link between asbestos and lung cancer appeared as early as the 1930s.¹⁰² Scientists in England studied individuals who worked in asbestos mines and discovered that they had a high risk of developing lung cancer as a result of

95. See *See Toxic Substances Control Act*, 15 U.S.C. § 2642(3) (2006); *Standards for Exposure to Asbestos Dust*, 29 C.F.R. § 1910.1001(b) (2011).

96. See CARROLL ET AL., *supra* note 7, at 13; see also Christopher J. O’Malley, Note, *Breaking Asbestos Litigation’s Chokehold on the American Judiciary*, 2008 U. ILL. L. REV. 1101, 1101–02 (citing RACHEL MAINES, ASBESTOS AND FIRE: TECHNOLOGICAL TRADE-OFFS AND THE BODY AT RISK 19 (2005) (stating that the lowest fire death rate in the United States occurred simultaneously with the use of 1.5 billion pounds of asbestos)).

97. See *Fact Sheet: Asbestos Exposure and Cancer Risk*, *supra* note 4; see also SELIKOFF & LEE, *supra* note 94, at 16–20 (noting that some asbestos products included asbestos yarn, cloth, tape, paper, pipes, and insulation).

98. See *Fact Sheet: Asbestos Exposure and Cancer Risk*, *supra* note 4; see also Craighead, *supra* note 9, at 51–54.

99. See *Fact Sheet: Asbestos Exposure and Cancer Risk*, *supra* note 4. The United States government commissioned the use of asbestos to fireproof ships during World War II. During that time, 4.5 million Americans were employed in shipyards and exposed to the risk of asbestos inhalation. Paul D. Carrington, *Asbestos Lessons: The Consequences of Asbestos Litigation*, 26 REV. LITIG. 583, 586–87 (2007).

100. See *Fact Sheet: Asbestos Exposure and Cancer Risk*, *supra* note 4; see also Craighead, *supra* note 9, at 63–68.

101. See BARRY L. CASTLEMAN, ASBESTOS: MEDICAL AND LEGAL ASPECTS 5–9 (5th ed. 2005); SELIKOFF & LEE, *supra* note 94, at 20–30.

102. See Richard Doll, *Mortality from Lung Cancer in Asbestos Workers*, 12 BRIT. J. INDUS. MED. 81, 81 (1955) (noting that in 1935, British scientists Kenneth Lynch and Atmar Smith published the first case report of a patient who developed lung cancer as a result of asbestos exposure). Well before these epidemiological studies surfaced, the Ancient Romans in the first century also recognized the health hazards associated with asbestos. Pliny the Elder even suggested that slaves who handled asbestos should use transparent bladder skins as respirators to prevent asbestos fiber inhalation. Ira Pilchen, *Asbestos, “The Magic Mineral,” Creates Toxic Tort “Avalanche,”* 75 JUDICATURE 320 (1992).

their exposure to asbestos, with the risk increasing in proportion to the length of employment.¹⁰³ In the United States, Dr. Irving Selikoff conducted the first groundbreaking work on asbestos-related diseases while at the Mt. Sinai School of Medicine in New York in 1964.¹⁰⁴ Like the British studies, this study also found a causal connection between asbestos exposure and an increased risk of cancer.¹⁰⁵ When Congress eventually passed the Occupational Safety and Health Act¹⁰⁶ in 1970 and created OSHA, the agency quickly sought to regulate asbestos.¹⁰⁷

In 1972, OSHA set forth a series of strict guidelines for controlling asbestos exposure in the workplace.¹⁰⁸ These regulations established a permissible exposure limit, as well as requirements for providing employees with respiratory equipment while handling asbestos, special clothing for use during the workday, changing rooms, and laundry facilities in order to isolate the asbestos-containing clothing.¹⁰⁹ As evidence of asbestos's harmful effects mounted, the Environmental Protection Agency proposed banning all products containing asbestos.¹¹⁰ Although the proposal was set aside,¹¹¹ some products containing asbestos were banned.¹¹²

Ten years after the proposed ban, one journalist called asbestos "the worst occupational health disaster in U.S. history."¹¹³ Researchers have estimated that from 1985 to 2009, more than 225,000 deaths would occur as

103. See Doll, *supra* note 102, at 86; see also CASTLEMAN, *supra* note 101, at 42–44.

104. See CARROLL ET AL., *supra* note 7, at 14. Although significant research on asbestos exposure was not conducted in the United States until the 1960s, evidence exists that the asbestos industry knew about the dangers of the product since the 1930s. Records from companies like Johns-Manville indicate that corporate officials concealed the risks of asbestos exposure from their workers. See Hensler, *supra* note 10, at 258.

105. See CARROLL ET AL., *supra* note 7, at 14.

106. Pub. L. No. 94-469, 84 Stat. 1590 (codified as amended at 29 U.S.C. § 651 (2006)) ("The Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . .").

107. See CARROLL ET AL., *supra* note 7, at 13; see also CASTLEMAN, *supra* note 101, at 269 ("The asbestos industry knew [asbestos] would be one of the first regulatory targets of the Occupational Safety and Health Administration (OSHA).").

108. See Standards for Exposure to Asbestos Dust, 29 C.F.R. § 1910 (2011).

109. See *id.* The 1972 regulations demonstrated an effort to warn and protect not only the employees, but also those who may come into contact with asbestos carried on the employees' person from harm. See *id.*

110. See Asbestos; Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions, 54 Fed. Reg. 29,460, 29,467 (July 12, 1989) ("EPA has concluded that the continued manufacture, importation, and processing of the asbestos-containing products that are identified in the rule poses an unreasonable risk of injury to human health.").

111. See *Corrosion Proof Fittings v. E.P.A.*, 947 F.2d 1201, 1229–30 (5th Cir. 1991); see also CASTLEMAN, *supra* note 101, at 454.

112. See CARROLL ET AL., *supra* note 7, at 13. It is important to note that asbestos is only harmful once it is disturbed. When disturbed, inhalation of its fibers can be lethal. *Fact Sheet: Asbestos Exposure and Cancer Risk*, *supra* note 4.

113. Dennis Cauchon, "Nobody Can Plead Ignorance": At Least 1 Million Likely To Die Over 30 Years in Poor Nations, USA TODAY, Feb. 8, 1999, at 4A. Others, however, point out asbestos's lifesaving properties. Because of its fire-resistant qualities "[i]t is not unlikely that tens or even hundreds of thousands of Americans were spared a scorching death because of the use of asbestos." Carrington, *supra* note 99, at 587.

a result of asbestos exposure from 1940 to 1979.¹¹⁴ One of the most salient points about asbestos-related diseases is that they have a very long latency period; symptoms can surface more than fifteen years after an individual's first exposure.¹¹⁵ As a result, many people will not show symptoms until decades after they have already left their places of employment.¹¹⁶

Doctors have linked several different cancers to asbestos exposure.¹¹⁷ Mesothelioma represents the most severe of the asbestos-related cancers and affects the lining of the chest or abdomen.¹¹⁸ Asbestos exposure is the only cause of mesothelioma, and the disease is always fatal, with death occurring from several months to a year or two after diagnosis.¹¹⁹ An individual does not need exposure to high levels of asbestos to contract mesothelioma.¹²⁰ Asbestos exposure can also cause various other cancers, such as lung cancer.¹²¹ Mesothelioma and lung cancer represent the two most common malignant diseases related to asbestos exposure.¹²² However, smoking and other factors can also cause lung cancer, which can complicate the analysis of causation in asbestos cases.¹²³

Asbestos exposure also causes various nonmalignant diseases of the lungs.¹²⁴ Asbestosis results in a scarring of the lung tissue that occurs when an individual inhales asbestos fibers and they become lodged in the lungs.¹²⁵ Asbestosis is usually not fatal and is often not debilitating.¹²⁶ The severity of the disease increases with the level of exposure and can range

114. See CARROLL ET AL., *supra* note 7, at 16.

115. See *Asbestos: Health Facts*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY (Apr. 1, 2008), http://www.atsdr.cdc.gov/asbestos/asbestos/health_effects/index.html; see also David Weill, *Diagnostic Features and Clinical Evaluation of the Asbestos-Associated Diseases*, in *ASBESTOS AND ITS DISEASES*, *supra* note 8, at 253, 254.

116. See *Asbestos: Health Facts*, *supra* note 115; see also CASTLEMAN, *supra* note 101, at 196.

117. See *Asbestos: Health Facts*, *supra* note 115 (noting that factors that impact the development of disease include exposure concentration, duration, and frequency, as well as the chemical composition of the specific asbestos fibers).

118. See *id.*; see also CARROLL ET AL., *supra* note 7, at 17; SELIKOFF & LEE, *supra* note 94, at 243–44.

119. See CARROLL ET AL., *supra* note 7, at 17; see also Harvey I. Pass et al., *Therapeutic Approaches to Malignant Mesothelioma*, in *ASBESTOS AND ITS DISEASES*, *supra* note 8, at 326, 326–27.

120. See CARROLL ET AL., *supra* note 7, at 17; CASTLEMAN, *supra* note 101, at 429 (noting that "levels of exposure insufficient to produce asbestosis can nonetheless cause cancer").

121. See *Fact Sheet: Asbestos Exposure and Cancer Risk*, *supra* note 4 (stating that some studies suggest that asbestos exposure can increase risks for gastrointestinal and colorectal cancers, as well as cancers of the throat, kidneys, esophagus, and gallbladder); see also Richard Attanoos, *Lung Cancer Associated with Asbestos Exposure*, in *ASBESTOS AND ITS DISEASES*, *supra* note 8, at 172, 172–86.

122. See CARROLL ET AL., *supra* note 7, at 17.

123. See *id.* (noting that because of the high rate of smoking in blue-collar industries where workers were exposed to asbestos, defendants often try to associate the plaintiffs' lung cancer with smoking rather than asbestos exposure); see also Attanoos, *supra* note 121, at 174.

124. See *Fact Sheet: Asbestos Exposure and Cancer Risk*, *supra* note 4.

125. See CARROLL ET AL., *supra* note 7, at 17; see also CASTLEMAN, *supra* note 101, at 9–10.

126. John E. Craighead, *Benign Pleural and Parenchymal Diseases Associated with Asbestos Exposure*, in *ASBESTOS AND ITS DISEASES*, *supra* note 8, at 139, 145–46.

from debilitating to only mildly impairing.¹²⁷ Other results of asbestos exposure include pleural thickening—a scarring of the membrane that surrounds the lungs—and pleural effusions, collections of fluid between layers of tissue lining the lungs or chest cavity.¹²⁸ As employees began to develop symptoms of these diseases, thousands of claims poured into state and federal courts across the country.¹²⁹

B. An “Elephantine Mass” of Asbestos Litigation

The history of asbestos has been described as “a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s.”¹³⁰ As discussed, the latency period for asbestos-related diseases could last as long as thirty or forty years, and therefore, employees did not bring claims until decades after their initial exposures.¹³¹ But when they did bring suit, employees first turned to the remedy of workers’ compensation.¹³² With epidemiological studies as evidence, employees sought to recover lost wages and medical costs resulting from asbestos-related diseases.¹³³

Many of these claims proved unsuccessful, however, because workers’ compensation administrators often stated that the nexus between the employee’s disease and the asbestos exposure that occurred decades ago was too tenuous, or that the statute of limitations for bringing claims had passed.¹³⁴ The employees that did get compensation typically received only a fraction of their lost wages and no damages for pain and suffering.¹³⁵ Moreover, the workers’ compensation system did not provide a strong incentive for employers to stop utilizing asbestos.¹³⁶

When workers’ compensation statutes proved unsatisfactory, employees turned to tort law and began to file claims against asbestos manufacturers for negligence and strict products liability.¹³⁷ Some states, however,

127. See CARROLL ET AL., *supra* note 7, at 17.

128. See *id.*; see also *Fact Sheet: Asbestos Exposure and Cancer Risk*, *supra* note 4.

129. See GRIFFIN B. BELL, ASBESTOS LITIGATION AND JUDICIAL LEADERSHIP: THE COURTS’ DUTY TO HELP SOLVE THE ASBESTOS LITIGATION CRISIS 2–3 (2002) (noting that 20,000 cases were pending since 1984).

130. JUDICIAL CONFERENCE OF THE U.S. AD HOC COMM. ON ASBESTOS LITIG., REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2–3 (1991).

131. See *supra* notes 115–16 and accompanying text.

132. See Hensler, *supra* note 10, at 259; see also CASTLEMAN, *supra* note 101, at 143–45.

133. See Hensler, *supra* note 10, at 259.

134. See *id.* at 259–60; see also CASTLEMAN, *supra* note 101, at 170 (stating that workers’ compensation claims “appear to have been bitterly contested, with payments delayed through every legal means”).

135. See Leahy, *supra* note 63, at 350 (noting that workers often received only half to two-thirds of lost wages); see also CASTLEMAN, *supra* note 101, at 197 (stating that, when exposure occurred a long time ago, compensation awards could be “pitifully small”).

136. See Leahy, *supra* note 63, at 350 (noting that the small amount that employers had to compensate their employees did not prove to be a successful deterrent).

137. See CASTLEMAN, *supra* note 101, at 197–98 (noting that because of the difficulty of getting adequate workers’ compensation “it is not surprising” that workers began to file civil suits against asbestos manufacturers); see also Rebecca Leah Levine, *Clearing the Air:*

prevented plaintiffs from bringing claims because their exposure occurred many years before, and the statute of limitations had already run¹³⁸: the permissible time to bring a claim began with the first instance of exposure, and had therefore expired.¹³⁹ State legislatures realized that because of the long latency period, plaintiffs could not be expected to file claims before noticing that they were sick.¹⁴⁰ Legislatures therefore changed the statute of limitations to require plaintiffs to file claims within a year or two after they knew, or should have known, of their injury.¹⁴¹

The first significant success for plaintiffs occurred in 1973 when the court in *Borel v. Fibreboard Paper Products Corp.*¹⁴² held that manufacturers of asbestos-containing products could be strictly liable for injuries resulting from exposure to asbestos.¹⁴³ The decision in *Borel* gave employees the confidence to begin to bring more product liability lawsuits.¹⁴⁴ Moreover, as a result of the asbestos standards that OSHA set in 1972, plaintiffs’ attorneys could argue that asbestos manufacturers did not attempt to regulate levels of exposure, further bolstering their claims.¹⁴⁵

Plaintiffs found increased success after legislatures adjusted the typical requirements of proving causation to account for the long latency period for asbestos-related diseases.¹⁴⁶ In a product liability case, plaintiffs must usually prove that the defendant’s product caused them harm.¹⁴⁷ In the case of asbestos exposure, however, plaintiffs must prove that the defendant’s product represented a substantial factor in bringing about their disease and that the product was at the site and in the proximity of where the plaintiff worked.¹⁴⁸ Often plaintiffs meet this burden of proof through circumstantial evidence.¹⁴⁹ In other contexts, plaintiffs can name the

Ordinary Negligence in Take-Home Asbestos Exposure Litigation, 86 WASH. L. REV. 359, 370 (2011). Employees could not bring separate claims against their employers under common law tort liability for injuries relating to asbestos exposure when there existed an applicable workers’ compensation law. Daniel J. Penofsky, Annotation, *Asbestos Injury Litigation*, 60 AM. JUR. TRIALS § 39 (1996).

138. See CARROLL ET AL., *supra* note 7, at 22.

139. See *id.*; see also Joel E. Smith, Annotation, *When Statute of Limitations Begins to Run as to Cause of Action for Development of Latent Industrial or Occupational Disease*, 1 A.L.R. 4TH 117 (1980) (“[W]here an injury . . . is sustained in consequence of the wrongful act of another, the statute of limitations attaches at once, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.”).

140. See CARROLL ET AL., *supra* note 7, at 22–23.

141. See *id.*

142. 493 F.2d 1076 (5th Cir. 1973).

143. See *id.* at 1081; see also CASTLEMAN, *supra* note 101, at 319 (calling the case “precedent setting”).

144. See CARROLL ET AL., *supra* note 7, at 2; Hensler, *supra* note 10, at 260 (“*Borel* opened the doors to the courthouse for workers who had been injured by exposure to asbestos.”).

145. See Leahy, *supra* note 63, at 357 (“Plaintiffs could now rely on the OSHA standards as a measure of reasonable conduct.”).

146. See Christopher W. Jackson, Note, *Taking Duty Home: Why Asbestos Litigation Reform Should Give Courts the Confidence to Recognize A Duty to Second-Hand Exposure Victims*, 45 WAKE FOREST L. REV. 1157, 1162–63 (2010).

147. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

148. See 63 AM. JUR. 2D *Products Liability* § 72 (2011).

149. See *id.*

products that they handled, but in asbestos suits plaintiffs often cannot remember the names of products they worked with thirty or forty years ago.¹⁵⁰ Therefore, some courts now allow testimony from co-workers stating that other employees used the defendant's asbestos-containing products at the worksite at the same time that the plaintiff worked there.¹⁵¹ Others require that the plaintiff demonstrate that the defendant's product was used frequently at the worksite, and that the plaintiff regularly worked in its proximity.¹⁵² The long latency period unique to asbestos-related diseases has thus resulted in certain accommodations for proving causation.¹⁵³

The growth of asbestos litigation put a large strain on asbestos manufacturers.¹⁵⁴ By 1982, for example, plaintiffs filed 6,000 cases a year against Johns-Manville,¹⁵⁵ and at the end of that year the asbestos-producing giant had filed for bankruptcy.¹⁵⁶ As claims flooded the courts, more and more corporations were forced into bankruptcy.¹⁵⁷ Researchers have estimated that by 2002, more than seventy-five companies declared bankruptcy as a result of asbestos litigation, and asbestos plaintiffs received more than \$70 billion.¹⁵⁸

As asbestos manufacturers went bankrupt, plaintiffs "cast their litigation net wider" and turned to more "peripheral" defendants.¹⁵⁹ Many plaintiffs

150. *See id.* ("A plaintiff injured by asbestos fibers often does not know exactly when or where he or she was injured and therefore is unable to describe the details of how such injury occurred.").

151. *E.g.*, *Lane v. Celotex Corp.*, 782 F.2d 1526, 1528 (11th Cir. 1986) ("[R]ecover will require the plaintiff to show that he was exposed to defendant's asbestos-containing product by working with or in close proximity to the product." (quoting *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1481 (11th Cir. 1985))).

152. *E.g.*, *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162–63 (4th Cir. 1986) ("To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked.").

153. For a critique of what he deems the loosening of traditional elements of tort law, see BELL, *supra* note 129, at 11, which states that plaintiffs will "invariably identify the product of solvent companies that have available funds to pay inventory settlements" and that such a system "rarely accommodates a determination of whether plaintiffs made valid product identification."

154. *See Hensler, supra* note 10, at 261 (noting that the filing of claims quickly increased in states that contained industries like shipbuilding, which had a high risk of asbestos exposure); *see also* CASTLEMAN, *supra* note 101, at 198.

155. *See Leahy, supra* note 63, at 361.

156. *See id.*; *see also* CASTLEMAN, *supra* note 101, at 199. Many in the industry felt shocked by the bankruptcy of Johns-Manville, which had advertised itself as the "largest producer of asbestos-based products in the United States." Leahy, *supra* note 63, at 361 n.19.

157. *See Anita Bernstein, Asbestos Achievements*, 37 SW. U. L. REV. 691, 691 (2008); *see also* CASTLEMAN, *supra* note 101, at 201.

158. *See Bernstein, supra* note 157, at 691.

159. *See* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 CONN. INS. L.J. 477, 484–85 (2006) (quoting Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14); Susan Warren, *Asbestos Quagmire: Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, WALL ST. J., Jan. 27, 2003, at B1; *see also* CARROLL ET AL., *supra* note 7, at 31 ("Plaintiff attorneys sought out new defendants and pressed defendants that they had heretofore treated as peripheral to the litigation for more money.").

filed claims against premises owners claiming that they behaved negligently in failing to exercise reasonable care to protect the plaintiffs from asbestos-related harm.¹⁶⁰ In a typical claim against a premises owner, an employee of an independent contractor hired by the owner will bring suit.¹⁶¹ Because the employees are invitees, or “business visitors” of the premises owner, the premises owner can be liable for harms that the employees suffer if it knew, or should have known, of the defective condition on its premises.¹⁶²

Although plaintiffs initially limited their claims to asbestos manufacturers, more recently they have targeted much more numerous and varied companies.¹⁶³ Researchers estimate that, as of 2002, over 6,000 different companies spanning “the full range of American business” have been named as defendants in asbestos personal injury suits.¹⁶⁴

Along with premises owners, other “peripheral defendants” now include third-party product manufacturers, who produced parts that other parties later insulated with asbestos.¹⁶⁵ For example, plaintiffs bring these types of claims against the manufacturers of pipes or valves that the purchasers would insulate with asbestos in order to improve functioning.¹⁶⁶ Courts have approached these cases by asking whether the manufacturers had a duty to prevent the plaintiffs from asbestos-related harms when the manufacturers did not themselves use asbestos with their products.¹⁶⁷ Those courts that determine a duty existed find that the manufacturers often knew, or should have known, that their products would be used in conjunction with asbestos.¹⁶⁸ Thus, the defendants should have foreseen that the people who ultimately handled their products would become exposed to the hazards of asbestos.¹⁶⁹ Most courts, however, have rejected

160. See, e.g., *In re All Me. Asbestos Litig.*, 581 F. Supp. 963, 977 (D. Me. 1984); see also CASTLEMAN, *supra* note 101, at 751.

161. See Kenneth R. Meyer et al., *Emerging Trends in Asbestos Premises Liability Claims: Understanding Current Theories of Liability and Proposed Legislation to Protect Your Client*, 72 DEF. COUNS. J. 241, 242 (2005).

162. See RESTATEMENT (SECOND) OF TORTS §§ 332, 343 (1965). In some situations courts will state that the premises owner did not retain any control over the work of the independent contractor and therefore should not be held liable. E.g., *Purcell v. Varian Med. Sys., Inc.*, No. A100725, 2004 WL 639852, at *2 (Cal. Ct. App. Mar. 30, 2004).

163. See CARROLL ET AL., *supra* note 7, at 49; see also CASTLEMAN, *supra* note 101, at 745 (noting that by 2004 asbestos litigation “involved thousands of corporate defendants” ranging from manufacturers to premises owners and insurers).

164. See CARROLL ET AL., *supra* note 7, at 49.

165. See Paul J. Riehle et al., *Products Liability for Third Party Replacement or Connected Parts: Changing Tides from the West*, 44 U.S.F. L. REV. 33, 38 (2009); see also Beth M. Kramer et al., *Recent Developments in Toxic Torts and Environmental Law*, 46 TORT TRIAL & INS. PRAC. L.J. 635, 638–39 (2011).

166. E.g., *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 495 (Wash. 2008).

167. See *id.*; see also *O’Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012).

168. See *Sawyer v. A.C. & S., Inc.*, No. 111152/99, 2011 WL 3764074, at *2 (N.Y. Sup. Ct. June 24, 2011) (“[A] manufacturer’s liability for third-party component parts must be determined by the degree to which injury from the component parts is foreseeable to the manufacturer.”); see also *Chicano v. Gen. Elec. Co.*, No. Civ.A. 03-5126, 2004 WL 2250990, at *6 (E.D. Pa. Oct. 5, 2004) (stating that there is “at least a genuine issue of material fact” as to whether the defendant could foresee that its product would be used with asbestos-containing insulation).

169. See *Sawyer*, 2011 WL 3764074, at *3.

these types of suits, holding that a manufacturer of a component part is not responsible for what is added to its product in the stream of commerce.¹⁷⁰ Although these types of claims have not met with great success,¹⁷¹ they nevertheless represent the widening of claims to more and more peripheral parties.

Faced with what the Supreme Court characterized as an “asbestos-litigation crisis,”¹⁷² Congress has tried numerous times to pass asbestos reforms. In 1990, Chief Justice William H. Rehnquist appointed the U.S. Judicial Conference Ad Hoc Committee on Asbestos Litigation to examine the effects of the crisis.¹⁷³ A report published by the Committee in 1991 concluded that “the situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions . . . which the courts are ill-equipped to meet effectively.”¹⁷⁴ Notwithstanding the Committee’s call for Congressional action, attempts to pass legislation addressing the mass of asbestos claims have failed.¹⁷⁵ In 2005, the Senate Judiciary Committee approved the Fairness in Asbestos Injury Resolution Act,¹⁷⁶ which would have established a \$140 billion National Asbestos Trust Fund comprised of money from different bankrupt estates, as well as from companies that currently face asbestos liability.¹⁷⁷ The bill, however, never passed the Senate.¹⁷⁸

C. *The “Specter of Limitless Liability”: Take-Home Asbestos Cases*

The new frontier for asbestos litigation has seen the emergence of take-home asbestos cases.¹⁷⁹ Alternatively referred to as “secondary” or “bystander” exposure cases, these claims are typically brought by members of the employee’s household who become exposed to asbestos through contact with the employee’s work clothes or with the employee’s person.¹⁸⁰

170. See *O’Neil*, 266 P.3d at 996; see also *Braaten*, 198 P.3d at 498 (stating that its decision is “in accord with the majority rule nationwide: a manufacturer’s duty to warn is restricted to warnings based on the characteristics of the manufacturer’s own products” (internal quotation marks omitted)).

171. See *Braaten*, 198 P.3d at 498.

172. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

173. See BELL, *supra* note 129, at 3.

174. See *id.* (quoting JUDICIAL CONFERENCE OF THE U.S. AD HOC COMM. ON ASBESTOS LITIG., *supra* note 130, at 2 (1991)). Some of the specific problems that the Committee pointed to include long delays, the same issues being relitigated, high transaction costs, and the possibility that future claimants may not be able to recover as a result of the diminishing of assets. *Id.* at 3.

175. See Lester Brickman, *An Analysis of the Financial Impact of S. 852: The Fairness in Asbestos Injury Resolution Act of 2005*, 27 CARDOZO L. REV. 991, 1003–06 (2005).

176. S. 852, 109th Cong. (2005).

177. See Carrington, *supra* note 99, at 596.

178. See *id.*

179. See Behrens & Cruz-Alvarez, *supra* note 11, at 1. Behrens and Cruz-Alvarez note the evolution of asbestos litigation. In the beginning, it involved plaintiffs suing asbestos products manufacturers. *Id.* Then, plaintiffs would bring claims against “peripheral defendants” like premises owners because the manufacturers had filed for bankruptcy. *Id.* Now, the litigation has moved to “peripheral plaintiffs” who seek to hold premises owners liable for secondary exposure. *Id.*

180. See Behrens, *supra* note 14, at 545–46.

Take-home exposure plaintiffs bring claims against, among other defendants, the employers, and often the premises owners, particularly in cases where the employee worked for an independent contractor.¹⁸¹ The central issue in these cases is whether the defendant owed a duty to the plaintiff to prevent him from the harm associated with asbestos exposure.¹⁸²

Although employees typically cannot bring a claim against their employers because of workers’ compensation statutes, take-home asbestos plaintiffs do not face this restriction.¹⁸³ As will be discussed in greater detail in Part III, these plaintiffs often assert that the employer breached its duty of care by failing to warn its employees of the dangers of asbestos exposure or was negligent in failing to maintain a safe working environment.¹⁸⁴ Courts wrestling with the issue of whether to apply a duty of care have utilized many of the factors discussed in Part I.B above, such as foreseeability, the nature of the relationship between the parties, and whether the defendants’ actions constituted misfeasance or nonfeasance.¹⁸⁵ The history of asbestos litigation has also informed the courts decisions, and the policy implications of their holdings often play a role in duty determinations.¹⁸⁶

III. STATE SPLIT ON WHETHER EMPLOYERS OWE A DUTY TO FAMILY MEMBERS INJURED BY TAKE-HOME ASBESTOS

Part III details the conflict between state courts that determine that employer and landowner defendants owe a duty to third-party plaintiffs to protect them from asbestos-related injuries, and state courts that hold that the defendants owe no duty to third-party plaintiffs.

A. States That Find Employers Owe a Duty

Part III.A. of this Note examines the opinions of the Supreme Court of New Jersey and the Tennessee Supreme Court, which both held that landowners and employers owe a duty to take-home asbestos plaintiffs to protect them from asbestos-related injuries. In determining that a duty existed, both courts relied heavily on the foreseeability of the harm to the plaintiff.

181. See “Take-Home” Exposure Claims on the Rise, 39 Prod. Safety & Liability Rep. (BNA) 1229 (Nov. 7, 2011).

182. See *id.*

183. See *supra* notes 132–37 and accompanying text.

184. E.g., *Price v. E.I. Dupont de Nemours & Co.* 26 A.3d 162 (Del. 2011); *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208 (Ga. 2005); *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d 115 (N.Y. 2005); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008).

185. See *Price*, 26 A.3d 162; *CSX Transp., Inc.*, 608 S.E.2d 208; *In re Certified Question from the Fourteenth Dist. Ct. App. of Tex.*, 740 N.W.2d 206 (Mich. 2007); *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006); *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d 115; *Satterfield*, 266 S.W.3d 347.

186. See *Price*, 26 A.3d 162; *CSX Transp., Inc.*, 608 S.E.2d 208; *In re Certified Question*, 740 N.W.2d 206; *Olivo*, 895 A.2d 1143; *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d 115; *Satterfield*, 266 S.W.3d 347.

1. New Jersey: *Olivo v. Owens-Illinois, Inc.*

In *Olivo v. Owens-Illinois*,¹⁸⁷ the Supreme Court of New Jersey examined the duty of a landowner to spouses handling workers' asbestos-covered clothing.¹⁸⁸ The plaintiff, Anthony Olivo, worked as a steamfitter and welder for thirty-seven years between 1947 and 1984.¹⁸⁹ Independent contractors hired him to work at different sites in New Jersey, including defendant Exxon Mobil's refinery.¹⁹⁰ During the course of his duties, Mr. Olivo routinely worked with asbestos-containing products such as pipe covering and gaskets.¹⁹¹ When Mr. Olivo came home each evening, he removed his asbestos-laden clothes, and left them for his wife, Eleanor Olivo, to wash.¹⁹² Doctors eventually diagnosed Mr. Olivo with a non-malignant asbestos-related disease, while Mrs. Olivo was diagnosed with mesothelioma and died a year later.¹⁹³

Mr. Olivo, who brought suit on his wife's behalf, alleged that Exxon Mobil breached its duty to maintain a safe working environment by failing to protect him and Mrs. Olivo from asbestos exposure.¹⁹⁴ In turn, Exxon Mobil filed a motion for summary judgment, claiming that it owed no duty to Mrs. Olivo because she did not sustain injuries on its premises.¹⁹⁵ The trial court agreed with Exxon Mobil and granted the motion, stating that it would not be "fair or just"¹⁹⁶ to impose a duty on a landowner to prevent injuries that occurred off premises.¹⁹⁷ The Appellate Division reversed, holding that Exxon Mobil should have foreseen harm to Mrs. Olivo and that it stood in the best position to prevent the harm because the company could have warned the workers or provided changing facilities to minimize the risk of exposure.¹⁹⁸

In affirming the Appellate Division's decision, the Supreme Court of New Jersey engaged in a two-step analysis to determine whether Exxon Mobil owed a duty of reasonable care to Mrs. Olivo.¹⁹⁹ First, the court determined that the defendant should have foreseen the risk of harm to an individual like Mrs. Olivo.²⁰⁰ The court relied on a 1937 report for the petroleum industry, as well as hygiene texts dating back to 1916, to determine that Exxon Mobil knew of the dangers associated with prolonged asbestos exposure.²⁰¹ Moreover, the court stated that it "requires no leap of

187. 895 A.2d 1143 (N.J. 2006).

188. *See id.* at 1146.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 1146–47.

196. *Id.* at 1147.

197. *Id.*

198. *Id.*

199. *See id.* at 1148–49.

200. *Id.* at 1149.

201. *Id.*

imagination” to recognize that during the course of his employment either Mr. Olivo or his spouse would have to launder his clothing and would therefore come into contact with asbestos.²⁰² Therefore, the court held that Exxon could foresee the risk of asbestos exposure to a person like Mrs. Olivo.

Second, the court applied a balancing analysis: it examined “the relationship between the parties, the nature of the risk and how relatively easy it would have been to provide warnings,” and determined that these factors weighed in favor of imposing a duty on Exxon Mobil.²⁰³ The court responded to Exxon Mobil’s fear that using a foreseeability analysis would lead to limitless liability, stating that the holding applied specifically to the foreseeable harm that Mrs. Olivo experienced.²⁰⁴ Accordingly, the court’s duty analysis did not extend to every third party injured by take-home asbestos.²⁰⁵ Foreseeability, however, did play a crucial role in New Jersey’s determination of duty in cases of secondhand asbestos exposure.²⁰⁶

2. Tennessee: *Satterfield v. Breeding Insulation Co.*

Like the Supreme Court of New Jersey in *Olivo*, Tennessee’s highest court also held that a duty existed to protect those who came into regular contact with asbestos-containing clothes from harm.²⁰⁷

For eight years plaintiff Doug Satterfield worked at defendant Alcoa, Inc., an international manufacturer of aluminum and aluminum products.²⁰⁸ Many of the materials used by Alcoa contained asbestos, and as a result Mr. Satterfield routinely came into contact with asbestos dust.²⁰⁹ During his employment at Alcoa, Mr. Satterfield and his wife had a daughter, Amanda Nicole Satterfield.²¹⁰ Amanda Satterfield spent the first three months of her life hospitalized because she was premature, and Mr. Satterfield visited her every day, going directly from work to the hospital.²¹¹ As a result, Amanda regularly came in contact with asbestos dust from her father’s work clothes, and at the age of twenty-five was diagnosed with mesothelioma, passing away shortly afterward.²¹²

Before her death, Amanda Satterfield alleged that Alcoa negligently allowed her father to wear his asbestos-containing clothes home, thus

202. *Id.*

203. *Id.*

204. *Id.* at 1150. *But see In re N.Y.C. Asbestos Litig.*, 840 N.E.2d 115, 119 (N.Y. 2005) (stating that imposing a duty unleashes a “specter of limitless liability” (quoting *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 223 (2001))).

205. *Olivo*, 895 A.2d at 1150.

206. *Id.*

207. *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 352 (Tenn. 2008).

208. *Id.* at 352–53.

209. *Id.* at 353.

210. *Id.*

211. *Id.*

212. *Id.* at 351–54. Amanda Satterfield had originally filed a complaint against Alcoa, but after she died the trial court substituted her father Doug Satterfield as the representative of her estate.

repeatedly exposing her to asbestos fibers.²¹³ In response, Alcoa filed a motion for judgment on the pleadings, asserting that it owed no duty to Ms. Satterfield.²¹⁴ The trial court granted the motion, but the Tennessee Court of Appeals reversed.²¹⁵

The Tennessee Supreme Court affirmed, holding that Alcoa owed a duty to those individuals who regularly came into contact with its employees' asbestos-containing clothing.²¹⁶ The court began its analysis by emphasizing that Alcoa's actions constituted misfeasance, not nonfeasance.²¹⁷ While individuals have a duty to refrain from affirmatively causing others harm, they generally do not have a duty to protect others from harm.²¹⁸ Tennessee has espoused this rule, with the exception that when the parties have a special relationship, there exists a duty to protect the endangered party.²¹⁹

The court rejected Alcoa's argument that because its act consisted of a failure to warn, and no special relationship existed between the company and Amanda Satterfield, it therefore owed no duty to her.²²⁰ The court held that, in determining if an action constitutes misfeasance or nonfeasance, a court must consider whether the individual's entire conduct created an increased risk of harm, and not simply whether a specific act constituted a negligent omission.²²¹ The court therefore characterized Alcoa's actions as misfeasance, because "operating its facility in such an unsafe manner that dangerous asbestos fibers were transmitted outside the facility" constituted an affirmative act that created a risk of injury.²²² When an individual engages in an injurious affirmative act, he has a duty to those injured by the act, no matter what the relationship is between the parties.²²³ Accordingly, because Alcoa engaged in affirmative acts of misfeasance, the court did not need to consider the relationship between it and Ms. Satterfield.²²⁴

Although the analysis of misfeasance did not require an inquiry into the relationship of the parties, it did require the court to engage in a balancing

213. *Id.* at 351.

214. *Id.* at 352.

215. *Id.*

216. *Id.*

217. *Id.* at 355.

218. *Id.* at 355–56; *see supra* notes 57–60 and accompanying text.

219. *Satterfield*, 266 S.W.3d at 359.

220. *Id.* at 364.

221. *Id.* at 356–57 (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 37 reporter's note cmt. c (Tentative Draft 2005) ("For example, a failure to employ an automobile's brakes or a failure to warn about a latent danger in one's product is not a case of nonfeasance . . . because in those cases the entirety of the actor's conduct (driving an automobile or selling a product) created a risk of harm.")).

222. *Id.* at 364.

223. *See id.* at 363.

224. *Id.* at 363–64. The court adopted the *Third Restatement's* view that parties do not have to be in privity to establish negligence, stating that "[e]ven when the actor and victim are complete strangers and have no relationship, the basis for the ordinary duty of reasonable care . . . is conduct that creates a risk to another." *Id.* at 362 (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 37 reporter's note cmt. c (Tentative Draft 2005)).

test before imposing a duty.²²⁵ Similar to the factors outlined by the New Jersey court, the Tennessee Supreme Court stated that a duty exists when “the degree of foreseeability of the risk and the gravity of the harm outweigh the burden that would be imposed if the defendant were required to engage in an alternative course of conduct that would have prevented the harm.”²²⁶ The court noted that foreseeability plays a significant role in this analysis.²²⁷ A duty exists when the harm from a course of conduct is foreseeable enough that a reasonable person would refrain from engaging in it.²²⁸

Applying the balancing factors to Amanda Satterfield’s case, the court concluded that Alcoa knew the danger that asbestos posed and that it should have foreseen the harm that an individual, like Ms. Satterfield, could suffer.²²⁹ Moreover, Alcoa could have easily reduced the harm by, among other things, providing basic warnings about asbestos, offering laundry services to its employees, and encouraging employees to use on-site showers.²³⁰ Therefore, the court determined that Alcoa owed a duty of reasonable care to individuals like Ms. Satterfield.²³¹

Unlike the Supreme Court of New Jersey, Tennessee’s highest court did not limit this duty to the individual plaintiff.²³² Instead, it determined that such a duty “extends to those who regularly and repeatedly come into close contact with an employee’s contaminated work clothes over an extended period of time, regardless of whether they live in the employee’s home or are a family member.”²³³ The court reasoned that because Alcoa created a foreseeable risk to such individuals, and did nothing to minimize this risk, Alcoa’s duty should extend beyond those in the immediate family of the employee.²³⁴ Rejecting Alcoa’s argument that such a finding would contribute to the “asbestos litigation crisis,” the court noted that Ms. Satterfield, who died of mesothelioma, represents the type of plaintiff whose claims courts should encourage.²³⁵ Moreover, if the financial burden does not fall upon actors like Alcoa, it will fall upon the victims themselves, a result the court does not support.²³⁶

In a concurring and dissenting opinion, Justice Janice M. Holder stated that the majority should not have relied on foreseeability in its determination of duty.²³⁷ Justice Holder argued that courts should instead

225. *Id.* at 364–65.

226. *Id.* at 365. *See* *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1147–49 (N.J. 2006).

227. *Satterfield*, 266 S.W.3d at 366. *But see id.* at 375–78 (Holder, J., concurring and dissenting) (arguing that courts should not determine foreseeability at the duty stage, and that juries should instead consider foreseeability when deciding breach and proximate cause).

228. *Id.* at 366–67 (majority opinion).

229. *Id.* at 367.

230. *Id.* at 368.

231. *Id.* at 369.

232. *Id.* at 374.

233. *Id.*

234. *Id.*

235. *Id.* at 370.

236. *Id.* at 371.

237. *See id.* at 375 (Holder, J., concurring and dissenting).

leave foreseeability for juries to consider when deciding breach and proximate cause.²³⁸ She expressed a concern that, “[b]y incorporating foreseeability into an analysis of duty, the majority transforms a factual question into a legal issue and expands the authority of judges at the expense of juries.”²³⁹ Thus, whether a defendant could foresee harm to the plaintiff plays a role in establishing whether the defendant’s actions were reasonable, which represents a determination of breach.²⁴⁰

Justice Holder would have adopted the *Third Restatement*’s approach and hold that whenever a defendant’s conduct creates a risk of harm to the plaintiff, a duty of reasonable care arises.²⁴¹ Only under certain specific circumstances, such as when countervailing policy considerations exist, should courts determine that the defendant owes no duty to the injured plaintiff.²⁴² For example, Tennessee has held that property owners do not owe a duty to prevent a contractor from harm caused by a defect that the contractor has undertaken to repair.²⁴³ Justice Holder noted that while foreseeability represents a “notoriously malleable and indefinite concept,”²⁴⁴ the *Third Restatement* offers a clearer approach.²⁴⁵ When a plaintiff asserts that the defendant’s conduct harmed him, as the plaintiff did in this case, courts should presume a duty exists unless specific policy considerations weigh in favor of finding no duty.²⁴⁶

B. States That Decline to Impose a Duty

Part III.B of this Note examines the opinions of the New York Court of Appeals, the Supreme Court of Georgia, the Michigan Supreme Court, and the Delaware Supreme Court, which all determined that employees and premises owners do not owe a duty to take-home asbestos plaintiffs. In their decisions to deny duty, these courts focused on the lack of a relationship between the parties, the characterization of the defendants’ acts as nonfeasance, and the policy of limiting already massive asbestos litigation.

238. *Id.* at 376.

239. *Id.* (“A collection of twelve people representing a cross-section of the public is better suited than any judge to make the common-sense and experience-based judgment of foreseeability.”).

240. *Id.* at 377.

241. *Id.* at 377 (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 (2005) (“An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”)); *see supra* notes 71–73 and accompanying text.

242. *Satterfield*, 266 S.W.3d at 378; *see supra* notes 74–78 and accompanying text.

243. *Satterfield*, 266 S.W.3d at 378 (citing *Blair v. Campbell*, 924 S.W.2d 75, 76–78 (Tenn. 1996)).

244. *Id.* (“[T]here are clear judicial days on which a court can foresee forever.” (citing *Thing v. La Chusa*, 771 P.2d 814, 830 (Cal. 1989))).

245. *Id.*

246. *Id.*

1. New York: *In re New York City Asbestos Litigation*

In *In re New York City Asbestos Litigation*,²⁴⁷ the New York Court of Appeals held that an employer does not owe a duty to third parties to protect them from harm caused by asbestos exposure.²⁴⁸ The plaintiff, John Holdampf, worked for the defendant, the Port Authority, between 1960 and 1996, doing various jobs that required him to handle asbestos-containing products.²⁴⁹ Mr. Holdampf’s wife, Elizabeth, was exposed to the asbestos dust when she washed her husband’s uniforms.²⁵⁰ Doctors diagnosed Mrs. Holdampf with mesothelioma in 2001.²⁵¹

Mr. and Mrs. Holdampf alleged that the Port Authority acted negligently in failing to warn its employees of the dangers of asbestos to themselves and to those who could foreseeably come into contact with asbestos-containing materials.²⁵² The Port Authority moved for summary judgment, stating that it owed no duty to Mrs. Holdampf, as she did not work for the Port Authority.²⁵³ The New York State Supreme Court granted the motion, stating that the Port Authority did not owe Mrs. Holdampf a duty to prevent her from harms associated with asbestos exposure.²⁵⁴ The court based its decision on *Widera v. Ettco Wire & Cable Corp.*,²⁵⁵ in which the Appellate Division held that an employer did not owe a duty to the plaintiff to prevent harm caused by in utero exposure to chemicals that a father brought home on his work clothes.²⁵⁶

The Appellate Division, however, modified the Supreme Court’s order, distinguishing *Widera* on the grounds that it involved the question of injuries that occurred in utero.²⁵⁷ It also noted several decisions that held manufacturers of asbestos products liable for injuries to foreseeable third parties.²⁵⁸ The Appellate Division granted leave and certified the question of duty to the New York Court of Appeals.²⁵⁹

The Court of Appeals, focusing on the lack of a relationship between Mrs. Holdampf and the Port Authority, found that there was no duty.²⁶⁰ Unlike the Tennessee Supreme Court, the New York Court of Appeals stated that because the Port Authority did not employ Mrs. Holdampf, it did not have a duty to protect her from the danger caused by her husband’s asbestos-laden clothes.²⁶¹ The court reasoned that because Mrs.

247. 840 N.E.2d 115 (N.Y. 2005).

248. *Id.* at 116.

249. *Id.*

250. *Id.* at 116–17.

251. *Id.* at 117.

252. *Id.*

253. *Id.* at 117–18.

254. *Id.* at 118.

255. 611 N.Y.S.2d 569 (App. Div. 1994).

256. *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d at 118.

257. *Id.* at 118.

258. *Id.*

259. *Id.*

260. *Id.* at 119–22.

261. *Id.* at 120.

Holdampf's claim was based on nonfeasance, a special relationship had to exist in order to find that the Port Authority owed a duty to her.²⁶² In this case, the Port Authority had no relationship with Mrs. Holdampf and, moreover, was not in the best position to protect her from harm because any actions it may have taken depended upon Mr. Holdampf's compliance.²⁶³

The Court of Appeals also rejected New Jersey's emphasis on foreseeability as an element of duty determinations.²⁶⁴ The court held that courts should not take foreseeability into account in determining whether a duty exists; rather, juries should use foreseeability to determine the duty's scope.²⁶⁵ Unlike the Tennessee Supreme Court, the New York Court of Appeals stated that using foreseeability to find duty in this case could lead to endless liability.²⁶⁶ Instead, the court explained that the only way to curb this "specter" is to limit a finding of duty to those classes of plaintiffs who have a special relationship with the defendant.²⁶⁷ In cases that involve take-home asbestos, there is no special relationship between the defendant and the injured third party, and therefore no duty exists.

2. Georgia: *CSX Transportation, Inc. v. Williams*

The Supreme Court of Georgia, agreeing with the New York Court of Appeals, held that an employer does not owe a duty to third parties who sustained injuries off the employer's premises.²⁶⁸ Three children of different employees brought a negligence claim in federal court against their fathers' employer, CSX Transportation, Inc. (CSXT), for harms suffered as a result of their exposure to their fathers' asbestos-containing work clothes.²⁶⁹ In addition, one of the employees brought a wrongful death action claiming that his wife died as a result of the same exposure.²⁷⁰ CSXT filed a motion for summary judgment in both cases, claiming that it owed no duty to nonemployees to protect them from asbestos exposure away from the worksite.²⁷¹

The district court denied the motion, but granted CSXT leave to seek an interlocutory appeal, because this was a matter of first impression in Georgia.²⁷² The Eleventh Circuit granted the interlocutory appeal and certified the question of whether an employer owes a duty to third parties

262. *Id.* at 119 (noting that in situations of nonfeasance a duty exists only "where there is a relationship either between the defendant and a third-person tortfeasor that encompasses defendant's actual control of the third person's actions, or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others." (quoting *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 233 (2001))).

263. *Id.* at 120.

264. *See id.* at 122 ("*Olivo* is distinguishable legally in that New Jersey, unlike New York, relies heavily on foreseeability in its duty analysis.").

265. *Id.* at 119.

266. *Id.* at 122.

267. *Id.*

268. *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005).

269. *Id.* at 208.

270. *Id.*

271. *Id.*

272. *Id.*

who sustain harms from employees’ asbestos-containing clothing to the Supreme Court of Georgia.²⁷³

Georgia’s highest court declined to impose a duty because no relationship existed between the employer and the third parties.²⁷⁴ While an employer owes its employees a duty to maintain a safe environment, the plaintiffs did not work for CSXT.²⁷⁵ Like the New York Court of Appeals, the Supreme Court of Georgia stated that foreseeability should not play a role in determinations of duty.²⁷⁶ Moreover, from a policy perspective, the court noted that finding liability under these circumstances would “create an almost infinite universe of potential plaintiffs.”²⁷⁷

3. Michigan: *In re Certified Question from the Fourteenth District Court of Appeals of Texas*

The Michigan Supreme Court, in *In re Certified Question from the Fourteenth District Court of Appeals of Texas*,²⁷⁸ held that a premise owner does not owe a duty to injured third parties who had never entered the premises.²⁷⁹ Between 1954 and 1965, plaintiff Cleveland “John” Roland worked for independent contractors whom the defendant Ford Motor Company hired to reline the interiors of blast furnaces.²⁸⁰ The material that Mr. Roland used to reline the furnaces contained asbestos, which adhered to his clothing.²⁸¹ The decedent Carolyn Miller, Mr. Rowland’s stepdaughter, washed the clothing.²⁸² Doctors diagnosed her with mesothelioma in 1999, and she died a year later.²⁸³

The plaintiffs brought a claim in Texas alleging that Ms. Miller’s mesothelioma resulted from her exposure to the asbestos that adhered to her stepfather’s clothing while he was working for Ford.²⁸⁴ After the trial court denied the defendant’s motion for a directed verdict, a jury found for the plaintiffs and awarded them \$9.5 million.²⁸⁵ Ford then filed a motion for judgment notwithstanding the verdict, and after the trial court denied the motion, Ford appealed to the Fourteenth District Court of Appeals of Texas.²⁸⁶ The district court certified the question of whether a premises

273. *Id.*

274. *Id.* at 209–10.

275. *Id.* at 209.

276. *Id.*

277. *Id.* (quoting *Widera v. Ettco Wire and Cable Corp.*, 611 N.Y.S.2d 569, 571 (App. Div. 1994)).

278. 740 N.W.2d 206 (Mich. 2007).

279. *Id.* at 209–10.

280. *Id.* at 210.

281. *Id.*

282. *Id.*

283. *Id.* The plaintiffs are the representatives of the decedent’s estate, her stepfather, daughter, husband, and mother.

284. *Id.* at 209.

285. *Id.* at 210.

286. *Id.*

owner owes a duty to third parties injured from asbestos exposure off the premises to the Michigan Supreme Court.²⁸⁷

The Michigan Supreme Court considered multiple factors in determining that the defendant owed no duty to Ms. Miller.²⁸⁸ The court stated that, in examining whether a duty existed, it must consider whether the social benefits of imposing a duty outweigh the costs.²⁸⁹ This involves balancing factors such as “the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented.”²⁹⁰ The relationship of the parties, however, represented the most pivotal factor, because it determined whether the defendant should have acted to protect the injured party from harm.²⁹¹ The court noted that although it should consider foreseeability as one of the factors, it deemed the other considerations more important.²⁹²

The court first considered the relationship between the defendant and Ms. Miller, and held that it was extremely tenuous.²⁹³ Ms. Miller did not work for the defendant, nor had she ever appeared on the defendant’s premises.²⁹⁴ The court then considered the burden on the defendant, and held that the burden would be severe, because the defendant would have to protect every individual who came into contact with its employees and the employees of its independent contractors.²⁹⁵ The nature of the risk prong, however, was serious because of the highly dangerous properties of asbestos.²⁹⁶ Nevertheless, the court held that the defendant could not foresee the risk, because during the period when Mr. Roland worked on the defendant’s premises, the risks relating to asbestos were not well known.²⁹⁷ The four balancing factors thus weighed in favor of finding that no duty existed.

Like the highest courts of New York and Georgia, the Michigan Supreme Court also expressed the fear of limitless liability for defendants.²⁹⁸ It noted that many corporations had already faced bankruptcy because of the crushing asbestos claims brought against them by employees.²⁹⁹ If liability was extended to third parties, then the number of plaintiffs would be uncontrollable and the cost of litigation would debilitate many

287. *Id.*

288. *Id.* at 210–12.

289. *Id.* at 211.

290. *Id.* (quoting *Dyer v. Trachtman*, 679 N.W.2d 311, 314 (Mich. 2004)).

291. *Id.* *But see id.* at 225 (Cavanagh, J., dissenting) (stating that the majority incorrectly stressed the relationship between the parties more than the other factors).

292. *Id.* at 212–13 (majority opinion).

293. *Id.* at 216.

294. *Id.*

295. *Id.* at 217.

296. *Id.*

297. *Id.* at 218. *But see id.* at 226 (Cavanagh, J., dissenting) (criticizing the majority for looking to other courts’ determinations of what was known about asbestos at the time instead of considering foreseeability in the context of the present case).

298. *Id.* at 218–19 (majority opinion) (noting that the U.S. Supreme Court has stated that asbestos litigation in the United States reached a “crisis” level).

299. *Id.* at 219; *see supra* notes 154–58 and accompanying text.

defendants.³⁰⁰ Accordingly, policy considerations, as well as the four balancing factors, promoted a finding that landowners did not owe a duty to warn third parties who have never appeared on the landowner’s premises of the risks of asbestos.³⁰¹

Justice Michael F. Cavanagh dissented, arguing first that the majority should not have even decided the question of duty in this case, and further, that its analysis was incorrect because a duty existed.³⁰² Justice Cavanagh criticized the majority for resolving the issue without the benefit of a full review.³⁰³ Because the majority did decide the issue, however, he felt compelled to state his disagreement with the analysis as well. Justice Cavanagh first stated that the majority placed an undue emphasis on the lack of relationship between Ford and Ms. Miller.³⁰⁴ According to Justice Cavanagh, the court should not consider the relationship as the most important factor to weigh, but only one among many.³⁰⁵ In any case, Justice Cavanagh found that a relationship existed between Ms. Miller and the employer who, knowing the dangerous properties of asbestos, allowed employees to carry it home.³⁰⁶

Next, he opined that the majority exaggerated the burden that a finding of duty would impose on future defendants.³⁰⁷ If the majority found that a duty existed in this particular circumstance, it would not follow that companies would then face liability for every person that comes into contact with asbestos carried home on their workers’ clothing.³⁰⁸ Even if a finding of duty would place a large burden on defendants, Justice Cavanagh stated that the benefits of “corporate accountability” and a “valued, healthy society” nevertheless would outweigh that burden, especially considering the extremely dangerous properties of asbestos.³⁰⁹

Justice Cavanagh also criticized the majority’s decision regarding the foreseeability of harm to individuals like Ms. Miller.³¹⁰ He cited several cases, including *Olivo*,³¹¹ which found that the risks of asbestos were known during the time that Mr. Roland worked for Ford.³¹² Moreover, Justice Cavanagh pointed out that the jury clearly believed that Ford should have foreseen the harm to Ms. Miller when it found for the plaintiffs, and

300. *In re Certified Question*, 740 N.W.2d at 218–20. The court noted that competing policy considerations represented its “ultimate inquiry.” *Id.* at 218.

301. *Id.* at 222.

302. *Id.* at 223–24 (Cavanagh, J., dissenting).

303. *Id.* Justice Cavanagh also stated that the Texas court could have simply looked at Michigan case law to decide the issue. *Id.* at 223.

304. *Id.* at 224.

305. *Id.* at 225

306. *Id.* (noting that the majority’s view of relationship was “severely curtailed”).

307. *Id.*

308. *Id.* at 225–26. Justice Cavanagh states that “the majority needlessly invokes the sky-is-falling genre of arguments advanced by commentators who have been openly critical of asbestos litigation and tort recovery in general.” *Id.* at 228.

309. *Id.* at 229.

310. *Id.* at 226.

311. 895 A.2d 1143 (N.J. 2006); *see supra* Part III.A.1.

312. *In re Certified Question*, 740 N.W.2d at 226 (Cavanagh, J., dissenting).

deciding otherwise undermines the jury's determination.³¹³ Foreseeability, he stated, represents a fact-specific determination that the majority should not have decided.³¹⁴

4. Delaware: *Price v. E.I. DuPont de Nemours & Co.*

The Delaware Supreme Court, like the New York Court of Appeals, found that an employer does not owe a duty to protect third parties from harm because the defendant's inaction constituted nonfeasance.³¹⁵ Plaintiff Bobby Price worked as a maintenance technician for E.I. DuPont de Nemours & Co. between 1957 and 1991.³¹⁶ His duties required him to work with asbestos-containing products. His wife, Patricia Price, was also exposed to asbestos when she handled his work clothes and consequently developed an asbestos-related lung disease.³¹⁷

Mrs. Price filed a complaint against, among other parties, DuPont alleging that the company caused her injuries by exposing her to asbestos.³¹⁸ She then sought to amend her complaint to recharacterize DuPont's actions as misfeasance instead of nonfeasance.³¹⁹ A special master denied the motion, finding that despite the attempt to recharacterize DuPont's actions, the complaint would still fail to state a claim for misfeasance.³²⁰ The Superior Court affirmed, and Mrs. Price appealed.³²¹

The Delaware Supreme Court held that no duty existed because the defendant's behavior constituted nonfeasance and no special relationship existed between the parties.³²² The court stated that when an individual engages in acts of misfeasance, he owes a general duty to those whom his conduct harms.³²³ In contrast, when the person's acts constitute nonfeasance, no duty exists to protect others unless there is a special relationship between the parties.³²⁴ The court held that the defendant's failure to prevent Mr. Price from taking his clothes home, or its failure to warn of the dangers of asbestos, constituted nonfeasance.³²⁵ An attempt to recharacterize those actions without presenting any new facts does not transform acts of nonfeasance into acts of misfeasance.³²⁶ Because the

313. *Id.* at 226–27.

314. *Id.* at 227.

315. *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 170 (Del. 2011).

316. *Id.* at 163.

317. *Id.* at 163–65.

318. *Id.* at 163.

319. *Id.*

320. *Id.* at 166.

321. *Id.* at 164.

322. *Id.* at 170.

323. *Id.* at 167; *see supra* notes 57–60 and accompanying text.

324. *Price*, 26 A.3d at 167 (“[I]n a case involving misfeasance, the defendant’s duty is automatic, whereas in a case involving nonfeasance, the defendant’s duty arises only if there is a legally significant ‘special relationship’ between the parties.”); *see supra* notes 57–60 and accompanying text.

325. *Price*, 26 A.3d at 168–69.

326. *Id.* at 168.

defendant had no special relationship to Mrs. Price, a third party, the court held that the defendant owed her no duty.³²⁷

In a dissenting opinion, Justice Carolyn Berger stated that the majority should have found that DuPont's actions constituted misfeasance.³²⁸ Justice Berger noted that for nonfeasance, a defendant has not created a new risk for the plaintiff, but has simply failed to step in to benefit the plaintiff.³²⁹ In the present case, DuPont's affirmative act of releasing the asbestos clearly created a new risk of harm to Mrs. Price.³³⁰ Justice Berger contended that the majority should not focus on specific instances of inaction, such as failing to warn Mr. and Mrs. Price, to find that DuPont's conduct constituted nonfeasance.³³¹ Instead, the company's actions as a whole, which comprised utilizing asbestos at its worksite and allowing it to leave the worksite on employees' clothes, demonstrated misfeasance.³³²

Justice Berger also noted that once the court characterized the defendant's actions as misfeasance, it needed to determine whether the defendants could foresee harm to the plaintiff.³³³ Assuming Mrs. Price's allegations were true, DuPont knew the hazards of asbestos, that employees could easily transport asbestos on their clothing, and therefore, that individuals like Mrs. Price could sustain injuries from asbestos exposure.³³⁴ Justice Berger would have therefore found that DuPont should have foreseen harm to Mrs. Price and would have reversed the trial court's decision.³³⁵

IV. DELINEATING A CLEARER APPROACH TO DUTY DETERMINATIONS IN TAKE-HOME ASBESTOS CASES

Part IV.A argues that the standard applied by all six states is too fact-specific and uncertain. Part IV.B suggests that the *Third Restatement's* approach represents a clearer method.

A. *The Present Duty Standard Is Unworkable*

Part IV.A.1 asserts that when courts decide whether a defendant owes a duty to take-home asbestos plaintiffs, they often usurp the role of the jury by engaging in fact-specific inquiries. Part IV.A.2 criticizes courts that hold that no duty exists for burying their policy determinations in doctrines like nonfeasance, unforeseeability, and the lack of a relationship between the parties.

327. *Id.* at 170.

328. *Id.* at 171 (Berger, J., dissenting).

329. *Id.*

330. *Id.* at 173.

331. *Id.*

332. *Id.* at 172–73.

333. *Id.* at 173.

334. *Id.*

335. *Id.*

1. Foreseeability's "Schizophrenic Existence" in Duty Determinations

When determining whether a duty attaches in take-home asbestos cases, courts often engage in fact-specific inquiries about foreseeability.³³⁶ The question of duty, unlike breach and proximate cause, represents one that a court must determine as a matter of law.³³⁷ Accordingly, whether a defendant owed a plaintiff a duty of reasonable care should not depend on the particular facts of a case. Nevertheless, courts will often question whether a defendant could foresee harm to a particular plaintiff or class of plaintiffs.³³⁸ This analysis involves necessarily fact-specific inquiries into whether the defendant should have known about the hazards of asbestos during the time of the plaintiff's exposure, whether the defendant provided any laundry or shower facilities to its workers, and the extent of the plaintiff's exposure.³³⁹

Decisions based on foreseeability do not provide clear precedents for future cases. When a court determines that a defendant either could or could not have foreseen harm to a plaintiff, the court limits its holding to the facts of that case.³⁴⁰ Other courts later facing the same issue can reach a different interpretation of foreseeability simply by distinguishing the facts from the previous case.³⁴¹ Thus, using foreseeability may help to resolve the particular case before the court, but it does nothing to resolve the larger conflict about duty to third-party asbestos plaintiffs.

Duty determinations that use foreseeability can also cause inconsistencies between the judge and the jury, who can reach different conclusions about the same set of facts.³⁴² As Part I.A.2–3 explained, foreseeability plays a role in the jury's determination about the reasonableness of the defendant's conduct and the scope of his liability.³⁴³ When judges decide foreseeability, their conclusions overlap with inquiries that the court should leave to the jury when it determines breach and proximate cause.³⁴⁴ As Justice Holder pointed out, such decisions represent judgments about

336. *See supra* Part III.

337. *See supra* note 50 and accompanying text.

338. *See supra* notes 61–64, 199–202, 226–29 and accompanying text.

339. *See supra* notes 66–68, 199–202, 229–30 and accompanying text; *see also In re Certified Question from the Fourteenth Dist. Ct. App. of Tex.*, 740 N.W.2d 206, 226 (Mich. 2007) (Cavanagh, J., dissenting) (noting that "it should be self-evident that a finding regarding foreseeability must be based on the evidence specific to a particular case").

340. *See supra* notes 67–68, 199–202, 229–30 and accompanying text. In *Olivo*, for example, the court found a duty based on the "particularized foreseeability of harm to plaintiff's wife, who ordinarily would perform typical household chores that would include laundering the work clothes worn by her husband." 895 A.2d 1143, 1150 (N.J. 2006).

341. *See supra* note 68 and accompanying text; *see also In re Certified Question*, 740 N.W.2d at 217 n.17 (noting that limiting a duty holding to the particular case before the court "is not how a court of law properly determines the existence, or nonexistence, of a legal duty, for such a determination will apply not only in the instant case but in the next 500 cases as well").

342. *See supra* notes 313–14 and accompanying text.

343. *See supra* Part I.A.2–3.

344. *See supra* notes 66–67, 310–14 and accompanying text.

behavioral norms in the community, and a group of twelve people is much better qualified to make such conclusions than one judge.³⁴⁵

2. Courts Bury Policy Determinations in Doctrine

Although most of the states that found no duty made references to the public policy considerations that informed their decisions, they couched these considerations in various doctrines like a lack of foreseeability, nonfeasance, and the absence of a relationship between the parties.³⁴⁶ Foreseeability, as mentioned in Part IV.A.1, represents a fact-specific inquiry that courts should leave to juries.³⁴⁷ Characterizing a defendant’s actions as nonfeasance, and denying duty because no relationship existed between the parties, distorts basic tort law principles. When a defendant engages in acts of nonfeasance, he has not created a new risk of harm to a plaintiff, but has merely failed to protect him from an already existing harm.³⁴⁸ In take-home asbestos cases, defendants create the risk by exposing workers to asbestos, which the workers then carry home on their person and clothing.³⁴⁹ Thus, the defendants have not engaged in nonfeasance because they created a dangerous environment that resulted in third-party exposure.³⁵⁰

The real concern for courts that make “no duty” determinations in take-home asbestos cases lies in the perceived endless liability that defendants would face if the court found that a duty existed. The highest courts of New York and Georgia worried about the “specter of endless liability”³⁵¹ and the “infinite universe of potential plaintiffs.”³⁵² Nevertheless, the courts determined that duty did not exist because of nonfeasance, lack of a relationship between the parties, or lack of foreseeability of harm to the plaintiff.³⁵³ These doctrines obfuscate the policy decisions that truly inform courts’ determinations. When courts expressly state their policy reasons instead of engaging in multi-factored tests, they contribute to greater transparency in take-home asbestos cases.³⁵⁴

B. *The Third Restatement’s Method Represents a Better Solution*

Part IV.B.1 argues that the *Third Restatement* results in clearer duty determinations in take-home asbestos cases because it establishes a default

345. *See supra* notes 237–40 and accompanying text.

346. *See supra* Part III.B; *see also* DOBBS, *supra* note 18, § 227, at 579 (“Rules declaring that no duty exists . . . are expressions of ‘global’ policy . . . rules of law having the quality of generality.”).

347. *See supra* Part IV.A.1.

348. *See supra* notes 57–59 and accompanying text.

349. *See supra* notes 189–93, 208–12, 249–51, 269–70, 280–83, 316–17 and accompanying text.

350. *See supra* notes 221–24, 328–32 and accompanying text; *see also* Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 356–57 (Tenn. 2008).

351. *See supra* notes 266–67 and accompanying text.

352. *See supra* note 277 and accompanying text.

353. *See supra* Part III.B.

354. *See supra* notes 77–78 and accompanying text.

duty of reasonable care and leaves fact-specific inquiries like foreseeability to the jury. Part IV.B.2 maintains that the *Third Restatement* contributes to transparency in “no duty” decisions and encourages courts to take their “no duty” determinations more seriously.

1. Applying the *Third Restatement* Leads to Clearer, Less Fact-Specific Decisions

The *Third Restatement*'s approach to duty determinations removes factual inquiries from the judge and shifts them to the jury. The Restatement eliminates the use of fact-specific inquiries like foreseeability.³⁵⁵ It instead states that “[a]n actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”³⁵⁶ It thus establishes a default duty of reasonable care when a defendant’s conduct was a cause-in-fact of a plaintiff’s harm.³⁵⁷ As Justice Holder stated, the *Third Restatement*'s approach removes the “free-floating” analysis in which courts consider whether a defendant could foresee harm to a plaintiff.³⁵⁸ Instead, in most circumstances, the foreseeability analysis shifts to the jury, who can better evaluate the specific facts of a case in the context of breach and proximate cause. This shift also removes any overlap that the court and the jury may have on the issue of foreseeability, as occurred in Michigan.³⁵⁹

The *Third Restatement* makes courts’ inquiries much simpler when they determine that a duty existed, which results in clearer legal precedent. Courts would not need to engage in multi-factored balancing tests to reach their conclusions.³⁶⁰ When courts incorporate factors like foreseeability, the nature of the relationship, or the ease with which a defendant could have provided warnings, they overstep the boundary between questions of law and questions of fact,³⁶¹ and generate a murky legal analysis.³⁶² The *Third Restatement*'s method, on the other hand, represents a clear analysis that instructs courts facing take-home asbestos cases to presume that a duty of reasonable care exists.³⁶³

2. *Third Restatement*'s Approach Results in More Transparent Policy Decisions

The *Third Restatement*'s approach encourages courts that determine that no duty existed to clearly state their public policy considerations. Although it states that courts generally should presume that a duty of reasonable care

355. See *supra* notes 72–75 and accompanying text.

356. See *supra* note 72 and accompanying text.

357. See *supra* notes 73–74 and accompanying text.

358. *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 378 (Tenn. 2008).

359. See *supra* notes 310–14 and accompanying text.

360. See *supra* notes 203–04, 225–30, 288–92 and accompanying text.

361. See *Cardi*, *supra* note 28, at 776–78.

362. See *supra* notes 68, 244–45 and accompanying text; see also *Cardi*, *supra* note 28, at 740–41, 792–93.

363. See *supra* notes 72–74 and accompanying text.

exists, it qualifies that presumption by stating that, “[i]n 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.”³⁶⁴ This approach recognizes that courts often use ambiguous legal doctrines to hold that defendants do not owe a duty to take-home asbestos plaintiffs.³⁶⁵ Instead, the *Third Restatement* suggests that courts should state their true concerns unequivocally by holding that the possibility of adding to an already massive litigation militates in favor of finding that employers and premises owners generally owe no duty to third-party plaintiffs.³⁶⁶

The *Third Restatement* does not prevent courts from finding no duty, but it does force them to consider their decisions more seriously, and will likely lead to fewer “no duty” holdings. The *Restatement* suggests that courts should make “no duty” policy determinations only in “exceptional cases,” and it is not clear whether take-home asbestos cases fit this category, because employers and premises owners frequently know of the risks that asbestos poses to those who have regular contact with it.³⁶⁷ Courts would therefore have to articulate clear policy concerns for limiting these defendants’ liability.

This approach may result in judges being reluctant to express policy concerns as explicitly as the *Third Restatement* suggests, because they do not want to step on the toes of legislators.³⁶⁸ New York, Georgia, and Michigan, however, have all expressed the important role that policy played in their decisions.³⁶⁹ The Michigan Supreme Court has even expressly stated that it considered policy the “ultimate inquiry” in its duty determination.³⁷⁰ Courts have thus already advanced policy concerns, and should not have to hide behind unclear legal doctrines to deny duty. If, on the other hand, the court has weak policy concerns, then the case should go to a jury to determine liability.

If a court does not want to make a policy-based determination about denying duty, it can still decide breach or proximate cause as a matter of law.³⁷¹ A court can sometimes determine that a defendant unable to foresee harm to a plaintiff acted reasonably, so no breach occurred.³⁷² Similarly, a

364. See *supra* note 76 and accompanying text; see also *Cardi, supra* note 28, at 789 (stating that courts “will thus be guided by the carrot of Section 7(b) and the stick of Section 7(a) to write opinions that transparently explain duty decisions in terms of public policy”).

365. See *supra* notes 260–63, 274–76, 288–97, 322–27 and accompanying text.

366. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. j (2005) (noting that “articulating the policy or principle at stake will contribute to transparency, clarity, and better understanding of tort law”).

367. See *supra* notes 103–11 and accompanying text.

368. See *Cardi, supra* note 28, at 763 (“Many courts feel squeamish about deciding tort cases on the basis of reasoning that arguably is proper only for the legislative branch.”).

369. See *supra* notes 266–67, 277, 298–301 and accompanying text.

370. See *supra* notes 300–01 and accompanying text.

371. See *supra* notes 79–80 and accompanying text.

372. See *supra* Part I.A.2.

court can deem the harm too remote, and hold that there was therefore no proximate causation.³⁷³

This avenue, however, requires a court to observe the deferential “no reasonable jury” standard.³⁷⁴ Like the requirement that policy considerations should come into play only in “exceptional circumstances,” this requirement also forces courts to treat “no breach” and “no proximate cause” determinations seriously. Exempting the defendants from liability in cases where the plaintiffs have suffered diseases like mesothelioma demands significant consideration. The *Third Restatement* would therefore require courts to take a necessary pause before making “no duty” determinations. They could still hold that employers and landowners do not face liability for injuries to third-party plaintiffs, but they would have to clearly delineate the policy reasons for denying duty, or satisfy the heightened “no reasonable jury” standard for denying breach or proximate cause.

CONCLUSION

In courts’ efforts either to impose a duty or deny a duty in take-home asbestos cases, they have engaged in unclear analyses and set bad precedents for future cases. Courts that find that a duty existed rely on fact-specific inquiries like foreseeability that usurp the role of the jury, while courts that deny duty hide their policy determinations behind legal doctrines like nonfeasance and a lack of relationship between the parties. The *Third Restatement’s* method sets a clearer standard. It encourages courts to presume a default duty of reasonable care, which will send more take-home asbestos cases to juries who can better determine liability. It also prompts courts to take “no liability” decisions more seriously. Unless a court can articulate clear policy reasons for denying duty, or can meet the “no reasonable jury” standard when denying breach or proximate cause, it must adopt the default duty of reasonable care.

373. See *supra* Part I.A.3.

374. See *Cardi, supra* note 28, at 774–78.