Arizona's Duty Framework in Negligence Cases

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I. Introduction

Arizona's courts, like most courts, have wrestled with the limits of tort liability in negligence cases. Two basic frameworks have been developed to address this issue: duty and causation.[1] Under a duty framework, a court determines, as a matter of law, whether a defendant owes a duty of care to a plaintiff before the specific facts of the case are considered.[2] If the court determines the defendant owed no duty of care to the plaintiff, "an action for negligence cannot be maintained."[3] In contrast, under a causation framework, the basis for limiting liability is whether a plaintiff can prove that the defendant's wrongful conduct was a proximate cause of her injury.[4] This causation determination is generally a factual question for the jury.[5]

The tension between these two frameworks can be seen in one of the most famous of tort cases, *Palsgraf v. Long Island R.R. Co.*[6] In *Palsgraf*, the plaintiff was standing on the railroad platform waiting to board her train.[7]

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1. *See, e.g.*, Restatement (Third) of Torts § 29 cmts. a & f (Am. L. Inst. 2010) (stating that "[n]o serious question exists that some limit on the scope of liability for tortious conduct that causes harm is required," and that duty and scope of liability, formerly known as proximate cause, "are two primary legal doctrines for limiting liability").

2. *See* Gipson v. Kasey, 150 P.3d 228, 230 (Ariz. 2007) (citing Markowitz v. Ariz. Parks Bd., 706 P.2d 364, 368 (Ariz. 1985)); Quiroz v. ALCOA Inc., 416 P.3d 824, 828, 842 (Ariz. 2018) (citations omitted).

3. *Gipson*, 150 P.3d at 230 (citing *Markowitz*, 706 P.2d at 366).

4. *See, e.g.*, Restatement (Third) of Torts § 29 cmt. f ("Some courts use duty in situations in which other courts would use proximate cause. The classic case of *Palsgraf v. Long Island R.R. Co.*, revealed the potential for interchangeability between duty and scope of liability, although proximate cause was the term employed at the time. Judge Cardozo employed duty, while Judge Andrews employed proximate cause, to determine whether the defendant was liable for harm to a particular plaintiff. *Palsgraf*'s legacy has been a tension in tort law about the proper balance between duty rules and proximate-cause limits to circumscribe appropriately the scope of liability.").

5. *Gipson*, 150 P.3d at 230 (citing *Markowitz*, 706 P.2d at 370); *Quiroz*, 416 P.3d at 828–29 (citing *Gipson*, 150 P.3d at 231).

6. 162 N.E. 99 (N.Y. 1928).

7. *Id.* at 99.

Several feet away, a man attempted to board another train as it was leaving the platform.[8] The man, who was holding an innocuous package, lost his balance as he tried to board the train.[9] A nearby train guard attempted to assist him by pushing him onto the train from behind.[10] This caused the man to drop his package on the tracks, which, unbeknownst to the guard (or apparently anyone) was filled with fireworks.[11] These fireworks exploded and caused some scales on the train platform to dislodge.[12] One of these scales fell and injured the plaintiff.[13] Plaintiff sued the railroad company and obtained a jury verdict in her favor.[14]

On appeal, Judge Cardozo, writing for the majority, reversed the verdict and dismissed plaintiff's claim on the grounds that the train company was not liable because it owed no duty to plaintiff.[15] Cardozo stated that plaintiff could not allege a cognizable claim for negligence simply by alleging that she had been injured by the train guard's negligent act.[16] Rather, he stated that negligent acts (and omissions) are not actionable unless a plaintiff shows that the defendant owed a duty of care based on a pre-existing relationship between the parties.[17] Cardozo famously noted that "Proof of negligence in the air, so to speak, will not do,"[18] and that "[o]ne who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person."[19]

Justice Andrews, writing for the dissent, applied a causation framework.[20] Andrews stated that with respect to duty, "[e]very one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others."[21] Thus, he opined,

> when injuries do result from out unlawful act, we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen, and unforeseeable. But there is one limitation. The

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. Palsgraf v. Long Island R.R. Co., 225 N.Y.S. 412, 413 (N.Y. App. Div. 1927).
15. *Palsgraf*, 162 N.E. at 101.
16. *Id.* at 99.
17. *Id.* at 100–01.
18. *Id.* at 99 (citations omitted).
19. *Id.* at 101.
20. *Id.* at 102.
21. *Id.* at 103.

> damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former.[22]

In *Quiroz v. ALCOA Inc.*, the Arizona Supreme Court rejected the causation framework and affirmed, with a few important modifications, the duty framework that has been applied in Arizona for over a century.[23] Specifically, the court held that "in every negligence case" a plaintiff bears the burden of proving, as a matter of law, the existence of a duty,[24] and that duty may be based on "special relationships recognized by the common law," as well as negligent undertakings, or assumed duties.[25] Additionally, relying on its earlier decision in *Gipson v. Kasey*, the court held that duty may be based on relationships created by "public policy,"[26] and that foreseeability is no longer a consideration in establishing duty.[27] Finally, *Quiroz* expressly rejected the duty framework set forth in the Restatement (Third) of Torts.[28]

II. DUTY AS AN ELEMENT IN A NEGLIGENCE CASE

In *Gipson*, the court explained that "[w]hether the defendant owes the plaintiff a duty of care is a threshold issue; absent some duty, an action for negligence cannot be maintained."[29] Further, "Arizona does not presume duty; rather, in every negligence case, the plaintiff bears the burden of proving the existence of a duty."[30] Determining the existence of a duty is a matter of law for the court to decide.[31]

Both *Gipson* and *Quiroz* stress that courts may not consider the specific facts of a case in determining whether a duty exists.[32] Rather, courts

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22. *Id.*
23. 416 P.3d 824, 827 (Ariz. 2018).
24. *Id.*; *see infra* Part II.
25. *Id.*; *see infra* Parts III and IV.
26. *Quiroz*, 416 P.3d at 829; *see infra* Part III.
27. *Quiroz*, 416 P.3d at 827; *Gipson*, 150 P.3d at 231; *see infra* Part V.
28. *Quiroz*, 416 P.3d at 827; *see infra* Part VI.
29. *Gipson*, 150 P.3d at 230.
30. *Quiroz*, 416 P.3d at 838; *see Gipson*, 150 P.3d at 230 (stating that plaintiff bears the burden of proving the element of duty); Vasquez v. State, 206 P.3d 753, 760 (Ariz. Ct. App. 2008) (same). Once a plaintiff establishes the element of duty, she must also prove the remaining three elements of a negligence claim, which are: standard of care and breach; a causal connection between the breach and the resulting injury; and actual damages. *Gipson*, 150 P.3d at 230; *Quiroz*, 416 P.3d at 827–28.
31. *Gipson*, 150 P.3d at 230; Markowitz v. Ariz. Parks Bd., 706 P.2d 364, 366, 368 (Ariz. 1985).
32. *Quiroz*, 416 P.3d at 828; *Gipson*, 150 P.3d at 230, 232. In *Dinsmoor v. City of Phoenix*, 492 P.3d 313, 319 (Ariz. 2021), the Arizona Supreme Court appears to have from this well-

determine the existence of a duty based on the legal relationship of the parties before considering the specific acts or omissions giving rise to the plaintiff's injuries.[33] Further, the specific facts leading to the injuries are a consideration only as to the standard of care and breach, which are factual issues for the jury.[34] As one commentator has noted,

> It is better to reserve "duty" for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other, and to deal with *particular conduct* in terms of a legal standard of what is required to meet the obligation . . . . *What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty*.[35]

Thus, for example, in *Udy v. Calvary Corp.*, a tenant rented an unfenced trailer space next to a busy street.[36] To prevent his children from running into the street, the tenant requested permission from the landlord to build a fence next to his space.[37] The landlord denied the request, and one of his children was subsequently injured when he ran into the street and was struck by a car.[38] The landlord argued that he had no duty to protect tenants from injuries occurring outside his property, and the trial court dismissed the lawsuit on summary judgment.[39]

The court of appeals reversed, holding that a duty existed based on the parties' special relationship as landlord-tenant.[40] The court further stated that the issue of whether the landlord was liable for injuries occurring outside his

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established rule, stating, "We do not understand *Gipson* as meaning a court cannot consider facts to determine whether a duty exists based on the presence of an unreasonable risk of harm that arose within the scope of a special relationship." However, a few weeks after issuing *Dinsmoor*, the Court reemphasized Arizona's rule that case-specific facts are not considered in determining the existence of a duty. *See* CVS Pharmacy, Inc., v. Bostwick, 494 P.3d 572, 578 (Ariz. 2021) ("We determine whether a legal duty exists without considering the case-specific facts concerning breach and causation.").

33. *Quiroz*, 416 P.3d at 828, 838; *Gipson*, 150 P.3d at 232.

34. *Gipson*, 150 P.3d at 230.

35. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 356 (5th ed. 1984) (emphasis added); *see also* Martinez v. Woodmar IV Condos. Homeowners Ass'n, Inc., 941 P.2d 218, 223 (Ariz. 1997) (holding that duty is based on the relations between individuals before the injury occurs and should not be based on the specific details of a defendant's conduct); *Markowitz*, 706 P.2d at 367 ("[T]he existence of a duty is not to be confused with details of the standard of conduct.").

36. 780 P.2d 1055, 1057–58 (Ariz. Ct. App. 1989).

37. *Id.* at 1057.

38. *Id.* at 1058.

39. *Id.* at 1058–59.

40. *Id.* at 1058–61.

property concerned the relevant standard of care, i.e., the reasonable precautions the landlord was required to take for the safety of his tenants.[41]

III. DUTIES BASED ON PUBLIC POLICY

As *Quiroz* noted, Arizona continues to recognize the traditional duties based on common law special relationships.[42] These special relationships include landowner-invitee, innkeeper-guest, common carrier-passenger, and tavern owner-patron.[43] However, *Quiroz* also held that Arizona recognizes duties based upon "public policy."[44] Specifically, in *Gipson*, the court stated that a "finding of duty . . . does not necessarily depend on a preexisting or direct relationship between the parties," and that duties may exist when public policy supports "the protection of persons with whom no preexisting relationship existed."[45] *Quiroz* elaborated on this point, explaining that "in a country such as ours with over 300 million people, duties based on public policy are necessary to govern relationships between people who may be legal 'strangers'" and "do not share preexisting relationships."[46]

The primary sources for identifying duties based on public policy are state and federal statutes, as well as city ordinances.[47] For such duties, "the statute itself creates a legal relationship between the parties giving rise to a duty."[48]

It is important to note that not every statute gives rise to a tort duty.[49] Rather, there are two important limitations on this doctrine. First, statutes only give rise to a duty when they are designed to protect a specific class of

41. *Id.* at 1059–61; *see also* Stephens v. Bashas' Inc., 924 P.2d 117, 120–21 (Ariz. Ct. App. 1996) (holding that the existence of a duty was premised on the parties' landowner-invitee relationship, not the location of the injury; and the fact plaintiff was injured outside defendant's premises was only relevant as to the element of breach/standard of care).

42. *Quiroz*, 416 P.3d at 829; *Gipson*, 150 P.3d at 232.

43. *Quiroz*, 416 P.3d at 829; *Gipson*, 150 P.3d at 232; RESTATEMENT (SECOND) OF TORTS §§ 314A, 316–19, 341–343A (AM. L. INST. 1965) (discussing duties based on common law special relationships); *see also* Bogue v. Better-Bilt Aluminum Co., 875 P.2d 1327, 1339 (Ariz. Ct. App. 1994) (stating a duty exists based on the employer-employee special relationship); RESTATEMENT (SECOND) OF TORTS § 314B (same); Collette v. Tolleson Unified Sch. Dist., No. 214, 54 P.3d 828, 832 (Ariz. Ct. App. 2002) (recognizing a duty based on the special relationship between a school district and its students); Monroe v. Basis Sch., Inc., 318 P.3d 871, 873 (Ariz. Ct. App. 2014) (recognizing a special relationship between schools and their students).

44. *Quiroz*, 416 P.3d at 827; *Gipson*, 150 P.3d at 232–33 (Ariz. 2007).

45. *Gipson*, 150 P.3d at 232 (internal quotation and citation omitted).

46. *Quiroz*, 416 P.3d at 829–30 (citation omitted).

47. *Id.* at 830.

48. *Id.* at 829; *see* Alhambra Sch. Dist. v. Super. Ct., 796 P.2d 470, 474 (Ariz. 1990) ("The relationship that gives rise to a duty of care may also be created by statute.").

49. *See Gipson*, 150 P.3d at 233 (stating that "[n]ot all criminal statutes . . . create duties in tort.").

persons.[50] Second, the statute must be designed to protect against a specific type of harm.[51] Thus, a duty exists only if the plaintiff is within the specific class of persons the statute is designed to protect, and the plaintiff suffered the type of harm the statute was designed to protect against.[52]

Gipson provides an example of a duty based on a statute. In *Gipson*, the defendant attended a work party, bringing with him pills containing oxycodone that had been prescribed to him for back pain.[53] The defendant gave some of the pills to plaintiff's girlfriend, knowing that she would provide some of those pills to the plaintiff (in part because plaintiff had asked defendant for some of his pills on prior occasions).[54] Defendant also knew that mixing the pills with alcohol was dangerous and could be lethal.[55] As expected, plaintiff's girlfriend gave some of the pills to plaintiff, which caused him to die in his sleep.[56] Plaintiff's mother filed a wrongful death action, which was dismissed on summary judgment on the grounds that defendant owed no duty of care to plaintiff.[57]

On review, the Supreme Court reversed, holding that defendant owed a duty to plaintiff.[58] The court reasoned that although no special relationship existed between the parties, the defendant owed a duty of care to plaintiff based on public policy.[59] Specifically, the court held that "[s]everal Arizona statutes prohibit the distribution of prescription drugs to persons lacking a valid prescription," and that "these statutes are designed to avoid injury or death to people who have not been prescribed prescription drugs, who may have no medical need for them and may in fact be endangered by them, and who have not been properly instructed on their usage, potency, and possible dangers."[60] As a result, "Because [plaintiff] is within the class of persons to be protected by the statute and the harm that occurred here is the risk that the statute sought to protect against, these statutes create a tort duty."[61]

Arizona has recognized the existence of a duty based on a statute or ordinance in several cases. For example, in *Estate of Hernandez v. Arizona*

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50. *Id.* at 233; *Quiroz*, 416 P.3d at 829.
51. *Gipson*, 150 P.3d at 233.
52. *Id*; *see CVS Pharmacy*, 494 P.3d at 578–79 (stating that statutes only give rise to a duty when a plaintiff is within the specific class of persons the statute is designed to protect and a plaintiff suffers the type of harm the statute was designed to protect against).
53. *Gipson*, 150 P.3d at 229.
54. *Id.* at 229–30.
55. *Id.* at 230.
56. *Id.*
57. *Id.*
58. *Id.* at 234.
59. *Id.*
60. *Id.* at 233 (internal quotation and citation omitted).
61. *Id.*

Board of Regents, Rayner, a minor, consumed alcohol at a fraternity party, and then later struck plaintiff's car, leaving him "blind, severely brain-damaged, and quadriplegic."[62] Plaintiff sued several defendants, including the fraternity and the fraternity members who furnished alcohol to Rayner.[63]

In reversing the trial court's grant of summary judgment, the Supreme Court held, in part, that the defendants owed a duty of care to plaintiff based on Arizona Revised Statutes section 4-244, a statute "making it a criminal offense to furnish alcohol to a minor."[64] The court stated that the "existence of a statute criminalizing conduct is one aspect of Arizona law supporting the recognition of duty in this cause of action[,]" and that "[a] criminal statute may establish a tort duty if the statute is 'designed to protect the class of persons, in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation . . . .'"[65] The court further stated that the subject statute was enacted to protect against the specific harm that occurred in this case— a minor consuming alcohol and causing an injury to a third party.[66]

Similarly, in *Cobb v. Salt River Valley Water Users' Ass'n*, the court relied on a city ordinance to establish a duty.[67] In *Cobb*, the defendant allowed water to run onto the adjacent public sidewalk while watering his property.[68] Plaintiff was injured when she slipped on the wet sidewalk.[69] She argued, in part, that the defendant owed her a duty based on a city ordinance prohibiting property owners from allowing water to run onto the public sidewalks.[70] The Court agreed, holding that the ordinance gave rise to a duty of care.[71]

It is important to note that to create a duty based on public policy, the plaintiff need not show the defendant *violated* a specific statute. Proof of violation of a statute is required to show negligence per se, which addresses

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62. 866 P.2d 1330, 1333 (Ariz. 1994).
63. *Id.*
64. *Id.* at 1339.
65. *Id.* (quotations and citation omitted).
66. *Id.* at 1342; *see also* Brannigan v. Raybuck, 667 P.2d 213, 216–17 (Ariz. 1983) (stating that a statute barring minors from consuming alcohol created a duty prohibiting liquor licensees from furnishing alcohol to minors; the court stated that "one of the very hazards that makes it negligent to furnish liquor to a minor" is that, based on their "immaturity" and "lack [of] full capacity [for] self-control," they "will become drunk and injure [themselves] or others"); *see also* Est. of Maudsley v. Meta Servs., Inc., 258 P.3d 248, 253–55 (Ariz. Ct. App. 2011) (holding that mental health statutes created a duty for mental health facilities to screen, evaluate, and treat individuals who may be in need of mental health services).
67. 114 P.2d 904, 906–07 (Ariz. 1941).
68. *Id.* at 905.
69. *Id.*
70. *Id.* at 906.
71. *Id.* at 906–07.

the *standard of care* in a negligence action, not the existence of a duty.[72] In contrast, a duty exists based on public policy when the legislature enacts a statute that is designed to protect a specific class of persons from a specific type of harm.[73]

Quiroz stressed that in the context of tort duties, public policy should be based primarily, but not exclusively, on statutes.[74] Citing *Ray v. Tucson Medical Center*,[75] the court stated the reason for this limitation:

> The declaration of "public policy" is primarily a legislative function. The courts unquestionably have authority to declare a public policy which already exists and to base its decisions upon that ground. But in the absence of a legislative declaration of what that public policy is, before courts are justified in declaring its existence such public policy should be so thoroughly established as a state of public mind, so united and so definite and fixed that its existence is not subject to any substantial doubt.[76]

Thus, the court concluded that "in the absence of a statute, we exercise great restraint in declaring public policy."[77]

However, *Quiroz* recognized that there may be instances where "public policy giving rise to a duty" is based "on the common law—specifically, case law and Restatement sections consistent with Arizona law."[78] The court cautioned, however, that reliance on sources of duty outside statutes and ordinances "does not mean" that courts may "establish[ ] duties based on [their] own notions of appropriate public policy."[79] In short, *Quiroz* specifically disapproved of courts crafting new duty rules out of whole cloth based on their own perceived social norms and concerns.[80] Such policy judgments, the court concluded, should be made by the legislature.[81]

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72. *See* Steinberger v. McVey ex rel. Cnty. of Maricopa, 318 P.3d 419, 432–34 (Ariz. Ct. App. 2014) (discussing negligence per se and reliance on a statute to establish a standard of care); RESTATEMENT (SECOND) OF TORTS §§ 286, 288 cmt. a (AM. L. INST. 1965) (same).

73. *See supra* Part III.

74. 416 P.3d 824, 829 (Ariz. 2018).

75. *Id.* at 830 (quoting Ray v. Tucson Med. Ctr., 230 P.2d 220, 229 (Ariz. 1951)).

76. *Id.*

77. *Id.*

78. *Id.* at 831; *see also* Dabush v. Seacret Direct LLC, 478 P.3d 695, 700, 702–03 (Ariz. 2021) (discussing duties of a possessor of land based on the Restatement (Second) of Torts).

79. *Quiroz*, 416 P.3d at 831.

80. *Id.* at 830–31.

81. *Id.*; *see CVS Pharmacy*, 494 P.3d at 578 (stating that, in the context of determining the existence of duty, "'[w]e exercise great restraint in declaring public policy,' which is ordinarily the prerogative of legislative bodies" (quoting *Quiroz*, 416 P.3d at 830)).

IV. ASSUMPTION OF DUTY

In *Dabush v. Seacret Direct, LLC*, the Arizona Supreme Court addressed duty based on a negligent undertaking, or assumed duty.[82] Under this doctrine, a duty may arise when a defendant voluntarily assumes a duty of care to a plaintiff.[83]

In contrast to the general duty framework, a court must examine the specific facts of a case when determining whether a party assumed a duty.[84] Thus, *Dabush* explained, a court must examine case-specific facts to determine whether a party "assumed [a duty] expressly or by conduct."[85]

One of the cases the court cited in support of this rule was *Yost v. Wabash College*.[86] There, Yost, a member of a fraternity, was subject to hazing and was injured.[87] Yost filed a lawsuit against several parties, including Wabash College, as the owner and landlord of the fraternity house.[88] The College was granted summary judgment on the ground it owed no duty to Yost.[89]

On appeal to the Indiana Supreme Court, Yost argued that the College owed him a duty of care to prevent hazing from occurring on its campus.[90] The Supreme Court disagreed.[91] Analyzing the issue of assumed duty, the court stated, "The assumption of such a duty requires affirmative, deliberate conduct such that it is 'apparent that the actor . . . specifically [undertook] to perform the task that he is charged with having performed negligently . . . .'"[92]

Based on the facts of the case, the court concluded that the College had not assumed a duty to protect Yost from hazing.[93] The court acknowledged

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82. 478 P.3d 695, 703–04 (Ariz. 2021).

83. *See* Lloyd v. State Farm Mut. Auto. Ins. Co., 860 P.2d 1300, 1303 (Ariz. Ct. App. 1992) (stating that "[w]hen a person voluntarily undertakes an act, even when there is no legal duty to do so, that person must perform the assumed duty with due care and is liable for any lack of due care in performing it"); SECOND RESTATEMENT, *supra* note 43, at 509, §§ 323 (duty to another based upon a negligent undertaking), 324A (duty to a third person based upon a negligent undertaking).

84. *Dabush*, 478 P.3d at 703; *see* Sanchez v. City of Tucson, 953 P.2d 168, 170–73 (1998) (stating that the existence and extent of an assumed duty is a fact-specific determination); Tollenaar v. Chino Valley Sch. Dist., 945 P.2d 1310, 1312 (Ariz. Ct. App. 1997) (same); Jefferson Cnty. Sch. Dist. R–1 v. Justus, 725 P.2d 767, 772 n.5 (Colo. 1986) (en banc) (stating that whether defendant assumed a duty, and the extent of that duty, is a question of fact for the jury).

85. *Dabush*, 478 P.3d at 703.

86. 3 N.E.3d 509 (Ind. 2014).

87. *Id.* at 513.

88. *Id.*

89. *Id.* at 519.

90. *Id.* at 514.

91. *Id.* at 520.

92. *Id.* at 517 (alterations in original) (citations omitted).

93. *Id.* at 518.

that the College had enacted a general policy against hazing, implemented procedures for reporting and disciplining any student who participated in hazing, and had in fact disciplined students for participating in the same.[94] It noted, however, that although these policies were a general attempt to elicit good behavior from the students, the College did not directly oversee or attempt to control the behavior of the individual students.[95] Thus, the court concluded that there was insufficient evidence to show that the school "deliberately and specifically undertook to control and protect Yost from the injuries he sustained or to generally prevent its students from engaging in injurious private conduct toward each other."[96]

Dabush also held that "an assumed duty is limited to the extent of the specific undertaking."[97] Thus, for example, in *Jefferson County*, a first-grade student rode his bike to school without his parent's knowledge or permission.[98] On his way home from school, he was struck by a vehicle and sustained injuries from the accident.[99] At trial, plaintiff argued that the school district was negligent because it failed to prevent him from riding his bicycle home from school.[100] Specifically, plaintiff argued that the school assumed a duty to prevent students in lower grades from riding their bicycles to and from school.[101] Plaintiff asserted the school assumed this duty based on its school handbook, which included policies for bicycle safety and bus procedures, and by its practice of assigning teachers to patrol "the front of the school at the close of the school day."[102]

The trial court granted summary judgment on behalf of the school district, finding there was no assumed duty.[103] On appeal, the Colorado Supreme Court reversed.[104] The court recognized that "the school district's liability under a voluntarily assumed duty can obviously be no broader than the

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94. *Id.* at 517.

95. *Id.* at 518.

96. *Id.*

97. 478 P.3d at 704; *see* Jefferson Cnty. Sch. Dist. R–1 v. Justus, 725 P.2d 767, 772 n.5 (Colo. 1986) (en banc) (stating that "the scope of any assumed duty . . . must be limited to the performance [of the] . . . service undertaken," and can "be no broader than the undertaking actually assumed."); Bd. of Comm'rs of Monroe Cnty. v. Hatton, 427 N.E.2d 696, 699–700 (Ind. App. 1981) (holding that because the county only undertook to mow a three-foot area next to a roadway, it did not assume a duty to trim trees or growth outside of that area); Pratt v. Robinson, 39 N.Y.2d 554, 560 (N.Y. App. 1976) (holding a school's duty to safely bus students ceases once the student is dropped off at a safe location).

98. *Jefferson Cnty. Sch. Dist.*, 725 P.2d at 768.

99. *Id.*

100. *Id.* at 769.

101. *Id.*

102. *Id.* at 768–69.

103. *Id.* at 769.

104. *Id.*

undertaking actually assumed."[105] However, it held that a genuine issue of fact "existed as to whether, by distributing the handbook to parents containing rules for bus use and bicycle use, and by placing teachers at front of school, the school district undertook the task of enforcing a rule that students in lower grades were not eligible to ride bicycles to and from school."[106]

Dabush also held that under the assumed duty framework, "the nature of the services undertaken must be for the specific purpose of protecting a third party (or their things) from harm."[107] In reaching this holding, *Dabush* relied on *Stanley v. McCarver*.[108] In *Stanley*, a radiologist evaluated plaintiff's chest x-ray as part of a pre-employment tuberculosis screening.[109] The radiologist noted some abnormalities in the x-ray but failed to report them to plaintiff within the 72-hour timeline required by company policy.[110] Ten months later, plaintiff was diagnosed with lung cancer.[111] She filed suit against the radiologist, the employer, and the x-ray company.[112] In her lawsuit, plaintiff claimed that the defendants "'provided negligent and improper medical care' by failing to 'timely and adequately diagnose and/or communicate to [her] the abnormality evident on her chest x-ray.'"[113] The trial court granted summary judgment on the grounds the radiologist owed no duty to plaintiff.[114]

On appeal, the Supreme Court held that the radiologist owed a duty of reasonable care to plaintiff despite the absence of a doctor-patient relationship.[115] In so holding, the court explained that by agreeing "to interpret [plaintiff's] confidential medical record, her x-ray, and accurately report the results," the doctor "undertook a professional obligation with respect to [her] physical well being."[116] Thus, "By virtue of his undertaking to review [her] x-ray, [the radiologist] placed himself in a unique position to prevent future harm to [plaintiff]," and therefore assumed a duty of reasonable care to protect her from harm.[117]

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105. *Id.* at 772 n.5.
106. *Id.* at 767.
107. *Dabush*, 478 P.3d at 704; *see also* Tollenaar v. Chino Valley Sch. Dist., 943 P.2d 1310, 1311–12 (determining that a school did not assume a duty where plaintiffs submitted no evidence that the district "undertook to provide a service that it recognized, or should have recognized, as necessary for the students' protection.").
108. *Dabush*, 478 P.3d at 704; Stanley v. McCarver, 92 P.3d 849 (Ariz. 2004).
109. *Stanley*, 92 P.3d at 850–51.
110. *Id.*
111. *Id.* at 851.
112. *Id.*
113. *Id.* (alteration in original) (citing the record).
114. *See id.* at 851.
115. *Id.* at 853.
116. *Id.*
117. *Id.*

V. FORESEEABILITY

Quiroz summarized how the concept of "foreseeability" has been used in Arizona to determine the existence of a tort duty, stating that "[a] duty based on foreseeability exists when a defendant realizes or should realize that his conduct creates an unreasonable risk of harm to a 'foreseeable plaintiff.' A 'foreseeable' plaintiff is one who is within the 'orbit,' or 'zone of danger' created by a defendant's conduct."[118]

Historically, Arizona, like most jurisdictions, considered foreseeability as a factor in determining the existence of duty.[119] Thus, for example, in *Rager v. Superior Coach Sales & Service of Arizona*, the Arizona Supreme Court relied on foreseeability in determining duty, holding that "[w]hether or not there is a duty on the part of the defendant to protect the plaintiff from the injury of which he complains is based on foreseeability."[120] Similarly, in *Donnelly Construction Co. v. Oberg/Hunt/Gilleland*, the Court stated that "[d]uty and liability are only imposed where both the plaintiff and the risk are foreseeable to a reasonable person."[121]

Although the Court, in some cases, questioned the use of foreseeability,[122] it remained a factor in determining duty until *Gipson*. However, in *Gipson* the Court "expressly" held "that foreseeability is not a factor to be considered by courts when making determinations of duty, and we reject any contrary suggestion in prior opinions."[123] In so holding, *Gipson* explained that "[w]hether an injury to a particular plaintiff was foreseeable by a particular defendant necessarily involves an inquiry into the specific facts of an individual case[,]" and that "[s]uch factual inquiries are reserved for the jury."[124] Additionally, "Reliance by courts on notions of 'foreseeability' also may obscure the factors that actually guide courts in recognizing duties for purposes of negligence liability."[125]

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118. Quiroz v. ALCOA, Inc., 416 P.3d 824, 828 (Ariz. 2018) (first quoting Rossell v. Volkswagen of Am., 709 P.2d 517, 521 (Ariz. 1985); and then Tucker v. Collar, 285 P.2d 178, 183 (Ariz. 1955), *overruled on other grounds by* Rosen v. Knaub, 857 P.2d 381 (Ariz. 1993)).

119. *See* KEETON ET AL., *supra* note 35, § 43, at 284–88 (noting that most jurisdictions consider foreseeability in determining the existence of duty).

120. 526 P.2d 1056, 1062 (Ariz. 1974).

121. 677 P.2d 1292, 1295 (Ariz. 1984).

122. For example, in *Martinez v. Woodmar IV Condos. Homeowners Ass'n, Inc.*, 941 P.2d 218, 223 (Ariz. 1997), the Court questioned the use of foreseeability in a duty analysis, stating that "we disapprove of attempts to equate the concepts of duty with specific details of conduct." And in *Gipson*, the Court noted "that our case law has created 'some confusion and lack of clarity . . . as to what extent, if any, foreseeability issues bear on the initial legal determination of duty.'" Gipson v. Kasey, 150 P.3d 228, 231 (Ariz. 2007).

123. *Gipson*, 150 P.3d at 231.

124. *Id.*

125. *Id.*

As *Quiroz* observed, "*Gipson* enacted a sea change in Arizona tort law by removing foreseeability from our duty framework."[126] Thus, "Post-*Gipson*, to the extent our prior cases relied on foreseeability to determine duty, they are no longer valid."[127]

One current problem created by the elimination of foreseeability is that the Restatement (Second) of Torts, which Arizona courts have relied on in determining the existence of duty, uses foreseeability as a basis for establishing duty. *Quiroz* noted this problem, stating that duty under the Restatement (Second) of Torts "hinges on proof of foreseeability."[128]

Thus, given the fact that *Gipson* rejects foreseeability as a factor in determining duty, to the extent the Restatement Second relies on foreseeability, it cannot, consistent with Arizona law, provide a source for duty.[129]

Quiroz emphasized, however, that although Arizona has eliminated foreseeability from its duty framework, "foreseeability may still be used in determining [the elements of] breach and causation."[130] "Stated another way, *Gipson* held that while courts may no longer use foreseeability to determine whether a plaintiff is foreseeable (duty), they may still use foreseeability in determining whether the injury is foreseeable (breach and causation)."[131]

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126. *Id.* at 231; Quiroz v. ALCOA Inc., 416 P.3d 824, 829 (Ariz. 2018).

127. *Quiroz*, 416 P.3d at 829. *See also* Guerra v. State, 348 P.3d 423, 425 (Ariz. 2015) (stating foreseeability is no longer a factor in determining duty); Barkhurst v. Kingsmen of Route 66, Inc., 323 P.3d 753, 758 (Ariz. Ct. App. 2014) (same); Boisson v. Ariz. Bd. of Regents, 343 P.3d 931, 934 (Ariz. Ct. App. 2015) (holding that "foreseeability is not a part of the duty inquiry and those portions of *pre-Gipson* cases relying on foreseeability when addressing the issue are no longer valid"); Delci v. Gutierrez Trucking Co., 275 P.3d 632, 635 (Ariz. Ct. App. 2012) (to same effect).

128. *Quiroz*, 416 P.3d at 839–40; *see* KEETON ET AL., *supra* note 35, § 43, at 285 (noting that the Restatement of Torts adopted foreseeability as a basis for duty); Fedie v. Travelodge Int'l, Inc., 782 P.2d 739, 742 (Ariz. Ct. App. 1989) (discussing the existence of duty based on Second Restatement §§ 302 and 302B, and noting that both sections rely on foreseeability to determine duty); City of Tucson v. Wondergem, 435 P.2d 77, 83 (Ariz. Ct. App. 1967) (stating that Second Restatement § 302 cmt. g is based on the "doctrine of foreseeability"); *see also* Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 355 (Tenn. 2008) (noting that Second Restatement §§ 284 and 302 rely on foreseeability in determining duty).

129. *Quiroz*, 416 P.3d at 839–40; *see* Owner-Operator Indep. Drivers Ass'n v. Pac. Fin. Ass'n, 388 P.3d 556, 564 (Ariz. Ct. App. 2017) (stating that Arizona courts generally follow the Restatement of Law unless the Legislature or our courts adopt a contrary rule); Powers v. Taser Int'l, Inc., 174 P.3d 777, 781–82 (Ariz. Ct. App. 2007) (to same effect).

130. *Quiroz*, 416 P.3d at 829.

131. *Id.*

VI. REJECTION OF RESTATEMENT (THIRD) OF TORTS DUTY FRAMEWORK

The Arizona Supreme Court expressly rejected the Restatement (Third) of Torts duty framework in *Quiroz*.[132] *Quiroz* summarized this duty framework regarding negligent actions as follows:

> Under the Third Restatement, duty is "ordinarily" presumed to exist when a defendant, by his actions, creates a risk of harm to a plaintiff. Third Restatement § 7(a). This presumed duty relieves the plaintiff of the burden of proving duty, and requires the defendant to show that, based on some "countervailing principle or policy," a no-duty rule should apply to its case. *Id.* § 7(b); *see also id.* Reporter's Note to cmt. b (stating the "burden" of pleading a no-duty rule is on the defendant).
>
> In deciding whether to create a no-duty rule, courts must "determine legislative facts necessary to decide whether a no-duty rule is appropriate in a particular category of cases." Third Restatement § 7 cmt. b. This procedure requires courts, at the request of the defendant, to engage in a multi-factored policy analysis, considering such matters as "general social norms of responsibility" and the "overall social impact of imposing" a duty on a "class of actors." *Id.* § 7 cmts. c and i.

Quiroz also noted that with respect to omissions, or failures to act, the Third Restatement

> provides that no duty is presumed to exist when a passive defendant, through inaction, fails to protect a plaintiff from harm. *Id.* § 37. Under these circumstances, a plaintiff bears the burden of proving a defendant had an affirmative duty to act, i.e., to protect plaintiff from harm. *See id.* § 37 and cmt. b.[133]

In rejecting the Restatement Third duty framework, the court noted several problems. First, the "purported distinction [ ] between § 7," which addresses affirmative acts, and § 37, which addresses omissions, "is illusory" because the concept of "risk creation" underlying § 7 is defined "so broadly that virtually every case falls under the presumed duty of [care of] § 7."[134] Specifically, the Third Restatement provides that "a defendant creates a risk

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132. *Id.* at 843. Although *Gipson* discussed the Restatement (Third) of Torts duty framework, noting that under "§ 7 of the proposed Third Restatement . . . '[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm[,]''' it did not adopt it. Gipson v. Kasey, 150 P.3d 228, 233 n.4. The concurring opinion went further, discussing the "advantages" of the Restatement Third duty framework, but likewise did not adopt it. *Id.* at 234–35 (Hurwitz, J, concurring).

133. *Quiroz*, 416 P.3d at 836.

134. *Id.*

of harm if, at any point during the 'entire course of conduct' leading up to plaintiff's injury, he commits an act that 'set in motion a risk of harm . . . even though the specific conduct alleged to be a *breach* of the duty of reasonable care was itself an omission.'"[135] Further, in "examining a defendant's 'entire course of conduct' for possible actions creating a risk of harm, the Third Restatement suggests the widest possible inquiry: 'whether, if the actor had never existed, the harm would not have occurred.'"[136]

The Court also noted that, at bottom, the Third Restatement relies on a causation framework for establishing negligence, rather than a duty framework.[137] The Court stated that "the Third Restatement's risk-creation framework essentially gives rise to a presumed duty every time a plaintiff is injured by a defendant[,]" because "[a]s a practical matter, by alleging that a defendant caused his injury, a plaintiff necessarily asserts that defendant's conduct created a risk of physical injury."[138] Thus, the element of duty "is subsumed by causation," because "[u]nder the risk-creation framework, duty exists whenever a plaintiff suffers an injury[,]" and, as a practical matter, a defendant is "automatically subject to tort liability whenever [his] negligence causes an injury to a plaintiff."[139]

In contrast to the Restatement Third's approach, *Quiroz* observed that Arizona uses a different framework to analyze duty. Specifically, Arizona does not use "risk creation to determine duty," but rather "base[s] duty on special relationships and public policy."[140] Further, *Quiroz* noted that "unlike the Third Restatement, we determine duty *before* a defendant, by his acts or omissions, places a plaintiff at risk of physical injury."[141] "Additionally, Arizona does not presume duty; rather, in every negligence case, the plaintiff bears the burden of proving the existence of a duty."[142]

Ultimately, the Court concluded the "primary flaw in the Third Restatement's risk-creation framework is that it effectively creates a presumed duty of care owed by all people at all times."[143] *Quiroz* expressed concern that "[b]y presuming a duty is owed to everyone, the Third

135. *Id.* (first quoting Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 355 (Tenn. 2008); and then RESTATEMENT (THIRD) OF TORTS § 37 cmt. c & Reporter's Note (AM. L. INST. 2010)).

136. *Id.* (quoting RESTATEMENT (THIRD) OF TORTS § 7 Reporter's Note to cmt. *l* (AM. L. INST. 2010)).

137. *Id.* at 836–37.

138. *Id.* at 837.

139. *Id.* at 841–42.

140. *Id.* at 838.

141. *Id*.

142. *Id.*

143. *Id.* at 840.

Restatement eliminates duty as a separate element of a negligence claim[,]" which conflicts with Arizona's duty framework.[144]

VII. CONCLUSION

The question of the proper limits on tort liability continues to confront courts. Specifically, there is an ongoing tension between the duty and causation frameworks in limiting the scope of tort liability. The Arizona Supreme Court has attempted to address this issue in its recent decisions, and undoubtedly it will continue to do so in the future.

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144. *Id.* at 841.