Iowa Supreme Court Adopts Restatement (Third) Rules on Duty and Causation, Makes Summary Judgment More of a Long Shot: A Note on Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009).

Amanda Wachuta
Ahlers & Cooney, P.C.
100 Court Ave., Suite 600
Des Moines, IA 50309
(515) 246-0322
awachuta@ahlerslaw.com

Thompson v. Kaczinski was a personal injury action brought by a motorist who crashed his car on a rural road when swerving to miss a trampoline tarp that had blown into the road from the defendants' adjacent property. The district court granted summary judgment to the defendants, holding the defendants did not owe a duty to the plaintiff because the risk of their trampoline tarp blowing onto the road was not foreseeable, and that their failure to secure the tarp was not a proximate cause of the plaintiff's damages. The court of appeals affirmed the district court. On further review, the Iowa Supreme Court vacated the court of appeals' decision, reversed the trial court, and remanded the case for trial.

What does this decision mean? Let's start with the basics. Everyone knows to prevail on a negligence claim, a plaintiff must prove four elements: (1) duty, (2) breach, (3) causation, and (4) damages. Causation, in turn, has always been said to have two sub-elements: (a) factual causation (aka "cause in fact," "but-for" causation), and (2) proximate causation (aka "legal cause").

The first sub-element of causation, factual causation, is fairly straightforward and remains intact following the *Thompson* case. The issue is simply this: would the plaintiff's injury have happened but for the defendant's conduct? If a negligence action has been filed, the answer to this question is likely a pretty easy "yes." However, if the plaintiff would have been injured whether or not the defendant acted the way he did, then there is no actual causation, and the plaintiff does not have a meritorious negligence claim against the defendant.

The second sub-element of causation, on the other hand—proximate cause—is what the Iowa Supreme Court's decision in *Thompson* changed. Our pre-*Thompson* jury instructions required the plaintiff to prove the defendant's conduct was a "substantial factor" in bringing about the plaintiff's injury. Iowa case law had previously instructed that whether an act was a substantial factor was determined by looking at the "proximity and forseeablility of the harm flowing from the actor's conduct." *Virden v. Betts & Beer Constr. Co.*, 656 N.W.2d 805, 808 (Iowa 2003). The Iowa Supreme Court had explained:

> "If upon looking back from the injury, the connection between the negligence and the injury appears unnatural, unreasonable, and improbable in the light of common experience, such negligence would be a remote rather than a proximate cause. If, however, by a fair consideration of the facts based upon common human experience and logic, there is nothing particularly unnatural or

> unreasonable in connecting the injury with the negligence, a jury question would be created."

Clinkscales v. Nelson Secs., Inc., 697 N.W.2d 836, 843 (Iowa 2005).

In *Thompson*, the Iowa Supreme Court was persuaded by the drafters of the American Law Institute's *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* that the framework just described was too confusing. In an attempt to simplify the second sub-element of causation, the Iowa Supreme Court did away with the label "proximate cause" completely and replaced the "substantial factor" inquiry with the *Restatement*'s "scope of liability" inquiry.

The new rule is simply stated: "An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." *Restatement (Third)* § 29, adopted in *Thompson*, 774 N.W.2d at 839. Most of the time, it will probably also be easily applied. For example, getting into a car accident is within the risks that come from driving negligently, having someone slip and fall is within the risks that come from a grocer leaving a broken jar of peanut butter on the aisle floor. On the other hand, when a plaintiff is injured in a way *not* to be expected from the defendant's conduct—in the peanut butter example, for instance, a customer having an allergic reaction—the defendant may be absolved from liability under the *Thompson*/*Restatement* scope-of-liability principle.

The *Thompson* court acknowledged that both concepts—proximate cause and scope-of-liability—hinge in large part on foreseeability. Both concepts: " 'exclude liability for harms that were sufficiently unforeseeable at the time of the actor's tortious conduct that they were not among the risks—potential harms—that made the actor negligent.' " *Thompson*, 774 N.W.2d at 839 (quoting *Restatement* § 29, cmt. *j*). However, under the new scope-of-liability principle,

> the jury should be told that, in deciding whether the plaintiff's harm is within the scope of liability, it should go back to the reasons for finding the defendant engaged in negligent or other tortious conduct. If the harms risked by that tortious conduct include the general sort of harm suffered by the plaintiff, the defendant is subject to liability for the plaintiff's harm.

Restatement § 29, cmt. *d*. Thus, if the jury finds the grocer was negligent—i.e., breached his duty to exercise reasonable care—to answer the scope-of-liability issue, the jurors should be asking themselves, "All right, *why* did we find that leaving a broken jar of peanut butter on the floor was not reasonable?" Most likely, the answer will be, "because someone could slip and fall on it" and not, "because someone with a severe peanut allergy could come in and suffer a reaction." Therefore, the grocer is liable to the plaintiff in the slip-and-fall case but not to the plaintiff in the allergic-reaction case, because only the harm suffered by the former resulted from the risks that made the grocer's conduct tortious (negligent).

Of course, the issue is for the jury to decide in most cases. The *Thompson* court noted that a trial court can only grant summary judgment on the scope-of-liability issue when the injury suffered by the plaintiff is not among the harms "the jury *could* find as the basis for determining the defendant" was negligent. *Thompson*, 774 N.W.2d at 838 (quoting *Restatement* § 29, cmt.

d). In other words, the plaintiff's injury must have come about in a pretty off-the-wall way in order for defendants to win summary judgment on the scope-of-liability issue. The facts of *Thompson* itself provide a good illustration. The plaintiff was injured when his car crashed after swerving to miss a trampoline tarp that had blown onto the road in a strong gust of wind from property abutting the road. The Iowa Supreme Court concluded the jury could find that this was a harm within the risks of not securing your trampoline parts in September in Iowa when you live thirty-eight feet from a roadway.

Proximate cause is not the only thing the court tinkered with in *Thompson*. Easily the most common basis for defendants to move for summary judgment on in negligence cases has been the duty prong. This is because "[t]he question of the proper scope of legal duty is a question of law to be determined by the court." *Sweeney v. City of Bettendorf*, 762 N.W.2d 873, 880 (Iowa 2009). While duty is still a question of law for the court, *Thompson* emphasized that the question should not even be posed in most cases, explaining:

> "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." Thus, in most cases involving physical harm, courts "need not concern themselves with the existence or content of this ordinary duty," but instead may proceed directly to the elements of liability set forth in section 6 [i.e., breach, factual causation, scope of liability]. The general duty of reasonable care will apply in most cases, and thus courts "can rely directly on § 6 and need not refer to duty on a case-by-case basis."

Thompson, 774 N.W.2d at 834-35 (quoting *Restatement* §§ 6, 7).

The *Thompson* court, again following the *Restatement (Third)*, stated that district courts should not be making fact-specific duty holdings such as, for example, "there is no duty for a landowner to tie down his trampoline parts because the risk of harm to passersby is not foreseeable," or "grocers do not owe a duty to peanut-allergic customers to promptly clean up peanut butter spills because an allergic reaction due to spilled peanut butter is not foreseeable."

Rather, "[t]he assessment of the foreseeability of a risk is allocated to the fact finder, to be considered when the jury decides if the defendant failed to exercise reasonable care." In other words, the "default" is that everyone has a duty to act reasonably under the circumstances. The focus should be on whether what the defendant did or did not do *constitutes* reasonable conduct under the circumstances (i.e., whether the defendant breached the duty)—and that question is to be answered by the jury, not the court. *Thompson*, 774 N.W.2d at 835. Thus, the roadside property owner in *Thompson* had a duty to act reasonably under the circumstances. Whether their failure to secure their trampoline pieces was a breach of that duty was a question for the jury to consider.

It is easy to see, therefore, how winning summary judgment in a negligence case will be even more difficult than it was before. The *Thompson* decision has all but eliminated defendants' one foothold. *See Robinson v. Poured Walls of Iowa, Inc.*, 553 N.W.2d 873, 875 (Iowa 1996) ("Although claims of negligence are seldom capable of summary adjudication, the threshold determination of whether the defendant owes the plaintiff a duty of care is always a

legal question for the court."). The duty window is just slightly ajar. The *Thompson* court noted that "in exceptional cases, the general duty to exercise reasonable care can be displaced or modified." *Thompson*, 774 N.W.2d at 835. "An exceptional case is one in which 'an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases." *Id.* Justice Cady's special concurrence provides an example of when that might happen. He posited that had the property in the road been a curbside waste or recycling container, public-policy considerations might intervene to limit the scope of landowners' duty to clear windblown property from the roadway. That is, the public policy favoring curbside recycling militates against a duty for landowners to tie their containers down or vigilantly keep watch over them in windy weather. Of course, the response to that argument is that the jury would not likely find a landowner's failure to clear a windblown recycling container from the street on pick-up day constituted a breach of the duty to act reasonably under the circumstances.

We will have to wait and see how further case law develops the division of labor between judges and juries. It is clear, however, from the *Thompson* decision, that the current Iowa Supreme Court favors letting the fact-finder make many calls previously weighed in on by the trial court judge. Additionally, it is clear that the current Iowa Civil Jury Instructions on proximate cause will need to redrafted. For questions about the impact of *Thompson* on litigation in Iowa, please do not hesitate to contact a member of Ahlers & Cooney's Litigation, Dispute Resolution & Investigations Department.