

## ARTICLES

### A TANGLED *WEBB*—REEXAMINING THE ROLE OF DUTY IN INDIANA NEGLIGENCE ACTIONS

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#### INTRODUCTION

The four elements of a negligence action have long been recited by courts in Indiana and elsewhere as duty, breach, causation and harm. The American Law Institute's current consideration of the Restatement (Third) of Torts has produced a vigorous national debate over the roles of duty and causation in a negligence action.<sup>1</sup> Indiana's causation doctrine is relatively conventional, and although it presents its own set of problems, in general these are not unique to Indiana and are beyond the scope of this article except as duty and proximate cause relate to each other.<sup>2</sup> Duty, on the other hand, has a unique Indiana history that illuminates and in my view helps resolve the national debate. It alone is the subject of this article. In this article I offer my view on the reasons courts often inappropriately speak in terms of duty when the issue really is something else. I believe negligence actions are best understood by recognizing that every actor has an obligation to behave reasonably. This approach is not designed either to expand or to constrict liability. Rather it focuses on what I believe to be the central legal issue in a negligence claim: are there any factors—usually dubbed policy considerations—that preclude this claimant as a matter of law from recovering

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1. See generally *Symposium: The John W. Wade Conference on the Third Restatement of Torts*, 54 VAND. L. REV. 3 (2001).

2. Proximate cause is equally subject to criticism, but for purposes of this article I restrict my comments to the court's role in allowing or denying a claim under the duty rubric. I use "causation" rather than "scope of liability" not because I prefer that terminology, but only because it is conventional and avoids distractingly long diversions from the points I seek to make. It seems widely understood that "proximate cause" embraces both causation in fact and a legal concept variously described as "legal cause," foreseeability, scope of liability, etc. Although I agree with those who would abolish the term as confusing to the jury and to analysis by appellate courts, I nevertheless use it as shorthand. The alternative is to fill every discussion of scope of liability with an explication of precisely how the term is used, even though it is irrelevant to the analysis of the court's role in assessing the presence or absence of "duty."

from this defendant under these circumstances?

### I. DUTY AS AN ELEMENT OF A NEGLIGENCE CLAIM

The concept of duty has become increasingly subject to criticism in general tort literature as either wholly unnecessary or hopelessly confused. Although some view duty as a concept that is “perfectly intuitive” and “central to negligence law,”<sup>3</sup> others find its application “so changeable that it actually defies the idea of a definition.”<sup>4</sup> Indiana’s approach to duty has been no less problematic. The charge has been leveled that, over the years, Indiana courts have found duties to be present or absent “independently and haphazardly, without any thought given to their relationship to other tort obligations arising in other factual contexts.”<sup>5</sup>

A few things seem clear. “Duty” is used to describe a rule set down by the courts and applied by the judge to permit a claim to go forward. In lawyer’s terms, it is a question of law. If the court finds no duty of the defendant to the plaintiff, that is the end of the plaintiff’s negligence claim. Lack of “causation” or “proximate cause” may also serve to deny a claim, but that determination is ordinarily for the trier of fact. It is also clear that many specific duties have been found by the courts to be owed by landowners, occupiers of land and social hosts,<sup>6</sup> but those same parties have been said in other circumstances to owe no duty while engaged in the same or similar activity.<sup>7</sup> The same is true for, among others, health care providers,<sup>8</sup> utilities,<sup>9</sup> railroads,<sup>10</sup> motorists,<sup>11</sup> automobile

3. John C.P. Goldberg, *Duty & the Structure of Negligence*, 10 KAN. J.L. & PUB. POL’Y 149, 150 (2000).

4. Peter F. Lake, *Common Law “Duty” Analysis: The Conceptual Expansion of “Duty” in a Period of Doctrinal Consolidation/Retrenchment*, 10 KAN. J.L. & PUB. POL’Y 153, 154 (2000).

5. Jay Tidmarsh, *Tort Law: The Languages of Duty*, 25 IND. L. REV. 1419, 1425 (1992).

6. *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 971-73 (Ind. 1999) (social host owes duty to take reasonable precautions to protect invitees from foreseeable criminal attacks); *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 250 (Ind. 1996) (recognizing that a contractor owes a duty to passersby to keep adjoining areas reasonably clear of risks); *Valinet v. Eskew*, 574 N.E.2d 283, 285-86 (Ind. 1991) (finding possessor of land in urban area owes duty to prevent unreasonable risk of harm arising from condition of trees near the highway); *Lutheran Hosp. of Ind., Inc. v. Blaser*, 634 N.E.2d 864, 868-69 (Ind. Ct. App. 1994) (holding a landowner owes a duty to exercise reasonable care to discover defects or dangerous conditions on the premises, and invitor owes duty to provide safe means of ingress and egress); *Gunter v. Vill. Pub.*, 606 N.E.2d 1310, 1312 (Ind. Ct. App. 1993) (finding that a tavern owner owes a duty to protect patrons from reasonably foreseeable disorderly acts of other patrons).

7. *Van Duyn v. Cook-Teague P’ship*, 694 N.E.2d 779, 781 (Ind. Ct. App. 1998) (recognizing that generally there is no duty on part of business owners to protect patrons from criminal acts of third persons); *Fawley v. Martin’s Supermarkets, Inc.*, 618 N.E.2d 10, 14 (Ind. Ct. App. 1993) (requiring no duty to invitees to protect from runaway vehicles crossing onto pedestrian sidewalks from parking lots).

8. *Compare Harris v. Raymond*, 715 N.E.2d 388, 394-95 (Ind. 1999) (holding that

passengers,<sup>12</sup> schools,<sup>13</sup> employers and contractors,<sup>14</sup> insurers,<sup>15</sup> the government,<sup>16</sup>

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physicians have duty to warn current and former patients of safety issues highlighted either by manufacturer of medical device or the FDA), *and* Walker v. Rinck, 604 N.E.2d 591, 594-95 (Ind. 1992) (holding that physician owes duty to later-born children of mother with Rh-negative blood to provide the mother RhoGAM following birth of Rh-positive child), *and* Cowe v. Forum Group, Inc., 575 N.E.2d 630, 636-37 (Ind. 1991) (holding that nursing home owes total care patients duty to exercise reasonable care for their protection, and owes patient's unborn children duty because of extreme dependence of patient upon nursing home for that care), *with* Auler v. Van Natta, 686 N.E.2d 172, 175 (Ind. Ct. App. 1997) (recognizing absent circumstances supporting claim for vicarious liability or other special circumstances, hospital has no independent duty to obtain patient's informed consent).

9. *Compare* Bush v. N. Ind. Pub. Serv. Co., 685 N.E.2d 174, 177 (Ind. Ct. App. 1997) (finding a duty to those persons using road as it was intended to be used), *and* Goldsberry v. Grubbs, 672 N.E.2d 475, 480 (Ind. Ct. App. 1996) (recognizing a duty to motoring public to exercise reasonable care when placing poles along highways), *with* Butler v. City of Peru, 733 N.E.2d 912, 916 (Ind. 2000) (holding a utility company generally owes no duty to those injured by power lines owned by its customers).

10. *Compare* CSX Transp., Inc. v. Kirby, 687 N.E.2d 611, 615 (Ind. Ct. App. 1997) (recognizing there is a duty to construct and maintain crossings so that they will be reasonably safe for travel), *with* Cent. Ind. Ry. Co. v. Anderson Banking Co., 240 N.E.2d 840, 849 (Ind. App. 1968) (holding there is no duty to equip crossings with automatic signals or provide reflectors on sides of cars unless required to do so by Public Service Commission).

11. *Compare* Stephenson v. Ledbetter, 596 N.E.2d 1369, 1372 (Ind. 1992) (requiring a duty to passengers to exercise reasonable care in automobile's operation), *with* Merida v. Cardinal, 749 N.E.2d 605, 607 (Ind. Ct. App. 2001) (holding there is no duty of a driver on "preferred" street to look left and right at intersection when no notice other driver would violate law).

12. *Compare* Stephenson, 596 N.E.2d at 1372 (recognizing a duty to use reasonable care to avoid injury to self), *with* Hopper v. Carey, 716 N.E.2d 566, 574 (Ind. Ct. App. 1999) (holding there is no duty to wear seatbelt).

13. *Compare* Norman v. Turkey Run Cmty. Sch. Corp., 411 N.E.2d 614, 616 (Ind. 1980) (imposing duty to supervise students), *with id.* at 618 (finding no duty to pay particular attention to particular student running on playground).

14. *Compare* Kostidis v. Gen. Cinema Corp., 754 N.E.2d 563, 567 (Ind. Ct. App. 2001) (recognizing a construction contract implies a duty to do work skillfully, carefully, and in a workmanlike manner), *with* Blake v. Calumet Constr. Corp., 674 N.E.2d 167, 170 (Ind. 1996) (holding contractors owe no duty to third parties after owner has accepted work, except where work is deemed dangerously defective, inherently dangerous or imminently dangerous).

15. *Compare* Stump v. Commercial Union, 601 N.E.2d 327, 332 (Ind. 1992) (finding a duty not to handle claims in grossly negligent manner), *with* Baxter v. Ind. State Teacher's Ass'n Ins. Trust, 749 N.E.2d 47, 57 (Ind. Ct. App. 2001) (holding there is no duty to protect second insurer's subrogation rights).

16. *Compare* Benton v. City of Oakland City, 721 N.E.2d 224, 233 (Ind. 1999) (requiring a duty to maintain public recreational facility in reasonably safe manner), *with* Weatherholt v. Spencer County, 639 N.E.2d 354, 356 (Ind. Ct. App. 1994) (finding the county owed no duty to inmate to administer its jail).

polygraph examiners,<sup>17</sup> and animal keepers.<sup>18</sup> The common thread, of course, is that the presence of a “duty” determines whether the plaintiff may recover from the defendant, assuming causation and breach are proved. But the approach to finding duty varies widely. Duty may be found or rejected based on who the plaintiff is, the standard of conduct required of the defendant, or the circumstances under which the defendant acted. For example, a trespasser may not sue a landowner for a negligently maintained property but an invitee may.<sup>19</sup> A client may assert a claim against a lawyer for negligence, but a non-client may not.<sup>20</sup> A social host has no common law duty to refuse to serve a potentially inebriated guest, but a bartender does.<sup>21</sup> Duties in these examples have been rejected or embraced on qualitatively different considerations, including concern for an unmanageable scale of exposure, distaste for the plaintiff, and perceived social norms. The result of these rules addressing various fact situations is a series of data points that adhere to no common logic: a mosaic that forms no pattern.

Although it is less objectively demonstrable, I believe one can find many instances in Indiana case law where the case is resolved by finding no duty, but it would seem more accurate to identify the reason the plaintiff lost as a failure to establish either unreasonable conduct or causation. As a single example, take *Norman v. Turkey Run Community School Corp.*,<sup>22</sup> where the Indiana Supreme Court held that teachers owed no duty to a four-year-old who was injured when he ran into another child at a playground under the teachers’ supervision. A more accurate reason for dismissing the plaintiff’s case would seem to be that the teachers were not negligent as a matter of law because the particular injury simply was not preventable by any reasonable precautions. I suggest Indiana cases offer many examples of the same phenomenon—finding no duty where some less sweeping fact-specific reason would better explain the plaintiff’s failure to carry the day.

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17. *Lawson v. Howmet Aluminum Corp.*, 449 N.E.2d 1172, 1177 (Ind. Ct. App. 1983) (holding there is a duty to examinee to exercise reasonable care in conducting polygraph examination).

18. *Blake v. Dunn Farms, Inc.*, 413 N.E.2d 560, 563 (Ind. 1980) (requiring a duty to provide for restraining and confinement of animal).

19. *Frye v. Trs. of Rumbletown Free Methodist Church*, 657 N.E.2d 745, 748 (Ind. Ct. App. 1995).

20. *Compare Rice v. Strunk*, 670 N.E.2d 1280, 1283-84 (Ind. 1996) (finding duty to exercise ordinary skill and knowledge), *with Hacker v. Holland*, 570 N.E.2d 951, 955 (Ind. Ct. App. 1991) (holding generally there is no duty to non-clients).

21. *Compare Gariup Constr. Co., Inc. v. Foster*, 519 N.E.2d 1224, 1228 (Ind. 1988) (requiring no duty of social host), *with Elder v. Fisher*, 217 N.E.2d 847, 853 (1966) (recognizing common law duty of sellers of alcohol). Apart from these common law rules, liability may or may not also be established for damages resulting from providing an inebriated person alcohol under section 7.1-5-10-15.5 of the Indiana Code. IND. CODE § 7.1-5-10-15.5 (1998).

22. 411 N.E.2d 614 (Ind. 1980).

## II. *WEBB v. JARVIS* AND ITS SUBSEQUENT APPLICATION

In 1991, in *Webb v. Jarvis*,<sup>23</sup> the Indiana Supreme Court, in an attempt to establish a consistent formula to identify a duty, announced a tripartite test that directed trial courts to balance (1) the relationship between the parties, (2) the foreseeability of harm, and (3) public policy concerns. But preexisting notions of duty were not so easily eradicated. Since *Webb*, courts have concluded that its formula supersedes those individual strains of duty, that it complements them, or that it applies only when a new issue of duty arises. In many cases, *Webb* has been ignored; in others, it has been misapplied.

*Webb* involved a patient who had been over-prescribed steroids and in a rage shot his brother-in-law. The brother-in-law sued the prescribing doctor, arguing that the doctor breached a duty to administer medical treatment in such a way as to take into account possible harm to others. The Indiana Supreme Court held that the doctor owed no such duty.<sup>24</sup> The court concluded that all three factors under the newly formulated test weighed against the imposition of a duty. At the time, the *Webb* balancing test was “new” in the sense that “Indiana cases had long recognized the need of a tort plaintiff to establish a duty, but no single test to determine the existence of a duty had ever been established.”<sup>25</sup>

### A. *Early Inconsistent Application of Webb*

From the beginning there was uncertainty as to whether *Webb* supplied the only test to determine whether a duty exists or whether the long-established common law rules of duty also survived. As one commentator soon noted, “[i]t is easy to declare, as *Webb v. Jarvis* does, a new test for duty. It is difficult to apply that analysis to existing duty rules, many of which cannot be justified under *Webb*’s analysis.”<sup>26</sup> In fact, the confusion over *Webb*’s proper role began with an opinion the Indiana Supreme Court had issued only three days earlier in *Valinet v. Eskew*.<sup>27</sup> *Valinet* involved a claim by a passing motorist hit by a falling limb, and addressed the question of a landowner’s duty to maintain the trees on the property. Although *Webb* and *Valinet* were decided nearly simultaneously, the court in *Valinet* simply adopted the rule of section 363 of the Restatement (Second) of Torts that possessors of land in rural areas are not liable for physical harm to others resulting from the condition of trees near a highway.<sup>28</sup> There was no discussion of the relationship, foreseeability, and public policy factors, or their possible effect on the outcome of the case.

Through the years, the most consistent criticism of *Webb* has been the contention that the issue of duty cannot fit neatly within a three-part balancing

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23. 575 N.E.2d 992 (Ind. 1991).

24. *Id.* at 995.

25. Tidmarsh, *supra* note 5, at 1424-25 (footnote omitted).

26. *Id.* at 1466-67.

27. 574 N.E.2d 283 (Ind. 1991).

28. RESTATEMENT (SECOND) OF TORTS § 363 (1965).

test. That assertion has its Hoosier roots in *Gariup Construction Co. v. Foster*,<sup>29</sup> which predated *Webb* by three years. In *Gariup*, the Indiana Supreme Court quoted, with approval, the following passage from *Prosser & Keeton on the Law of Torts*:

It is . . . not surprising to find that the problem of duty is as broad as the whole law of negligence, and that no universal test for it ever has been formulated. . . . But it should be recognized that "duty" is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection. . . . No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.<sup>30</sup>

This formulation—duty is no more than the sum of the policy considerations bearing on the plaintiff's right to recover—is, I think, still valid. It is another way to say that duty, or the absence of duty, is an expression of the result of the analysis, not a tool used to reach that result.

Despite *Webb*'s attempt to establish a standard test for duty, one month later, in *Cowe v. Forum Group, Inc.*,<sup>31</sup> the same court examined whether a medical care provider owed a duty to an unborn fetus to detect its mother's pregnancy. Instead of employing the *Webb* analysis, the court found a duty analogous to "that of a common carrier to provide protection and care."<sup>32</sup> That duty was owed to the mother and, by extension, to her unborn child.<sup>33</sup> The court continued to employ traditional duty rules the next year in *Stephenson v. Ledbetter*,<sup>34</sup> in which it held that the driver of a pickup truck owed a duty of reasonable care to an intoxicated passenger who fell out of the pickup's bed.<sup>35</sup> Although the court cited both *Webb* and *Gariup* for the proposition that duty is a question of law, it referred to neither case when it came time to determine whether a duty existed. Instead, the court relied on "the common law view . . . that the operator of an automobile owes to a passenger the duty of exercising reasonable care in its operation."<sup>36</sup> That same year, in *Stump v. Commercial Union*,<sup>37</sup> the court treated *Webb* as just one way to determine the existence of a duty, not as an exclusive test, and then applied the *Webb* factors to determine that a workers' compensation insurance carrier owed a duty to injured employees not to handle claims in a grossly negligent manner.<sup>38</sup>

29. 519 N.E.2d 1224 (Ind. 1988).

30. *Id.* at 1227 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 357-59 (5th ed. 1984)).

31. 575 N.E.2d 630 (Ind. 1991).

32. *Id.* at 636.

33. *Id.* at 637.

34. 596 N.E.2d 1369 (Ind. 1992).

35. *Id.* at 1372.

36. *Id.* (citing *Munson v. Rupker*, 148 N.E. 169 (1925)).

37. 601 N.E.2d 327 (Ind. 1992).

38. At the same time, the Indiana Court of Appeals also demonstrated a reluctance to employ

In 1996, the Indiana Supreme Court decided three cases that seemed to suggest a drift away from *Webb*. In *Tibbs v. Huber, Hunt & Nichols, Inc.*,<sup>39</sup> a state employee, injured when he slipped on a pipe in a stairway, sued the general contractor and subcontractor cutting pipe in a nearby hallway. The subcontractor claimed no duty because it did not control the stairwell. The court hinged its analysis on the foreseeability of injury, instead of balancing the *Webb* factors: “[T]he stairwell was certainly within the ‘range of apprehension’ and, accordingly, [the defendant] was obliged to behave safely.”<sup>40</sup> This seems more properly an exercise in scope of liability than a duty analysis. It assumes the contractor and its subcontractor could be liable to the employee as a person who could be expected to use the stairway and therefore seems to assume a duty on the part of the contractor and subcontractor to maintain the stairway in a safe condition.

Similarly, in *Rice v. Strunk*,<sup>41</sup> the court assumed that the “duty” imposed on an attorney sued for negligence required an attorney-client relationship and rejected balancing the relationship of the parties against the other two *Webb* factors:

[B]ecause it is necessary . . . for the plaintiffs to show the existence of an attorney-client relationship, the existence of duty will turn initially on the relationship of the parties. That is, if an attorney-client relationship does not exist, it will not be necessary to reach the foreseeability and public policy factors.<sup>42</sup>

Finally, in *Blake v. Calumet Construction Corp.*,<sup>43</sup> the court acknowledged that it “usually considers three factors”<sup>44</sup> when determining duty, but the court did not describe *Webb* as the exclusive test. Instead, it noted William Prosser’s article, *Palsgraf Revisited*,<sup>45</sup> which discussed “other considerations, such as conscience of the community and ease of administration.”<sup>46</sup> In the end, the court noted that the application of a century-old common law rule was not challenged by either party and for that reason affirmed the trial court under a traditional

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*Webb* as the exclusive test for duty. See, e.g., *Gunter v. Vill*, Pub, 606 N.E.2d 1310, 1312 (Ind. Ct. App. 1993) (citing *Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991), for the proposition that “[i]n Indiana, landowners have a duty to exercise reasonable care to make their premises safe for business invitees,” and *Welch v. Railroad Crossing, Inc.*, 488 N.E.2d 383, 388 (Ind. Ct. App. 1986), for the proposition that “[a] duty to anticipate and to take steps to protect against a criminal act arises only when the facts of a particular case make it reasonably foreseeable that a criminal act is likely to occur.”).

39. 668 N.E.2d 248 (Ind. 1996).

40. *Id.* at 250.

41. 670 N.E.2d 1280 (Ind. 1996).

42. *Id.* at 1284.

43. 674 N.E.2d 167 (Ind. 1996).

44. *Id.* at 170 (quoting *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991)).

45. 52 MICH. L. REV. 1 (1953).

46. *Blake*, 674 N.E.2d at 170.

common law principle: “The duty inquiry in this case . . . is governed by a line of decisions dealing specifically with contractors’ liability to third parties for construction flaws.”<sup>47</sup>

In *Walker v. Rinck*,<sup>48</sup> the Indiana Supreme Court applied the *Webb* formulation in a pre-conception medical malpractice case. In *Walker*, later-born children sued a doctor for failing to give RhoGAM injections to their mother, who had Rh-negative blood, after the birth of her first child. The court determined: (1) the children “were the beneficiaries of the consensual relationship” between their mother and her doctor; (2) the various health deficiencies suffered by the children were foreseeable; and (3) the public policy behind the issuance of RhoGAM injections is “to protect future children.”<sup>49</sup> Therefore, a duty existed.

In *Erie Insurance Co. v. Hickman*,<sup>50</sup> the court applied *Webb* not to determine the existence of a duty, but rather to determine whether Indiana recognized a tort cause of action based on breach of an already recognized contractual duty. The court first observed that “Indiana law has long recognized that there is a legal duty implied in all insurance contracts that the insurer deal in good faith with its insured.”<sup>51</sup> In determining whether the breach of that duty constituted a tort, the court turned to *Webb*. Citing the “unique character” of the insurance relationship, the foreseeability of harm to an insured, and the public policy of “fair play between insurer and insured,” the court held that “recognition of a cause of action for the tortious breach of an insurer’s duty to deal with its insured in good faith is appropriate.”<sup>52</sup>

### B. *Webb in the Court of Appeals*

The Indiana Court of Appeals has generally, but not uniformly, adhered to *Webb* as the test for duty.<sup>53</sup> Notably, in 1994, the court of appeals per then Judge

47. *Id.* at 170.

48. 604 N.E.2d 591 (Ind. 1992).

49. *Id.* at 594-95.

50. 622 N.E.2d 515 (Ind. 1993).

51. *Id.* at 518 (citing *Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173, 181 (Ind. 1976)).

52. *Id.* at 518-19.

53. *See, e.g., Zurich Am. Ins. Group v. Wynkoop*, 746 N.E.2d 985, 990 (Ind. Ct. App. 2001) (stating that “[t]his court has analyzed the question of what must be considered in order for a court to impose a duty at common law. Three factors must be balanced . . . .”); *Ousley v. Bd. of Comm’rs*, 734 N.E.2d 290, 294 (Ind. Ct. App. 2000) (holding that “the *Webb* test has become firmly entrenched in the case law of Indiana.”); *Ind. Bell Tel. Co. v. Maynard*, 705 N.E.2d 513, 514 (Ind. Ct. App. 1999) (stating “[i]n determining whether to impose a duty in a negligence action at common law, this court considers three factors . . . .”); *Ebbinghouse v. FirstFleet, Inc.*, 693 N.E.2d 644, 647 (Ind. Ct. App. 1998) (citing *Webb*, 575 N.E.2d at 995) (reasoning “[o]ur supreme court has held that in determining whether a defendant owed a duty to the plaintiff, we must consider and balance three factors . . . .”); *but see Basicker ex rel. Johnson v. Denny’s, Inc.*, 704 N.E.2d 1077, 1080 (Ind. Ct. App. 1999) (citing *Van Duyn v. Cook-Teage P’ship*, 694 N.E.2d 779, 781 (Ind. Ct.

Rucker, applied the *Webb* formulation in examining whether counselors and clergy with knowledge of a child's sexual abuse owed a duty to the child to report the abuse.<sup>54</sup> The court held that: (1) no significant relationship arose from either the knowledge of abuse, or the defendant's status as a marriage counselor of the abuser or clergy for the victim; (2) it was foreseeable that the abuse, if unreported, would continue; and (3) public policy was reflected in legislation<sup>55</sup> that criminalized failure to report but had created no civil cause of action.<sup>56</sup> Balancing the factors, the court concluded that no duty existed on the part of three of four defendants to report the abuse. That same year, the Indiana Supreme Court issued two opinions that seemed to come down on the side of *Webb* as the exclusive test for duty. The court applied the *Webb* test to determine the existence of a "private duty of a governmental entity,"<sup>57</sup> and later that year, again applied *Webb* in holding that pharmacists owe a duty of reasonable care to customers to stop filling prescriptions when they know, or should know from the frequency of prescription orders, that the drugs are being misused.<sup>58</sup>

Although attempting to apply *Webb* as a test for duty, the court of appeals has taken a variety of views as to how this is to be done. The efforts of the court of appeals to rationalize and apply *Webb* are discussed in Part III.A.

### C. Recent Explanations of *Webb*

The Indiana Supreme Court has continued to waffle over the proper application of *Webb*. In recent years, it has described *Webb* as a "useful," though

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App. 1998)) (relying on traditional duty concept that "[g]enerally, there is no duty on the part of a business owner to protect its patrons against the criminal acts of third persons unless the particular facts make it reasonably foreseeable that the criminal act will occur"); *CSX Transp., Inc. v. Kirby*, 687 N.E.2d 611, 615 (Ind. Ct. App. 1997) (citing *Penn. R.R. v. Mink*, 212 N.E.2d 784, 788 (Ind. App. 1966)) (relying on traditional rule that "[r]ailroad companies owe to the traveling public the duty of exercising reasonable care to avoid injury to persons at places where the tracks and the highway cross"); *Sheley v. Cross*, 680 N.E.2d 10, 12 (Ind. Ct. App. 1997) (relying on traditional rule that "a landowner does owe a duty to the traveling public to exercise reasonable care in the use of his property so as not to interfere with safe travel on public roadways").

54. *J.A.W. v. Roberts*, 627 N.E.2d 802 (Ind. Ct. App. 1994).

55. IND. CODE § 31-6-11-20 (1993) (recodified at IND. CODE § 31-33-22-1 (1998)).

56. *Roberts*, 627 N.E.2d at 813.

57. *Mullin v. Mun. City of South Bend*, 639 N.E.2d 278, 283 (Ind. 1994). That application prompted a dissent from Justice Dickson, who reiterated his position from *Gariup Construction Co.*:

The legal determination of whether a duty exists in a particular case is not necessarily resolved by recourse to the three factors found useful by this Court in *Webb v. Jarvis*. These should not constitute the exclusive tests for duty. . . . The majority opinion presents an unnecessary and unwise construct. It is better that the common law avoid such artificial and rigid formulations.

*Id.* at 285-86 (Dickson, J., concurring and dissenting) (citations omitted).

58. *Hooks Super X, Inc. v. McLaughlin*, 642 N.E.2d 514 (Ind. 1994).

“not exclusive,” test for duty,<sup>59</sup> as the only test,<sup>60</sup> and as the “usual” test.<sup>61</sup>

In *Delta Tau Delta v. Johnson*,<sup>62</sup> the court addressed the duty of a college fraternity to protect invitees from the criminal acts of third parties. The court first stated that it “need not formally use the three factor balancing test as enunciated in *Webb v. Jarvis*” because the fraternity already had a duty as a landowner “to exercise reasonable care for [the plaintiff’s] protection.”<sup>63</sup> However, the court then took the additional step of stating that “[t]he issue in this case is when, if ever, does that duty extend to criminal acts by third parties.”<sup>64</sup> For this question, the court returned to the *Webb* framework. In that context, the court ultimately adopted a “totality of the circumstances” test to determine whether the injury to the plaintiff—a rape by another guest—was foreseeable.<sup>65</sup> In one respect, *Delta Tau Delta* foreshadowed *NIPSCO v. Sharp*,<sup>66</sup> where the majority of the Indiana Supreme Court explicitly disapproved the *Webb* analysis used by the court of appeals to identify the duty of a supplier of electrical power. The supreme court found the duty to keep power lines insulated where the public may come into contact with them was found to had been long ago settled by precedent. The court then explained that where a “duty has already been declared” resort to *Webb* is unnecessary.<sup>67</sup>

Shortly before *NIPSCO* was decided, the Indiana Supreme Court, in *Mangold ex rel. Mangold v. Indiana Department of Natural Resources*,<sup>68</sup> quoted a passage from *Webb* dealing with its third “public policy” factor. *Webb* in turn quoted Prosser and Keeton describing duty as “only an expression . . . of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.”<sup>69</sup> In my view, the Prosser and Keeton quotation supports the broader statement that policy considerations are the only relevant factor necessary in determining duty, not just one of three separate and independent factors.

Although reiterating the *Webb* formula, the court in *Mangold* moved closer to the view that duty is merely the label a court pins on a defendant as the result of an evaluation of policy considerations. The court expressly recognized that “[b]y declaring that a school may be held liable for the injuries suffered by its students, we essentially have made a policy decision that a school’s relationship to its students, the foreseeability of harm, and public policy concerns entitle

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59. *Cram v. Howell*, 680 N.E.2d 1096, 1097 n.1 (Ind. 1997).

60. *Rice*, 670 N.E.2d at 1284 n.1.

61. *Blake*, 674 N.E.2d at 170.

62. 712 N.E.2d 968 (Ind. 1999).

63. *Id.* at 971 n.4.

64. *Id.*

65. *Id.* at 973.

66. 790 N.E.2d 462 (Ind. 2003). The court of appeals addressing the issue in *Webb* terms is found at *NIPSCO v. Sharp*, 732 N.E.2d 848, 856-58 (Ind. Ct. App. 2000).

67. *NIPSCO*, 790 N.E.2d at 465.

68. 756 N.E.2d 970 (Ind. 2001).

69. *Webb*, 575 N.E.2d at 997.

students to protection.”<sup>70</sup> This formulation recognizes that foreseeability of harm and the relationship between the parties are factors that may bear on the ultimate “policy decision,” whether the law allows recovery under these circumstances. The *Mangold* opinion pointed out that although the existence of duty is a question of law, breach of the duty is ordinarily a question for the trier of fact.<sup>71</sup> In this respect, the court cited *Bader v. Johnson*,<sup>72</sup> which reformulated the elements of a negligence claim from: (1) duty, (2) breach, (3) causation, and (4) damages to (1) duty, (2) breach, and (3) “compensable injury proximately caused” by the breach.<sup>73</sup> This formulation requires that damages be “compensable” and be “proximately caused.” It thus arguably presages an explicit compression of proximate cause and damages into one requirement that the harm be within the “scope of liability” created by the tortious act.

### III. THE PROBLEM WITH *WEBB*

*Webb* and its progeny do not attempt to explain how the three factors interact and how they are to be balanced. But the principal difficulty in applying the *Webb* formula lies in the factors it purports to “balance.” Public policy has always been the linchpin of duty, and remains so under the formulation I suggest. The other two factors—relationship and foreseeability—are either subsumed into the policy issue or more properly viewed as bearing on issues for the trier of fact. To be sure, the relationship between the parties may bear on whether the law will allow the plaintiff to collect from the defendant—consider the trespasser suing the landowner—but that relationship is not a distinct factor as opposed to one of many considerations that may affect the policy call.

#### A. *Foreseeability as a Webb Factor*

Foreseeability, on the other hand, is problematic for a number of reasons. First, there is no agreement as to what that term means under *Webb*. In 1996, in *Goldsberry v. Grubbs*,<sup>74</sup> Judge Kirsch suggested that foreseeability in the duty context was distinct from foreseeability for purposes of proximate cause. The court in *Goldsberry* reasoned that because foreseeability is applied in both duty and proximate cause it must mean something different in the two contexts.<sup>75</sup> If it were not two distinct concepts, as Judge Bailey recently put it, “deciding the duty question would subsume the entire law of negligence, i.e., duty breach and proximate cause, into the duty question.”<sup>76</sup> To resolve this difficulty, Judge Kirsch explained that in a duty analysis under *Webb*, foreseeability is viewed

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70. *Mangold*, 756 N.E.2d at 974.

71. *Id.* at 975.

72. 732 N.E.2d 1212 (Ind. 2000).

73. *Id.* at 1216-17.

74. 672 N.E.2d 475 (Ind. Ct. App. 1996).

75. *Id.* at 479.

76. *Hammock v. Red Gold, Inc.*, 784 N.E.2d 495, 507 (Ind. Ct. App. 2003) (Bailey, J., dissenting) (quoting *Goldsberry*, 672 N.E.2d at 479).

prospectively from the perspective of the actor and without regard to the facts of the particular case. In contrast, foreseeability for purposes of proximate cause is viewed retrospectively, and takes into account the particular circumstances of each case.<sup>77</sup> Judge Friedlander dissented in *Goldsberry* and explicitly rejected the suggestion that the label “foreseeability” was pinned on different concepts in the two contexts.<sup>78</sup> In Judge Friedlander’s view, imposition of a duty necessarily embraced the specific circumstances of the actor, and the court should adhere to the classic formulation of duty to exercise reasonable care as owed only to those reasonably foreseeably injured by a breach.<sup>79</sup>

Since 1996, the schizophrenic view of foreseeability proposed by the *Goldsberry* majority has been embraced by some panels of the Indiana Court of Appeals,<sup>80</sup> rejected by others,<sup>81</sup> and noted by some without taking sides.<sup>82</sup> *Goldsberry* seems accurately described by Judge Bailey as an effort to address “some of the confusion created by the *Webb* decision . . . .”<sup>83</sup> Attempting to straighten things out is the most the court of appeals can do when faced with directly applicable Indiana Supreme Court precedent. The logical result of a single “foreseeability” was to collapse proximate cause into duty. Because *Webb* distinguished the two, the court of appeals felt compelled to attempt to explain how the two can coexist. As explained in Part IV, I suggest that the logic of this situation drives us not to find two concepts of foreseeability, but rather to recognize that duty adds nothing to the analysis of a negligence action.

Moreover, I do not believe the effort to rationalize *Webb* by bifurcating foreseeability is successful. Like “proximate cause,” “foreseeability” as a concept in tort law also has its critics. That, like the issues surrounding “proximate cause,” is a subject for another day. Notwithstanding any shortcomings, “foreseeability” remains in common use and is specifically demanded by *Webb*. I think there are two problems in the two-foreseeabilities approach to *Webb*. First, I suspect it is not always easy and sometimes impossible to distinguish general circumstances from specific facts of a given case. Assuming that can be done, “prospective” general foreseeability is not restricted to duty issues.

I take prospective foreseeability to mean a reasonable person in the

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77. *Goldsberry*, 672 N.E.2d at 479.

78. *Id.* at 483 (Friedlander, J., dissenting).

79. *Id.* at 482 (Friedlander, J., dissenting) (citing *NIPSCO v. Sell*, 597 N.E.2d 329, 332 (Ind. Ct. App. 1992) (where the court of appeals, citing Justice Cardozo’s classic *Palsgraf* analysis, adopted this formulation of duty under *Webb*)).

80. *City of Gary v. Smith & Wesson*, 776 N.E.2d 368, 386 (Ind. Ct. App. 2002); *City of Indianapolis v. Pippin*, 726 N.E.2d 341, 346 (Ind. Ct. App. 2000); *Franklin v. Benock*, 722 N.E.2d 874, 879 (Ind. Ct. App. 2000); *King v. Northeast Sec., Inc.*, 732 N.E.2d 824, 834 (Ind. Ct. App. 2000).

81. *Hammock*, 784 N.E.2d at 501 n.10; *Bradtmiller v. Hughes Prop., Inc.*, 693 N.E.2d 85, 89 (Ind. Ct. App. 1998); *Bush v. NIPSCO*, 685 N.E.2d 174, 179 (Ind. Ct. App. 1997) (dissenting Judge Rucker expressly agreeing with *Goldsberry*).

82. *Ousley v. Bd. of Comm’rs of Fulton County*, 734 N.E.2d 290 (Ind. Ct. App. 2000).

83. *Hammock*, 784 N.E.2d at 506 (Bailey, J., dissenting).

defendant's shoes who thought about it would recognize a reasonable possibility that harm of the sort the plaintiff suffered would result from the defendant's act or omission. So understood, "foreseeability" may well bear on whether the plaintiff's injury is among the risks created by the defendant's unreasonable behavior for which the law should provide relief. That is a component of proximate cause as currently understood. As the comments to the pattern jury instruction observe, "the trier of fact considers if the injury was a natural and probable consequence of a negligent act, which in the light of the circumstances could have been reasonably foreseen."<sup>84</sup> Causation in fact is also embraced within proximate cause as typically instructed in Indiana courts and elsewhere. Indeed, the pattern instruction language focuses on causation in fact, not scope of liability.<sup>85</sup> Determination of causation in fact is a retrospective analysis. But the scope of liability component of proximate cause does not turn on a retrospective view of foreseeability, and it may also take into consideration the specific circumstances under which the defendant acted. This turns on whether the harm incurred by the plaintiff is within the risks that make the defendant's conduct unreasonable. It nevertheless is a component of proximate cause and is an issue for the trier of fact.<sup>86</sup> Finally, foreseeability of harm may also relate to whether the defendant's conduct fell below the reasonableness standard. This is a breach issue in conventional duty/breach analysis. Neither of these uses of foreseeability makes it an independent factor in whether the defendant's action as a matter of law is or is not a basis for a claim. Both may invoke specific circumstances, and evaluate the conduct from the perspective of the actor.

### *B. Duty, Scope of Liability, and Breach*

*Webb's* reference to foreseeability often causes confusion between duty and breach as well as between duty and proximate cause. Foreseeability is described by *Webb* as an independent factor in determining duty, but it may also relate to whether the defendant's actions were reasonable, i.e. to the defendant's breach. For example, a shopkeeper whose business is in a low-crime area and whose patrons have never been attacked may argue that his or her decision not to hire security guards was reasonable given the circumstances.<sup>87</sup> More frequently, foreseeability is also a critical component of causation. Thus, courts have found that a defendant owed no duty to a plaintiff when, as a matter of law, the

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84. IND. PATTERN JURY INST. CIVIL cmts. (2d ed.) (citing *Hedrick v. Tabbert*, 722 N.E.2d 1296 (Ind. Ct. App. 1999); *Mangold v. Ind. Dept. of Natural Resources*, 720 N.E.2d 424 (Ind. Ct. App. 1999)).

85. Section 5.06 provides: "'Proximate cause' is that cause which produces the [death][injury][property damage] complained of and without which the result would not have occurred. That cause must lead in a natural and continuous sequence to the resulting [death][injury][property damage][unbroken by any intervening cause]." *Id.* § 5.06.

86. See *Rubin v. Johnson*, 550 N.E.2d 324, 331 (Ind. Ct. App. 1990).

87. Cf. *Basicker ex rel. Johnson v. Denny's, Inc.*, 704 N.E.2d 1077, 1080 (Ind. Ct. App. 1999).

defendant was not the proximate cause of the plaintiff's injury. That was at least part of the issue in *Webb*, which is itself an illustration of the conflation of these factors. *Webb* characterized its analysis as focusing "on whether the person actually harmed was a foreseeable victim and whether the type of harm actually inflicted was reasonably foreseeable."<sup>88</sup> Although we may argue over whether "foreseeable" is the best way to describe harms within the risks created by the defendant's act, the formulation in *Webb* is a fair description of the inquiry that is left to the jury in determining whether the defendant acted unreasonably and, if so, whether that unreasonable act was the proximate cause of injury. As the Indiana Supreme Court recently put it:

Under Indiana law, a negligent defendant may be liable for a plaintiff's injury if his or her action is deemed to be a proximate cause of that injury. Whether or not proximate cause exists is primarily a question of foreseeability. As this Court recently stated, the issue is whether the injury "is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated." *Bader v. Johnson*, 732 N.E.2d 1212, 1218 (Ind. 2000). . . . The sum of all this is that, in order to be liable for a plaintiff's injury, the harm must have been reasonably foreseeable by the defendant . . . .<sup>89</sup>

If the harm is not reasonably foreseeable, then the defendant is not liable. But as the same court pointed out, an important aspect of foreseeability in Indiana negligence law is "[w]hether the resulting harm is 'foreseeable' such that liability may be imposed on the original wrongdoer is a question of fact for a jury."<sup>90</sup>

Foreseeability is in most cases an issue for the trier of fact, not an issue for the judge to resolve as a matter of law. It becomes an issue for the trial judge only if, as in *Webb* itself, one may conclude that proximate cause is lacking as a matter of law. Under this view the result in *Webb* would remain unchanged because the court determined that, as a matter of law, the injuries to the plaintiff were not reasonably foreseeable. Stated otherwise, the injury to the brother-in-law was not within the scope of liability for over-prescription because the injury was not the harm whose risk made the over-prescription tortious. In sum, layering a foreseeability component onto duty ultimately adds nothing to the analysis and confuses the determination of proximate cause and the reasonableness of an act.

### C. *The Harm in This Confusion*

The interdependence of relationship, foreseeability and duty becomes problematic because it generates the potential for incorrectly understood

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88. 575 N.E.2d at 997.

89. *Control Techniques v. Johnson*, 762 N.E.2d 104, 108 (Ind. 2002).

90. *Id.* at 107; *cf.* *Shambaugh & Son, Inc. v. Carlisle*, 763 N.E.2d 459, 461 (Ind. 2002) (stating "[o]rdinarily, the issue of proximate cause is not properly resolved by summary judgment, but is better left to the jury.").

precedents, which in turn lead to error in subsequent cases. Posit a case where the “real” reason why a defendant prevails on a summary judgment motion is that the defendant acted reasonably under the circumstances, i.e., was not negligent. A modest twist of the facts in *King v. Northeast Security, Inc.*,<sup>91</sup> provides such an example. If a school district hires a respectable security service to oversee its facilities, and arranges for surveillance during times students may be expected to be on its premises, it has acted reasonably to provide a secure environment for its students and should not be liable for a flaw in execution by the service that contributes to a mugging at the school. But if we express that result as a lack of duty to the students, rather than absence of an unreasonable act, it risks suggesting no liability under any circumstances for failure to provide a safe environment.

Expressing the defendant’s exposure in terms of duty can overstate liability as well as understate it. Describing a duty in terms of specific circumstances rather than a generalized duty of reasonable care can lead to black-letter rules of liability that approach strict liability. Thus, we may properly say it is unreasonable to fail to do X under these circumstances. But if we formulate that result as “there is a duty to do X,” it smacks of strict liability to anyone injured, however remotely.

#### IV. REFORMULATING THE NEGLIGENCE ACTION

The thesis of this article is that a clear understanding of the issues presented by a negligence case is often frustrated by the need to express a defendant’s exposure to liability in terms of “duty.” It seems odd to state that the very same action (leaving a banana peel on the marble floor of one’s home) is or is not a breach of duty, depending on who gets hurt (the trespasser or the invitee). A more accurate way to describe this legal result would seem to be that it is not reasonable conduct to leave the banana on the floor, but for good reasons we are content to leave the trespasser uncompensated. In the terms recently used in *Mangold*, public policy dictates leaving trespassers where they find themselves as a result of acts of simple negligence on the part of their victims. Similarly, if an injury is beyond the capability of the defendant to prevent at reasonable cost, we should either regard this as immunity (e.g., for governmental failure to prevent crime), or no unreasonable conduct (in a shopkeeper’s failure to provide security to patrons from the wholly random holdup). These results amount to a rule of law that this class of plaintiffs cannot recover from this class of defendants under these circumstances. But it is not useful to think of these as the absence of a duty.

##### *A. Duty as a Misleading Term*

A major reason to abandon speaking of “duty” is the confusion it generates.

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91. 790 N.E.2d 474, 477 (Ind. 2003). This case involved a claim against a security agency hired by a school for injuries incurred by a student who was beaten by another student in the school’s parking lot.

In ordinary English, most non-lawyers would think the government has a duty to provide law enforcement, and the shopkeeper has a duty to take reasonable steps to provide a safe environment for the shop's patrons. The law should view the matter no differently. If we conclude as a matter of law that there is no liability in these two circumstances, it is not for lack of duty. Rather, that result is based on either a policy that the government should not incur the expense necessary to prevent all crime—the National Guard on every corner—or a conclusion that the shopkeeper's security arrangements were reasonable given the crime rate in the area, available resources, and whatever else might be deemed relevant to the assessment.

To be sure, the duty of the government or the shopkeeper may be expressed as a duty to try to provide security, but not a duty to succeed in that effort. But if that is the test, the concept of duty adds nothing to the concept of liability for unreasonable conduct. It is not a breach of duty to fail to succeed in providing security. It is a breach only if no reasonable steps are taken. Thus, putting it in terms of "duty" and "breach" becomes circular. It adds nothing to the proposition that failure to exercise reasonable care can expose one to liability. More importantly, expressing the legal result in terms of duty is confusing to the fact-finder in many cases. Speaking of no duty to act is understandable if the claim is that the defendant failed to rescue the plaintiff. A failure to take affirmative action does indeed seem wrong if one has a duty to act and perfectly acceptable if there is no duty. But it is not consistent with ordinary language to apply "no duty" to the landlord who abandoned the banana peel. The same is true of many other defendants whom the law protects from liability despite their unreasonable acts.

### *B. The Role of Policy Considerations and Relationships*

If a defendant has acted unreasonably, but the law denies the plaintiff recovery, that result may indeed be based on the relationship between the parties. But the "relationship" factor is no more than a policy consideration that we deem persuasive. In one set of cases, the term "duty" is given a meaning in conformity with its ordinary usage. The common law starts from the proposition that one has no duty to prevent harm to another in the absence of some special relationship between the two. Thus, there is no claim against a bystander who fails to save a drowning person.<sup>92</sup> But a basis for requiring others to take affirmative action may be found in a variety of relationships between the victim and others who are not the immediate cause of the danger.<sup>93</sup> Many of these have already been discussed (landowner—invitee, attorney—client, nursing home—patient, etc.). In those cases, it is quite proper to speak of the relationship's giving rise to a duty, which is another way of saying the defendant may be liable for failing to prevent injury. Finding such a relationship is, I suggest, simply another example of identifying a reason why the law should allow recovery. It represents a policy call that the

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92. *L.S. Ayres & Co. v. Hicks*, 40 N.E.2d 334 (1942).

93. *See J.A.W. v. Roberts*, 627 N.E.2d 802 (Ind. Ct. App. 1994).

interests furthered by encouraging affirmative intervention are sufficient to overcome the general rule of nonliability for failure to act. And that in turn depends upon whether we regard the failure to intervene as reasonable conduct on the part of an actor playing the defendant's role under the circumstances.

For example, a legal malpractice claim is, under current doctrine, generally limited to the lawyer's clients.<sup>94</sup> This rule is said to be based on the relationship between the parties. It was presumably grounded in a concern for potentially overwhelming exposure from relatively minor culpability.<sup>95</sup> Yet we already see a shift toward allowing those outside the scope of that relationship to recover for reasonably foreseeable harm inflicted by the attorney.<sup>96</sup> At their core, situations like these are simply matters of policy, i.e., a determination that a certain class of plaintiffs will or will not be permitted to recover for injuries caused by acts of a certain class of defendants that fall below a reasonable standard of conduct. In those cases, the relationship factors balanced in *Webb* boil down to a subset of the public policy considerations already said to be balanced under the *Webb* formulation. *Webb* relied on an Indiana Court of Appeals case for the proposition that "[t]he duty of reasonable care is not, of course, owed to the world at large, but rather to those who might reasonably be foreseen as being subject to injury by the breach of the duty."<sup>97</sup> This is the sentiment expressed by some commentators who contend that the conclusion that everyone is obliged to act reasonably toward everyone, instead of attempting to analyze whether a particular defendant owed a duty to a particular plaintiff, means that "duty in its primary sense necessarily disappears from negligence."<sup>98</sup> This is the result that drove the court of appeals to bifurcate foreseeability. The disappearance of duty is not a result to be avoided. Rather, if properly understood it neither broadens nor narrows exposure to liability because the foreseeability component remains intact in the proof of causation and the reasons for finding duty vel non are equally viable as policy considerations.

Those commentators suggest, and *Webb* stated as much, that "duty" is important to the determination of whether the defendant had an obligation to avoid harming a particular person or class of persons. Although the formulation for a negligence action stated below does not use the word "duty," it still incorporates the same principle, and does so in a clearer line of reasoning.

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94. *Hacker v. Holland*, 570 N.E.2d 951, 955 (Ind. Ct. App. 1991) (holding plaintiff must have employed the attorney).

95. Craig D. Martin, *Liability of Attorneys to Non-Clients: When Does a Duty to Non-Clients Exist*, 23 J. LEGAL PROF. 273, 273 (1998).

96. *See, e.g., Walker v. Lawson*, 526 N.E.2d 968 (Ind. 1988) (allowing action by beneficiary of will who was known third-party beneficiary).

97. *Webb*, 575 N.E.2d at 997 (citing *Thiele v. Faygo Beverage, Inc.*, 489 N.E.2d 562, 574 n.4 (Ind. Ct. App. 1986)).

98. John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 706 (2001).

### C. *Limitations on Recovery*

Eliminating duty does not expand liability. First, the proximate cause inquiry, undertaken by the jury under current Indiana instructions, asks whether the particular injury to the particular plaintiff was a natural and probable consequence reasonably foreseeable by the defendant. This is Indiana's current formulation of the scope of liability issue. Some would prefer expressing it as whether the plaintiff's injury was caused by the risk that renders the defendant's conduct unreasonable. In either case the focus is not on what the defendant did, but whether the injury should be compensable. Second, many considerations of public policy, including those based on the relationship between the parties, also remain to address whether the defendant, though acting unreasonably, nevertheless avoids liability as a matter of law. Third, if foreseeability or reasonableness of conduct are so clear that they may be addressed as a matter of law, then the trial court may so rule.<sup>99</sup> This analysis reaches the same answers to the "important questions about duty in the primary sense."<sup>100</sup> It simply asks the questions differently, and in my view more lucidly. The effect of jettisoning duty is not a different result in any specific case. It is a better understanding of the principles underlying the result, and therefore more coherent precedent for the future.

### D. *The Role of Precedent*

I suggest the foregoing is a clearer way to think about the question whether a given set of facts supports recovery by the plaintiff against the defendant. But clarity of analysis is not the only value in the law. Predictability and consistency embodied in *stare decisis* are entitled to a great deal of weight, although some of these cases might be questioned on other substantive grounds. I do not suggest that all of the "rules" expressed in terms of "duty" are no longer good law for failure to formulate the reasoning underlying the rules of liability as I would prefer. Accordingly, although the decisions cited in footnotes six through twenty-two are couched in terms of duty, I do not challenge the result in those cases for that reason. To the extent any of them hold that a given class of defendants does or does not owe a duty to a given class of plaintiffs under the circumstances of that case, that "rule" may equally be reformulated as there is or is not a stated or unstated policy ground why, as a matter of law, those plaintiffs are barred from recovery from those defendants under those circumstances.

For these reasons, then, I would restate the application of the duty concept and, in the process, the broader formulation for a cause of action based on negligence. Essentially, there are three components of a cause of action for negligence, and the defendant may succeed by prevailing on any one of them, in any sequence. First, the plaintiff must prove the defendant was in fact "negligent." Negligence is defined as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar

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99. See, e.g., *Collins v. J.A. House, Inc.*, 705 N.E.2d 568, 573 (Ind. Ct. App. 1999).

100. *Goldberg & Zipursky, supra* note 98, at 706.

situation.”<sup>101</sup> All parties should act with reasonable prudence at all times, and a party who fails to adhere to that standard is negligent. Proof of negligence amounts to a showing of what a reasonably prudent person in the defendant’s position would have done, and the failure of the defendant to do so. But merely proving a defendant’s negligence does not mean the defendant will necessarily be held liable. A second component of the cause of action requires proof that the defendant’s negligence was the proximate cause of actionable harm. In the terms currently used by Indiana courts, that proof consists of a showing that the defendant was both the cause in fact of the harm, and also that the harm was reasonably foreseeable by the defendant at the time of his or her negligence. A plaintiff who provides evidence of negligence, proximate causation and harm has made out the prima facie cause of action. Finally, a defendant is free to contend—on motion for summary judgment, directed verdict or otherwise—that there are policy reasons why the person suffering the harm should nevertheless be precluded from recovery. These reasons may preclude liability to anyone for the particular act or omission, or they may be directed toward barring claims by persons with the characteristics of the particular plaintiff, or recovery for the harm alleged by the plaintiff. In this sense, the original core of the duty concept remains, but it is framed in terms of reasons for allowing or precluding the possibility of recovery.

A majority of the court of which I am a member has not adopted the view of negligence law that I suggest. So long as that remains the case, I see no point to writing separately in judicial opinions as to methodology. In the first place, because *Webb* is existing precedent, the parties usually brief their cases in *Webb* terms, and no one argues for the approach I suggest. Moreover, as already noted, the result in a given case is usually unaffected by choice of methodology. If I agree with the conclusion that the law does or does not permit the plaintiff to recover from the defendant under the circumstances, and the methodology of the opinion is consistent with existing precedent, I expect to concur without elaborating the points made in this Article.<sup>102</sup>

#### CONCLUSION

In sum, I think the traditional formula of duty, breach, causation and harm is in most cases better understood as proceeding on the assumption that all of us are obliged to take reasonable steps to avoid harm to others in the activities we undertake and can control. The issue of “duty” then resolves itself to an inquiry into whether there is some reason in policy why the law should nevertheless preclude recovery. That reason may arise from, inter alia, the nature of the plaintiff, the nature of the defendant, the relationship between them, the nature of the activities giving rise to the claim, or the nature of the harm alleged.

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101. BLACK’S LAW DICTIONARY 1056 (7th ed. 1999).

102. See, e.g., *Estate of Heck v. Stoffer*, 786 N.E.2d 265 (Ind. 2003).

