A DUTY TO RESCUE WITHIN THE SEXUAL ABUSE CONTEXT: FORESEEABILITY AND PUBLIC POLICY DRIVE THE DUTY ANALYSIS OF THE SUPREME COURT OF NEW JERSEY

The tort of negligence[1] has four components — duty,[2] breach,[3] causation,[4] and damages.[5] While these four components are treated

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[1] *See* BLACK'S LAW DICTIONARY 1032 (6th ed. 1990) (defining negligence as "[t]he omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do"); *see also* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984) (enumerating the elements of the tort of negligence).

[2] *See* KEETON ET AL., *supra* note 1, § 30, at 164. Professor Keeton describes duty as an "obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Id.* Keeton further notes, "The statement that there is or is not a duty begs the essential question — whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." *Id.* § 53, at 357; *see also id.* at 357-58 (discussing the concept of duty and, briefly, the problems that exist within duty analysis). Finally, Keeton states that "[i]t is therefore 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." *Id.*

[3] *See id.* § 30, at 164. Keeton defines breach as "[a] failure on the person's part to conform to the standard required." *Id.*; *see also id.* § 37, at 236-37 (stating that the concept of breach is uniquely tied to the general concept of a standard of care and that the relevant question is what the reasonable person would do under the same or similar set of circumstances). Keeton explains that

> [u]nder our system of procedure, [the question of breach] is to be determined in all doubtful cases by the jury, because the public insists that its conduct be judged in part by the man in the street rather than by lawyers, and the jury serves as a shock-absorber to cushion the impact of the law.

Id. § 30, at 237.

[4] *See id.* § 30, at 165 (explaining that the element of causation demands "[a] reasonably close causal connection between the conduct and the resulting injury"). A "cause in fact" or "but-for cause" is some conduct by the defendant that can be connected to the harm experienced by a plaintiff in a scientifically logical, physical manner. *See id.* § 41, at 266. Moreover, a proximate cause is conduct by the defendant close enough in the causal chain of events to a foreseeable harm suffered by a plaintiff so as to warrant the defendant's legal liability for that harm. *See id.* In order to make out his case of negligence, a plaintiff must prove that the defendant's conduct was both a cause in fact and a proximate cause of his harm. *See id.* (illustrating that there are two types of causation that must be proven).

[5] *See id.* § 30, at 165 (describing the damages requirement as the plaintiff's obli-

as separate and distinct elements,[6] the duty requirement often proves to be the most consequential, as well as the most fiercely litigated.[7] The primary reason that the duty requirement is so important is that a court's finding of a duty will often determine the outcome of a negligence action.[8] Thus, determining the duty issue has remained the province of judges rather than juries.[9]

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gation to prove that the defendant's conduct caused him some measurable harm such that the plaintiff deserves compensation).

[6] *See id.* § 30, at 164. A plaintiff's cause of action will falter if he fails to prove any one of the underlying elements of negligence. *See id.*

[7] *See, e.g.*, Strauss v. Belle Realty Co., 492 N.Y.S.2d 555, 559 (1985) (accepting defendant's argument regarding "crushing liability" and holding that the defendant power company owed no duty of care to a tenant injured in a common area of a building for which the defendant failed to provide electricity).

[8] *See* KEETON ET AL., *supra* note 1, § 37, at 236 (explaining the importance of the duty question to both parties because of the fact that any "decision by the court that, upon any version of the facts, there is no duty, must necessarily result in judgment for the defendant").

In certain scenarios it will not be very difficult for a plaintiff to secure evidence of a deviation from some accepted level of reasonableness or of causal links between conduct and harm, so a case may often turn on the judge's determination that the defendant owed the plaintiff a duty to protect him from some risk. *See generally* Rowland v. Christian, 443 P.2d 561 (Cal. 1968) (illustrating that duty was the only element in dispute, whereas breach, causation, and damages were fairly obvious when a faulty porcelain faucet handle cracked in the hands of the plaintiff, a social guest of the defendant); Lombardo v. Hoag, 269 N.J. Super. 36, 634 A.2d 550 (App. Div. 1993) (reasoning that the defendant, when returning a borrowed vehicle, had no duty to control the behavior of the person from whom he borrowed the vehicle; holding that, despite the proof of the driver's negligence, the defendant would not be held liable on a negligent entrustment theory); Vince v. Wilson, 561 A.2d 103 (Vt. 1989) (demonstrating an instance in which duty was the only significant issue in a negligent entrustment action because the issues of causation and damages were not disputed when the defendant gave her grandnephew money to buy a car despite her stipulated knowledge of his severe incompetence as a driver).

[9] *See* KEETON ET AL., *supra* note 1, § 37, at 236 (stating that the question of duty is "entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law; and it must be determined only by the court"). Retention of the issue of duty by judges likely sprang from their perception that they were better equipped intellectually to balance the notions of public policy, fairness, and foreseeability that are subsumed within the concept of duty. *See id.* at 238 ("An uneasy distrust of the jury, and of the layman's known propensity to be charitable with other people's money and to compensate any injury which has occurred, especially at the expense of corporations, has played no small part in this process . . . .").

For a particularly "intellectual," economic appraisal of the concept of duty from the perspective of a judge, see Judge Learned Hand's opinion in *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1949), which introduced a mathematical formula for deciding whether a duty exists. According to Judge Hand's formula, a duty will be imposed when the burden (B) on a defendant to provide adequate precautions is less than the product of the probability (P) of the harm occurring multiplied by the magnitude (L) of the injury experienced: B<PL. *See id.* at 173; *see also* Barbara Ann White, *Risk-Utility Analysis and the Learned Hand Formula: A Hand That Helps Or a*

Consequently, the judiciary historically has been hesitant to pronounce the existence of a duty where a plaintiff has not been harmed by an affirmative act.[10] This reluctance has been referred to in the common law as the nonfeasance rule.[11] In essence, the nonfeasance rule provides that "[t]he fact that [an] actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."[12]

While the nonfeasance rule has withstood, for the most part, several centuries of societal changes, plaintiffs have made some inroads with respect to the rule.[13] Most notably, courts have recognized that a special relationship between a plaintiff and a defendant could give rise to a duty based upon an omission by the defendant.[14]

Hand That Hides?, 32 ARIZ. L. REV. 77, 78 (1990) (demonstrating the far-reaching effects of cost-benefit analysis in the modern landscape of the law and explaining that such a tactic "necessarily imparts the moral and/or political values of the user into his or her decisions").

[10] *See* RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (1965) (providing that "liability for non-feasance was slow to receive *any* recognition in the law") (emphasis added).

[11] *See id.* The reasoning behind this reluctance has been explained in the following manner:

> The reason for the distinction may be said to lie in the fact that by "misfeasance" the defendant has created a new risk of harm to the plaintiff, while by "nonfeasance" he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs. The highly individualistic philosophy of the older common law had no great difficulty in working out restraints upon the commission of affirmative acts of harm, but shrank from converting the courts into an agency for forcing men to help one another.

KEETON ET AL., *supra* note 1, § 56, at 373.

[12] RESTATEMENT (SECOND) OF TORTS § 314 (1965). To this end, then, while it would be morally reprehensible to allow a baby to remain on a railroad's tracks when one could simply pick the baby up off the tracks long before a train arrived, it would be neither illegal nor tortious conduct to sit by and watch as the child gets run over by the train. *See id.* cmt. c, illus. 1.

[13] *See id.* cmt. c.

[14] *See id.* Initially such relationships were limited to the classic relationships like carrier-passenger and innkeeper-guest. *See* KEETON ET AL., *supra* note 1, § 56, at 376. Eventually, courts stretched the "special relationship" exception to its present incarnation, which includes landowner-invitee, shopkeeper-business visitor, jailer-prisoner, school-pupil, doctor-patient, parent/guardian-child, husband-wife, attorney-client, etc. *See id.* at 376-77; *see also* Greco v. United States, 893 P.2d 345, 348 (Nev. 1995) (finding a duty and evidence of a breach of that duty where a doctor failed to make a timely diagnosis of disabling, gross fetal defects); Negri v. Stop and Shop, Inc., 480 N.E.2d 740, 741 (N.Y. 1985) (holding that an affirmative duty to customers existed and that evidence of a breach of that duty could be inferred where owner of supermarket failed to clean the floors of aisles for the sake of the invitee); Fosgate v. Corona, 66 N.J. 268, 270-74, 330 A.2d 355, 356-59 (1974) (demonstrating that a failure to diagnose constituted an implicit breach of the doctor-patient rela-

Within the last fifty years, this nation's most progressive courts have gone a step further: Acknowledging a societal unrest regarding the nonfeasance rule, some jurisdictions have recognized duties where a minimal relationship or no relationship exists between the plaintiff and the defendant.[15] With the goals of deterring unreasonable be-

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tionship); O'Shea v. K Mart Corp., 304 N.J. Super. 489, 492, 701 A.2d 475, 476 (App. Div. 1997) (demonstrating that a shopkeeper owes a business invitee an affirmative duty of reasonable care in assuring that the premises shall be a safe place for undertaking actions that fit within the scope of the so-called "invitation").

Courts have acknowledged slight variations to the "special relationship" exception. One variation is the affirmative duty to aid someone when one's actions, though non-negligent, have nonetheless placed someone in a dangerous position. *See, e.g.*, Endre v. Arnold, 300 N.J. Super. 136, 143, 146, 692 A.2d 97, 101, 102 (App. Div. 1997) (acknowledging that "a host has a duty to come to the aid of a social guest who the host knows or has reason to know is in serious physical peril due to an accident that occurred on the host's premises," but holding that the defendant did not breach her duty because "[n]o reasonable fact finder could conclude that a thump in the middle of the night constituted evidence decedent had been so injured as to require the aid of the defendant"); Maldonado v. Southern Pac. Transp. Co., 629 P.2d 1001, 1004 (Ariz. Ct. App. 1981) (holding that the defendant railroad, which innocently injured the plaintiff, would acquire an affirmative duty of providing due care for the plaintiff if the defendant had knowledge or sufficient reason to know that it had innocently caused such harm). Another variation is liability for dissuading or preventing others from providing assistance to someone who is in danger. *See* Soldano v. O'Daniels, 190 Cal. Rptr. 310, 317 (1983) (holding that defendant bartender was liable for affirmatively preventing or dissuading a third party from rendering aid to someone in danger of physical harm). Finally, there have been decisions in which defendants have been found liable for failing to act reasonably upon voluntary assumption of a "rescue." *See* Farwell v. Keaton, 240 N.W.2d 217, 220 (Mich. 1976) (stating that "there is a clearly recognized legal duty of every person to avoid any affirmative acts which make a situation worse" and consequently holding liable a defendant who undertook to "rescue" a friend but performed unreasonably in his actions); Dudley v. Victor Lynn Lines, 48 N.J. Super. 457, 469-70, 138 A.2d 53, 60 (App. Div. 1958) (reinstating a survivor action by decedent's wife upon the theory that decedent's employer acted unreasonably when he failed to satisfy his assurance that he would procure medical attention for decedent, who exhibited signs of a heart attack).

[15] *See* Judith Ilene Bloom, *Minimizing Bank Liability for Criminal Assaults on Customers*, 105 BANKING L.J. 151, 159 (1988). The resultant success and underlying creativity of theories of defendant's liability based upon a third person's acts has been the subject of numerous commentaries. *See id.* (explaining ways in which bank managers can reduce the potential for criminal violence on bank customers as well as the bank's liability if such violence does occur); James T.R. Jones, *Battered Spouses' Damage Actions Against Non-Reporting Physicians*, 45 DEPAUL L. REV. 191, 261 (1996) (suggesting that one of the best ways to identify battered women would be to mandate reporting by physicians and to supplement such reporting laws with civil penalties against doctors who fail to report); James T.R. Jones, *Battered Spouses' State Law Damages Actions Against the Unresponsive Police*, 23 RUTGERS L.J. 1, 13-14 (1991) (discussing the different causes of action available for battered spouses against unresponsive law enforcement officers, which include common law negligence claims, implied private civil actions, and claims based on violations of state constitutional guarantees of equal protection and due process); Bradley Saxton, *Employment References in California After* Randi W. v. Muroc Joint Unified Sch. Dist.: *A Proposal for Leg-*

havior by "peripheral actors" and providing plaintiffs with a remedy for every harm, some courts have embraced plaintiffs' theories of duty to rescue liability, thereby acceding to the possibility of liability for the tortious and/or criminal actions of a third party.[16] While such

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islation to Promote Responsible Employment Reference Practices, 18 BERKELEY J. EMP. & LAB. L. 240, 277-81 (1997) (addressing the ramifications of a California case in which a school district was held liable in tort for the sexually abusive behavior of a teacher on whose behalf it had provided an unqualified positive employment reference, despite knowledge of past sexual improprieties; proposing legislation that would encourage employer responsibility in the dissemination of reference information); Kevin L. Kelley, Note, *Physician Owes Duty of Care to Third Party When His Negligence in Failing to Warn Patient Not to Drive Contributes to Third Party's Injury*, 15 ST. MARY'S L.J. 493, 499 (1984) (discussing *Gooden v. Tips*, 651 S.W.2d 364, 369-70 (Tex. App. 1983), in which the court found a duty for a physician to warn his patient of the intoxicating effects of a drug which could impair driving; acknowledging that the duty "was limited only to warn, not to control, the patient."); Robert J. Leibovich, Note, Bradshaw v. Daniel: *Making Tennessee Physicians Liable for the Actions of Ticks*, 24 MEM. ST. U. L. REV. 377, 388-89 (1994) (suggesting that *Bradshaw* is a dangerous departure from other physician warning cases because the harm in the other cases "emanated directly from the patient who was under a doctor's care" while in *Bradshaw*, the danger comes from a source that is not at all under the control of the physician — infected ticks); Lisa McCabe, Comment, *Police Officers' Duty to Rescue or Aid: Are They Only Good Samaritans?*, 72 CAL. L. REV. 661, 694-95 (1984) (suggesting that "the unique role of the police in society places them in a continuous special relationship with the public . . . " such that a police officer must fulfill "an affirmative duty of protection" and, thus, a duty to rescue); Timothy J. Miller, Note, *The Attorney's Duty to Reveal a Client's Intended Future Criminal Conduct*, 1984 DUKE L.J. 582, 599 (1984) (concluding that the best rule regarding disclosure of a client's intended criminal conduct is not mandatory disclosure, but, rather, discretionary disclosure of only those crimes in which "serious harm" will result); Christine E. Stenger, Comment, *Taking* Tarasoff *Where No One Has Gone Before: Looking at "Duty to Warn" Under the AIDS Crisis*, 15 ST. LOUIS U. PUB. L. REV. 471, 503 (1996) (addressing the opposing viewpoints concerning third party notification of HIV status — strict confidentiality versus exceptions to confidentiality coinciding with the conventional infectious disease standard of care).

Other particularly novel theories of duty have been discussed as well. *See* L.J. Deftos, *Genomic Torts: The Law of the Future—The Duty of Physicians to Disclose the Presence of a Genetic Disease to the Relatives of Their Patients With the Disease*, 32 U.S.F. L. REV. 105, 136 (1997) (noting that, while there is no mention of such a duty in any statutory scheme, several courts and "several important and prestigious medical organizations" support the idea of a physician's duty to disclose genetic infirmities to relatives who might share that same genetic risk); Robert B. Loper, Note, *'Red Sky in the Morning, Forecasters Take Warning': The Liability of Meteorologists for Negligent Weather Forecasts*, 66 TEX. L. REV. 683, 684-85 (1988) (addressing the potential liability of several groups of meteorologists for forecasts that do not meet "the standards of a reasonably prudent meteorologist . . . .").

[16] *See infra* notes 86-123 and accompanying text (discussing three New Jersey cases in this context). *See generally* John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867 (1991); David W. Robertson, *Negligence Liability for Crimes and Intentional Torts Committed by Others*, 67 TUL. L. REV. 135 (1992) (surveying the state of this area of the law, particularly in Louisiana and setting up a framework for labeling the different theories of potential liability when a tort or

decisions are in direct derogation of the traditional nonfeasance rule, the careful duty analysis performed therein has effected a manageable compromise between the nonfeasance rule and a general duty of due care.[17]

With its own unique commitment to progressive duty analysis, the Supreme Court of New Jersey has examined various scenarios in determining whether a duty of care should be imposed upon parties who would otherwise avoid liability if the rigid, traditional notions of duty were followed.[18] Most recently, in *J.S. v. R.T.H.*,[19] the Supreme

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crime is committed by a third party).

In addition to the progress made against the nonfeasance rule as manifested in common law, it should be noted that at least one state has attempted to turn the duty to rescue into a statutory duty. *See* VT. STAT. ANN. tit. 12, § 519 (1973). The statute provides in pertinent part:

> A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

Id. § 519(a). *See generally* Jack Wenik, Note, *Forcing Bystander to Get Involved: Case for Statute Requiring Witness to Report Crime*, 94 YALE L.J. 1787 (1985) (proposing a form of duty to rescue via a crime reporting statute).

The duty to rescue has also been a subject of "commentary" in popular culture. For example, in the last-ever episode of the popular 1990s television situation comedy *Seinfeld*, the title character and his friends were criminally tried and convicted pursuant to a type of "duty to rescue" statute. *See Seinfeld* (NBC television broadcast, May 14, 1998).

[17] *See supra* notes 10-16 and accompanying text (discussing the nonfeasance rule). In contrast, the amorphous concept of a "general duty of care" would impose a continuing obligation on the part of all persons to act reasonably under the circumstances across all types of relationships.

[18] In general, New Jersey courts, with the Supreme Court of New Jersey as the trailblazer, have committed to flexible notions of duty that avoid rigid formalism. *See, e.g.*, Wytupeck v. City of Camden, 25 N.J. 450, 462, 136 A.2d 887, 894 (1957) (declaring that "duty must of necessity adjust to the changing social relations and exigencies and man's relation to his fellows . . . ."). The court has exercised these flexible notions of duty in two manners. First, the court has broadened the notions of duty by allowing plaintiffs to bring claims for non-physical harms for the breach of some duty without having to plead the existence of some corresponding physical harm or risk of physical harm. *See, e.g.*, People Express Airlines, Inc. v. Consolidated Rail Corp., 100 N.J. 246, 266, 495 A.2d 107, 118 (1985) (holding that an airline, which had to evacuate its offices because of a tank car accident at the defendant's nearby railroad yard, could have an action against the defendant-railroad for economic damages incident to the evacuation, even though the airline alleged no corresponding physical damage); Portee v. Jaffee, 84 N.J. 88, 101, 417 A.2d 521, 528 (1980) (holding that a plaintiff mother, who witnessed her son die when trapped in an elevator, could have an action against the elevator companies and her landlords for emotional distress despite the fact that she had not personally experienced any risk of physical harm). Second, the court has broadened the notions of duty by imposing a duty of care upon persons to protect or rescue someone from the tortious and/or criminal acts of a third party. *See, e.g.*, McIntosh v. Milano, 168 N.J. Super.

Court of New Jersey considered the propriety of imposing a duty of care upon someone whose spouse sexually abuses children.[20] After engaging in a complex analysis balancing several factors, the court held that a duty to rescue may be imposed upon a person whose spouse poses a threat of sexual abuse to young children.[21] Further, the court held that the breach of such a duty constitutes a proximate cause of the ensuing harm — the sexual molestation of the victim.[22]

The defendants in *J.S. v. R.T.H.*, referred to by the court as "John" and "Mary,"[23] moved into a home next to the plaintiffs and their two daughters.[24] The plaintiffs permitted their daughters to spend a great deal of time with the defendants,[25] particularly John, who frequently invited the girls to his horse barn to ride and to care for his horses.[26] During these visits, John sexually abused the girls.[27]

466, 489-90, 403 A.2d 500, 511-12 (Law. Div. 1979). The *McIntosh* court followed the logic of *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976), and held:

> [A] psychiatrist or therapist may have a duty to take whatever steps are reasonably necessary to protect an intended or potential victim of his patient when he determines, or should determine, in the appropriate factual setting and in accordance with the standards of his profession established at trial, that the patient is or may present a probability of danger to that person.

McIntosh, 168 N.J. Super. at 489, 403 A.2d at 511-12; *see also* Clohesy v. Food Circus Supermarkets, Inc., 149 N.J. 496, 519-20, 694 A.2d 1017, 1030 (1997) (holding that a supermarket may have a duty to provide security for its customers such that the defendant-supermarket may be liable in tort for the murder of a customer who had been abducted from its parking lot); Kelly v. Gwinnell, 96 N.J. 538, 548, 476 A.2d 1219, 1224 (1984) (holding that a plaintiff injured in an auto accident by a drunk driver could have an action against the social host who had provided alcohol to the driver).

[19] 155 N.J. 330, 714 A.2d 924 (1998).

[20] *See id.* at 334, 714 A.2d at 926.

[21] *See id.* at 352, 714 A.2d at 935.

[22] *See id.*

[23] *See id.* at 335, 714 A.2d at 926. The defendants will be referred to by these names throughout this Note.

[24] *See id.* The girls, upon whose behalf this litigation was brought, were ages 12 and 15. *See id.* at 334, 714 A.2d at 926.

[25] *See J.S.*, 155 N.J. at 336, 714 A.2d at 927. The issue of negligence in the context of sexual abuse that arises in *J.S.* is not a wholly unique issue and, in fact, has been addressed by several jurisdictions. *See generally* Doe v. Franklin, 930 S.W.2d 921 (Tex. 1996); Chaney v. Superior Ct., 46 Cal. Rptr. 2d 73 (1995); Phillips v. Deihm, 541 N.W.2d 566 (Mich. 1995); Pamela L. v. Farmer, 112 Cal. App. 3d 206 (1980). However, *J.S.* appears to be unique because of the court's approach to the "special relationship" requirement for the duty to rescue. *See infra* note 143.

[26] *See J.S.*, 155 N.J. at 334, 714 A.2d at 926.

[27] *See id.* John encouraged the girls to visit daily and, almost always, he was the only adult in the company of the children. *See id.* at 336, 714 A.2d at 927. Mary never accompanied her husband with the two girls. *See id.* On several occasions, she entered the barn and, recognizing that the girls were visiting, scornfully com-

The sexual abuse continued for more than one year until John was arrested in November of 1992 after a phone call alerted the authorities to his abusive behavior and enabled the police to catch John in the act with the girls behind his house.[28]

The parents of the minor girls commenced both civil and criminal actions against John for his sexually abusive conduct.[29] The original civil complaint alleged that John had performed "intentional, reckless, and/or negligent acts of sexual assault against each of the two girls."[30] Later, in an amended complaint, the parents added Mary as a co-defendant, claiming that she acted negligently in that she "knew and/or should have known of her husband's proclivities/propensities" for sexually abusive behavior and that her negligence caused the girls to suffer physical and emotional injury.[31] Pursuant to Mary's motion,[32] the trial court granted summary judgment dismissing the claim against her[33] but did not dismiss the lawsuit

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mented, "Oh. Your whores are here." *Id.* at 336, 714 A.2d at 927. Likewise, Mary would occasionally yell to the girls as they were riding the horses, "[Y]ou bitches." *Id.* at 337, 714 A.2d at 927. Despite the obvious irritation that the girls' frequent visits were causing her, Mary conceded that she never confronted her husband regarding the girls' recurrent visits. *See id.*

[28] *See id.* at 337, 714 A.2d at 928. Upon John's arrest in November of 1992, Mary contended that she had no knowledge of her husband having sexual contact with the girls. *See id.*, 714 A.2d at 927. Alternatively, Mary stated that she was shocked to learn of this revelation because she had believed that a platonic friendship existed between her husband and the girls that revolved around the care of the horses. *See id.*

[29] *See id.* at 335, 714 A.2d at 926. With respect to the criminal charges, John entered a guilty plea to endangering the welfare of minors and received an 18-month sentence in state prison. *See id.*

[30] *Id.*

[31] *Id.*, 714 A.2d at 927. Initially, Mary and John filed a joint answer denying the accusations. *See id.* Subsequently, however, Mary amended her answer, asserting two new defenses: (1) that she owed no duty of care to the plaintiffs and (2) even if she did owe a duty to the plaintiffs, any alleged negligence on her behalf could not be deemed a proximate cause of any of the plaintiffs' injuries. *See id.*

[32] *See J.S.*, 155 N.J. at 335, 714 A.2d at 927. In her motion for summary judgment, Mary asserted that, because she had no duty of care to follow, there was no legal basis for a court to find her negligent, and the trial judge agreed. *See id.* In order to emphasize that the nonfeasance rule imparted no duty upon her to act on behalf of the girls, Mary even conceded — for the sake of argument — that "at all relevant times [she] knew or should have known of her husband's proclivities/propensities." *Id.* at 337, 714 A.2d at 928.

The plaintiffs opposed Mary's motion, arguing that such a motion was premature given that they had not had an opportunity to depose John or otherwise complete discovery. *See id.* at 335-36, 714 A.2d at 927.

[33] *See id.* Despite the near certainty that they would prevail in securing a judgment against John based on his criminal guilty plea, the plaintiffs appealed the trial court's grant of summary judgment on Mary's liability. *See id.* at 336, 714 A.2d at 927. For the purposes of actual recovery, Mary was an attractive defendant since the

against John.[34] The plaintiffs appealed the grant of summary judgment.[35] The appellate division reversed the trial court's decision, remanded the matter, and granted the plaintiffs an extended discovery period.[36]

The appellate division held that the plaintiffs could show that Mary had a duty to warn the plaintiffs or otherwise to take steps to prevent them from being sexually abused.[37] Acknowledging the possibility of such a duty, the appellate division relied on the "continuity and nature of the social relationship between these next-door neighbors and the girls' habitual and repeated visits of which Mary was clearly aware."[38] Additionally, the appellate division characterized the trial judge's grant of summary judgment as an inflexible approach to duty analysis, which had unnecessarily bowed to "the 'public policy of encouraging and fostering the marital relationship.'"[39] Specifying some acts that Mary could have performed to discharge her duty of care,[40] the appellate division recommended that the plaintiffs be af-

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plaintiffs' prospects for collecting upon any judgment against John were slim; John had declared bankruptcy and his homeowners' insurance policy had an exclusion for intentional acts. *See id.* at 336 n.2, 714 A.2d at 927 n.2. If Mary's conduct could be proven negligent, however, then the possibility of recovery under the homeowners' insurance policy would remain. *See id.*

[34] *See id.* The plaintiffs did, in fact, secure a judgment against John with the trial court awarding "$100,000 in compensatory damages, $25,000 in punitive damages, and $12,439.72 in prejudgment interest" to each of the girls. *Id.* However, a judgment against John was not the only relief the plaintiffs sought. *See supra* note 33 (explaining why the plaintiffs desired a judgment against Mary as well).

[35] *See id.*, at 336, 714 A.2d at 927 (citing J.S. v. R.T.H., 301 N.J. Super. 150, 693 A.2d 1191 (App. Div. 1997)).

[36] *See id.* (citing *J.S.*, 301 N.J. Super. at 158, 693 A.2d at 1194).

[37] *See J.S.*, 301 N.J. Super. at 153, 693 A.2d at 1192.

[38] *Id.* at 156, 693 A.2d at 1194. While the appellate division focused most directly upon the relationship of the parties in deriving its rule of law, it acknowledged the existence of the multi-factor balancing test that the Supreme Court of New Jersey would eventually use. *See id.* Predicating the existence of the duty upon the nature of the relationships, the appellate division stated that "the girls and their parents had a reasonable expectation that Mary would not knowingly expose them to the risk of sexual assault by her own husband." *Id.*

[39] *Id.* at 157, 693 A.2d at 1194 (quoting Rozycki by Rozycki v. Peley, 199 N.J. Super. 571, 579, 489 A.2d 1272, 1276 (Law Div. 1984)). To this end, the appellate division explained that if the court were to find that a duty existed, the duty would not oblige the defendant preemptively to warn all of the neighbors as the trial judge had erroneously feared. *See id.* Instead, the duty would entail that reasonable steps be taken to prevent any harm that may be foreseeable under the circumstances. *See id.*

[40] *See id.* at 157, 693 A.2d at 1194. The court noted that "[i]t will be a jury's role to determine the specific contours of her duty, and whether she deviated therefrom . . . ." *See id.* at 156, 693 A.2d at 1194.

forded an opportunity to present their theories of Mary's liability to a jury.[41]

Following the plaintiffs' appellate division victory, the Supreme Court of New Jersey granted Mary's petition for certification.[42] The court initially stated that in determining whether to impose a duty, the court would engage in a complicated balancing test.[43] The court then relied heavily upon notions of foreseeability and public policy[44] in holding that the law may impose a duty upon the spouse of a person who poses a threat of sexual abuse to young children.[45] The court also addressed the issue of proximate cause[46] and noted that judges, as a matter of law, may reject the imposition of liability when highly extraordinary consequences exist as a result of a breach of some relevant duty.[47] Acknowledging this limiting principle, the court nonetheless declared that injuries suffered by minor plaintiffs as a result of one spouse's sexually abusive behavior were not extraordinary consequences of the other spouse's failure to discharge a duty of care, such that a breach of that duty could also be a proximate cause of the harm.[48] Applying its new rules to the facts of the case before it, the unanimous court accordingly ruled that Mary could be charged with a duty of care to protect the girls from her

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[41] *See id.* at 157, 693 A.2d at 1194.

[42] *See* J.S. v. R.T.H., 151 N.J. 464, 700 A.2d 876 (1997).

[43] *See* J.S v. R.T.H., 155 N.J. 330, 337, 714 A.2d 924, 928 (1998). Thoroughly applying this balancing test, the court was able to supplement the appellate division's less-exhaustive analysis and ultimately to reach the same result. *See id.* at 354, 714 A.2d at 936. In so doing, the court explained that the factors that were necessary to all duty analyses included "the nature of the underlying risk of harm, . . . the opportunity and ability to exercise care to prevent the harm, the comparative interests of, and the relationships between or among, the parties, and . . . the societal interest in the proposed solution." *Id.*

[44] *See id.* at 351, 714 A.2d at 935.

[45] *See id.* at 352, 714 A.2d at 935. The court very precisely framed its holding regarding this new duty; the court held: "[W]hen a spouse has actual knowledge or special reason to know of the likelihood of his or her spouse engaging in sexually abusive behavior against a particular person or persons, a spouse has a duty to take reasonable steps to prevent or warn of the harm." *Id.*

[46] *See id.*

[47] *See id.* (citing Captuzal v. Lindsay Co., 48 N.J. 69, 77-80, 222 A.2d 513, 518 (1966) (holding that, even if a manufacturer's negligence in producing a water softener caused the eventual rusty discoloration of water, the manufacturer should not be liable to a plaintiff who had suffered an unusual heart attack prompted by fright at the sight of the discolored water)).

[48] *See id.* at 352, 714 A.2d at 935. ("It does not seem highly extraordinary that a wife's failure to prevent or warn of her husband's sexual abuse or his propensity for sexual abuse would result in the occurrence or the continuation of such abuse. The harm from the wife's breach of duty is both direct and predictable.").

husband's sexual abuse and that her breach of that duty could be a proximate cause of the plaintiffs' injuries.[49]

In 1957, the Supreme Court of New Jersey announced a general philosophy regarding duty analysis in *Wytupeck v. City of Camden*.[50] In *Wytupeck*, the court considered the liability of a city to a plaintiff-trespasser for the city's alleged negligence regarding the condition of city-owned land.[51] Evaluating the entirety of the facts,[52] the court determined that the plaintiffs adequately proved the existence of the city's duty.[53] The court stressed that foreseeability was the linchpin of

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[49] *See J.S.*, 155 N.J. at 353, 714 A.2d at 936. Based upon its rulings, the court affirmed the appellate division's reversal of summary judgment and its remand to the trial court. *See id.*

[50] 25 N.J. 450, 136 A.2d 887 (1957).

[51] *See id.* at 454, 136 A.2d at 889. The underlying facts of the case involved the electrocution of an infant plaintiff who was playing on a portion of the city's lands that had been used for water-pumping stations. *See id.* The City of Camden conceded that there was evidence that neighborhood children frequented such lands; however, the city vehemently denied that anyone had ever been seen or known to play in the vicinity of the fence enclosing the transformer that eventually injured the boy. *See id.* at 456, 136 A.2d at 890. The boy, nine years of age, was playing near a pump house when his paper airplane glided through the enclosure that contained a transformer. *See id.* at 457, 136 A.2d at 891. In an effort to retrieve the plane, the boy attempted to scale the fence. *See id.* As he placed one leg over the top of the fence, he made contact with a single uninsulated wire which was connected to the transformer. *See id.* Contact with this wire sent 4,000 volts of electricity through his body, causing serious burns and injuries. *See id.*

[52] *See id.* at 458-59, 136 A.2d at 892. The court particularly focused upon the testimony of the plaintiff's expert witness, Fishman. *See id.* Fishman, an electrical engineer, stated that the fence enclosing the transformer failed to conform to industry standards in that it lacked barbed wire on the top and was too close to some of the heavily charged wires that connected to the transformer. *See id.* In addition, the court focused upon two other facts. *See id.* at 459-60, 136 A.2d at 892. First, the court was compelled by the fact that the city's own expert conceded that all of the sub-stations (the term for the transformer and the fence as a unit) that he designed had an extension made of barbed wire in order to meet regulations and to deter children from climbing the fence. *See id.* Second, the court highlighted the fact that the great protection the barbed wire would provide could be obtained for less than $75.00. *See id.* at 460, 136 A.2d at 892.

[53] *See id.* at 464, 136 A.2d at 895. ("The case is well within the established principles of responsibility for a reasonably foreseeable risk . . . ."). In so holding, the court limited the duty as only "operative in favor of trespassers on land if the presence of the particular trespasser be discovered, or the possessor of the land be aware of the constant trespassing upon a particular place or limited area and the act is likely to cause death or serious bodily harm." *Id.* at 463, 136 A.2d at 894. This duty is now well-established in many jurisdictions. *See* W. E. Shipley, Comment, *Duty to Take Affirmative Action to Avoid Injury to Trespasser in Position of Peril Through No Fault of Landowner*, 70 A.L.R. 3d 1125 § 2 (1977) (stating that "it seems to be well established in many jurisdictions that where the presence of a trespasser is known to a landowner, or should have been anticipated by him, the duty owed is one of reasonable care under the circumstances" and listing the jurisdictions that support this premise).

its duty analysis,[54] but also remarked that any determination of duty must satisfy public policy concerns.[55] In addition to providing an analysis of duty within the specific context of landowner-trespasser,[56] the *Wytupeck* court demonstrated that, as a general matter, the Supreme Court of New Jersey regarded duty as a fluid concept that must be approached in a meticulous yet innovative manner.[57]

In *Portee v. Jaffee*,[58] the Supreme Court of New Jersey remained true to its declaration in *Wytupeck* that notions of duty must be flexible rather than static.[59] Unlike the *Wytupeck* court, which addressed whether a duty of care existed, the *Portee* court focused on whether the scope of a well-recognized duty of care should be expanded.[60] Specifically, the *Portee* court questioned whether a defendant's duty of

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[54] *See Wytupeck*, 25 N.J. at 464, 136 A.2d at 895. ("Liability here rests upon the foreseeability of harm to the child; it proceeds upon the ground that the trespass is to be foreseen . . . .").

[55] *See id.* ("[T]he rule proceeds from humanitarian considerations and reasons of social policy.").

[56] *See id.* With respect to the duty that it imposed, the court stated:

> [It] represents a prudent and essential accommodation of the landowner's right to use of his land and society's interest in the humane and the protection of the life and limb of its youth . . . . The correlative burden on the landowner, small indeed in comparison to the larger interests to be served, is a necessary concession to the common welfare. *Human safety is of far greater concern than unrestricted freedom in the use of land.*

Id. (emphasis added).

[57] *See id.* at 462, 136 A.2d at 894. The court noted:

> Duty is not a rigid formalism according to the standards of a simpler society, immune to the equally compelling needs of the present order; duty must of necessity adjust to the changing social relations and exigencies and man's relation to his fellows; and accordingly the standard of conduct is care commensurate with the reasonably foreseeable danger, such as would be reasonable in the light of the recognizable risk, for negligence is essentially "a matter of risk . . . that is to say of recognizable danger of injury."

Id. (quoting WILLIAM PROSSER, PROSSER ON TORTS § 36 (2d ed. 1954).

The court also announced:

> Duty is not an absolute conception; and the standard of conduct is not an absolute. Duty arises out of a relation between the particular parties that in right reason and essential justice enjoins the protection of the one by the other against what the law by common consent deems an unreasonable risk . . . .

Id. at 461, 136 A.2d at 893.

[58] 84 N.J. 88, 417 A.2d 521 (1980).

[59] *See id.* at 101, 417 A.2d at 528 (approving a new cause of action for bystanders for negligent infliction of emotional distress and, thus, demonstrating flexibility in duty analysis).

[60] *See id.* at 97, 417 A.2d at 526 (indicating the court's sensitivity both to violations of standards of care and the specter of excessive liability).

care should be expanded to impose liability for the emotional distress damages that a bystander suffered upon witnessing the death of her son in an elevator accident allegedly caused by the defendant's negligence.[61] In *Portee*, the court rejected traditional arguments against the imposition of liability for mental and emotional distress when plaintiff experienced no tangible physical harm or threat of physical harm.[62] To this end, the court announced that it would not shrink from the task of refining notions of liability so as "to remedy violations of reasonable care while avoiding speculative results or punitive liability."[63]

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[61] *See id.* at 90, 417 A.2d at 522. The underlying facts of *Portee* pertained to the death of the plaintiff's seven-year-old son; the boy lived with his mother, the plaintiff, in an apartment building in Newark. *See id.* at 91, 417 A.2d at 522. On May 22, 1976, the boy became trapped between the outer door of the building's elevator and the inside wall of the elevator shaft. *See id.* A neighboring child discovered the boy's precarious position and alerted the plaintiff, who enlisted the help of several Newark police officers. *See id.* The police officers, with the plaintiff watching, tried unsuccessfully for four and one-half hours to free the boy. *See id.* The boy suffered multiple fractures which caused massive hemorrhaging. *See id.* at 91, 417 A.2d at 523. He eventually died while still trapped. *See id.* The boy's mother subsequently filed suit against the defendant landlords and the defendant elevator companies for his wrongful death and for her own emotional distress caused by witnessing his death at the scene of the accident. *See id.* at 92, 417 A.2d at 523. The defendants moved for summary judgment on the claims for emotional distress. *See id.* The trial court granted summary judgment, approving defendants' theory that emotional distress recovery is only permissible where there has been at least the potential of personal injury. *See id.* The plaintiff's motion to appeal the grant of summary judgment was granted; however, the issue was directly certified by the Supreme Court of New Jersey for consideration. *See id.* at 90, 417 A.2d at 522 (citing Portee v. Jaffee, 82 N.J. 295, 412 A.2d 801 (1980)).

[62] *See id.* at 96, 417 A.2d at 525. The traditional arguments have focused upon the speculative nature of the plaintiff's actual emotional damages as well as the possibility that liability for such damages may be imposed in a manner that is "not commensurate with the culpability of [the] defendant's conduct." *Id.*

[63] *Id.* at 97, 417 A.2d at 526. Before fashioning a decision, the court surveyed its own prior law regarding liability for emotional distress damages. *See id.* at 96, 417 A.2d at 525. This analysis began with a discussion of *Falzone v. Busch*, 45 N.J. 559, 569, 214 A.2d 12, 17 (1965), which explains that in tort law, the rule of stare decisis is much more limited than in contract or property law, thus permitting the court to relax the requirement of physical impact in emotional distress cases. *See Portee*, 84 N.J. at 90, 417 A.2d at 522 (discussing *Falzone*, 45 N.J. at 569, 214 A.2d at 17). The court explained that *Falzone* eliminated a prior requirement that any claim for emotional distress or mental anguish must piggy-back a claim of actual physical harm. *See id.* (discussing *Falzone*, 45 N.J. at 569, 214 A.2d at 17). The court then explained, however, that the lower courts of New Jersey, including the Law Division in the present case, had been interpreting *Falzone*'s rule of law in an unnecessarily narrow fashion. *See id.* at 94, 417 A.2d at 524. The court stated that even though these other courts acknowledged that the physical impact requirement had been eliminated, most of them read *Falzone* as still requiring at least a risk of some physical harm. *See id.* In response to the confusion, the *Portee* court clarified that the "risk of harm" was not imperative. *See id.* at 95, 417 A.2d at 524-25. The court noted that "[s]ince

In its efforts to refine the unique concept of emotional distress liability to bystanders, the *Portee* court focused on notions of foreseeability and public policy.[64] As a result of its inquiry, the court explained that the emotional distress that results from witnessing the serious injury or death of a loved one is seemingly equivalent to the foreseeability of the injury itself because "few persons travel through life alone."[65] Furthermore, the court stated that, after balancing the interest in protecting emotions against the interest in avoiding encumbrances on freedom of conduct, it found emotional stability to be more weighty.[66] In light of these two major considerations, the court held that the general duty to avoid harm to others would encompass the avoidance of mental and emotional harm regardless of whether an individual experienced physical harm or was even at risk of such physical harm.[67] The court added that in the pure bystander context, proof of four specific elements[68] would be necessary to en-

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Falzone, this Court's decisions have shown no hostility to the imposition of liability for negligently caused mental or emotional distress *even without an attendant risk of physical harm*." *Id.* at 95, 417 A.2d at 525 (emphasis added).

[64] *See Portee*, 84 N.J. at 101, 417 A.2d at 528.

[65] *Id.*

[66] *See id.*

[67] *See id.* ("We find that a defendant's duty of reasonable care to avoid physical harm to others extends to the avoidance of this type of mental and emotional harm.").

[68] *See id.* Basically, the court's elemental test was a restructuring of the three-factor approach taken by the California Supreme Court in *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968). *See Portee*, 84 N.J. at 97, 417 A.2d at 526. In *Dillon*, the California Supreme Court ultimately allowed a bystander cause of action for negligent infliction of emotional distress for a plaintiff who witnessed the death of her infant daughter, who was lawfully crossing the street when the defendant negligently struck her with his motor vehicle. *See Dillon*, 441 P.2d at 914. In permitting the bystander cause of action, the court acknowledged that three major factors motivated its decision — the plaintiff's proximity to the accident scene, the plaintiff's "sensory and contemporaneous observance of the accident," and the plaintiff's close relationship with the victim. *Id.* at 920. The *Portee* court adjusted *Dillon's* instructive factors into four required elements:

> (1) the death or serious physical injury of another caused by defendant's negligence;
> (2) a marital or intimate, familial relationship between plaintiff and the injured person;
> (3) observation of the death or injury at the scene of the accident; and
> (4) resulting severe emotional distress.

Portee, 84 N.J. at 101, 417 A.2d at 528.

With respect to these elements, the court found "the existence of a close relationship to be the most crucial." *Id.* at 98, 417 A.2d at 526. For a discussion of the relational requirement, see Howard H. Kestin, *The Bystander's Cause of Action for Emotional Injury: Reflections on the Relational Eligibility Standard*, 26 SETON HALL L. REV. 512, 524 (1996). The author states:

> The [*Portee*] court's apparent design was to recognize the uniqueness

sure that a defendant's liability would not surpass his culpability.[69] Ultimately, the *Portee* court established that the performance of a precise duty analysis has the potential to resolve the inherent conflict between expansive theories of liability and the specter of groundless and/or speculative litigation.[70]

In *People Express Airlines, Inc. v. Consolidated Rail Corp.*,[71] decided five years after *Portee*, the court followed a very similar approach to duty analysis which resulted in further expansion of the scope of a defendant's duty of care.[72] In *People Express*, the court considered a plaintiff's claim that sought to broaden the scope of a recognized duty and to override a perceived per se rule.[73] Specifically, the court

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> of the type and depth of emotional harm experienced by one who has witnessed the infliction of serious injury to another person in a special relationship, as distinguished from the more common reaction of one who has lived through the infliction of death or injury upon another person less closely connected.

Id.

Subsequent to *Portee*, there was much consideration of the strict marital and/or familial relation element. In 1994, in *Dunphy v. Gregor*, 136 N.J. 99, 114, 642 A.2d 372, 380 (1994), the Supreme Court of New Jersey liberalized the requirement, permitting unmarried cohabitants to state a cause of action for negligent infliction of emotional distress. *See* Caroline C. Kureshi, *The Extension of the Bystander Liability Doctrine for Emotional Distress to Unmarried Cohabitants: A Critique of* Dunphy v. Gregor, 48 RUTGERS L. REV. 497, 531 (1996) (concluding that by "extending the doctrine of bystander liability to unmarried cohabitants who possess intimate familial relationships," the New Jersey courts have "adequately addressed a novel and controversial issue of tort law and ha[ve] set an excellent example for other states to follow"). Some commentators have urged that taking the step to include unmarried cohabitants may not even be liberal enough. *See* Dennis G. Bassi, Note, *It's All Relative: A Graphical Reasoning Model for Liberalizing Recovery for Negligent Infliction of Emotional Distress Beyond the Immediate Family*, 30 VAL. U. L. REV. 913, 917 (1996) (proposing that "one's emotional interests outweigh the burdens of imposing a new species of negligence liability" regardless of whether a blood, marriage, or adoption relation is present, and asserting that the bystander recovery rule should be expanded to focus on the substance of the actual emotional ties between the bystander and the victim, rather than the label that their relationship may have in our society).

[69] *See Portee*, 84 N.J. at 101, 417 A.2d at 528. ("[L]imiting judicial redress to those inflicted on intimate bonds by the death or serious injury of a loved one serves to prevent liability from exceeding the culpability of defendant's conduct.").

[70] *See id.* at 96-97, 417 A.2d at 525-26.

[71] 100 N.J. 246, 495 A.2d 107 (1985).

[72] *See id.* at 266, 495 A.2d at 118 (eliminating the requirement of physical loss in order to recover for economic loss).

[73] *See id.* at 251, 495 A.2d at 109. The perceived per se rule mentioned in the text mistakenly evolved from *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), in which recovery for economic damages had been disallowed (when, incidentally, the plaintiffs had suffered no physical damages). *See People Express*, 100 N.J. at 251, 495 A.2d at 109. In *Robins*, the United States Supreme Court disallowed the claim made by time charters of a steamship against the repairer of the steamship for economic damages that stemmed from the defendant's delay in repairing the vessel.

addressed the issue of whether an airline should recover in tort for purely economic damages when the defendant-railroad's negligence in operating its tank cars forced the plaintiff-airline to evacuate its business premises.[74] In its decision, the court rejected the routine policy arguments set forth by the defendants[75] and, instead, cited countervailing policy concerns that favored recovery for purely economic damages.[76]

After asserting general policy justifications for expanding the scope of duty to encompass purely economic losses, the *People Express* court analyzed various exceptions to the per se rule against recovery without physical harm.[77] The court proposed that the breadth of

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See Robins, 275 U.S. at 307. The Court did not, however, deny the claim because the plaintiffs' damages were purely economic, but, rather, because the plaintiffs had no standing against the defendant-repairer under contract law, because they were not in privity with the defendant, or under property law, because they had no property interest in the ship. *See id.* at 308-09. Thus, as the *People Express* court accurately recognized, there had never been an intention to bar recovery for pure economic loss because *Robins* had not actually "created a [per se] rule absolutely disallowing recovery in such circumstances." *People Express*, 100 N.J. at 251, 495 A.2d at 109.

[74] *See People Express*, 100 N.J. at 249, 495 A.2d at 108. On July 22, 1981, one of the defendant's railway tank cars was accidentally punctured and began to emit ethylene oxide, an extremely volatile substance. *See id.* Immediately following this accident, the defendant Conrail activated its prepared evacuation plan. *See id.* The plan called for the evacuation of all areas within a one-mile radius. *See id.* The relevant evacuation area included Newark Airport's North Terminal, the location of the plaintiff's place of business. *See id.* As a result, the plaintiff-airline was forced to cease its business operations for 12 hours. *See id.* In response to the accident, the plaintiff filed a lawsuit, alleging that the defendant's negligence caused the plaintiff economic damages associated with canceled flights, lost reservations (because of the inability to answer the phones to accept bookings), and fixed operating costs. *See id.* at 249-50, 495 A.2d at 108-09. Conrail moved for summary judgment on the ground that the plaintiff's claims were not recoverable in tort unless they were accompanied by some physical harm (personal injury or property damage). *See id.* at 250, 495 A.2d at 109. The trial court granted the motion, but the appellate division reversed. *See id.*

[75] *See id.* at 252, 495 A.2d at 110. The policy arguments the court rejected stressed that the physical harm rule is essential to prevent "fraudulent claims, mass litigation, and limitless liability, or liability out of proportion to the defendant's fault." *Id.* In evaluating these considerations in assessing the need for the per se rule requiring physical harm, the court stated that the solution to such concerns "is not the judicial obstruction of a fairly grounded claim for redress. Rather, it must be a more sedulous application of traditional concepts of duty and proximate causation . . . ." *Id.* at 254, 495 A.2d at 111.

[76] *See id.* at 254-55, 495 A.2d at 111. First, the court reminded that one of the main goals of the tort system is to assure all innocent victims that they will be afforded an avenue of legal redress unless there exists some powerful, contradictory public policy. *See id.* Second, the court noted that an indiscriminate per se rule subverts some of the other objectives of tort law, such as the deterrence of similar tortious behavior, the creation of safer products and procedures, and the assignment of the risk of loss to those who can best bear them. *See id.*

[77] *See id.* at 256-61, 495 A.2d at 112-14. The court first discussed a "special rela-

such exceptions appeared to undermine the soundness of the rule itself.[78] Relying upon these exceptions, the court fashioned a new rule that eliminated the physical injury requirement.[79] The court held that the law imposed a duty upon a defendant to act reasonably to avoid the risk of causing economic damages to "particular plaintiffs or plaintiffs comprising an *identifiable* class with respect to whom [the] defendant knows or has reason to know are likely to suffer such damages from its conduct."[80] Complementing this holding, the court issued the following general proclamation regarding duty analysis: "[It is this court's policy to] strive to ensure that the application of the negligence doctrine . . . does not unnecessarily or arbitrarily foreclose redress based on formalisms or technicalisms."[81]

Viewed in tandem, the decisions in *Portee* and *People Express* pronounced two significant notions: (1) Actions asserting non-physical harm must go forward even though the plaintiff has failed to allege that the defendant has caused an ascertainable physical injury,[82] and

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tionship" exception, in which a plaintiff's pure economic harm is deemed recoverable because the plaintiff relied to his detriment on the quality of the defendant's work or services; the court noted that the exception has been extended to auditors, surveyors, engineers, attorneys, etc. *See id.* at 256-57, 495 A.2d at 112. Next, the court discussed a similar exception — the "particularly foreseeable plaintiff group" exception; the court explained that jurisdictions have considered it equitable "to impose liability on defendants who . . . had *particular knowledge or reason to know* that others . . . would be economically harmed by negligent conduct." *Id.* at 258, 495 A.2d at 113 (emphasis added). Finally, the court discussed the "private action for public nuisance" exception. *See id.* at 259-60, 495 A.2d at 113-14. This exception found the scope of a defendant's duty to cover economic damages unaccompanied by physical loss when "the pecuniary losses suffered by those who make direct use of the resource are particularly foreseeable because they are so closely linked, through the resource, to the defendant's behavior." *Id.* at 260, 495 A.2d at 114. For a discussion of the "special injury" rule that is required in the private action for public nuisance, see Michael C. Skotnicki, Note, *Private Actions for Damages Resulting from an Environmental Public Nuisance: Overcoming the Barrier to Standing Posed by the "Special Injury" Rule*, 16 AM. J. TRIAL ADVOC. 591, 606 (1992) (praising the growing tendency in modern courts to replace the "special injury" requirement in private actions for public nuisance with a more flexible foreseeability-proximate cause test).

[78] *See People Express*, 100 N.J. at 256, 495 A.2d at 112. ("[T]he evolution of various exceptions to the rule of nonrecovery for purely economic losses . . . suggests that the exceptions have cast considerable doubt on the validity of the current rule and, indeed, have laid the foundation for a rule that would allow recovery.").

[79] *See id.* at 262, 495 A.2d at 115 (dispensing with the per se rule and stating that "knowledge or special reason to know of the consequences of the tortious conduct in terms of the persons likely to be victimized and the nature of the damages likely to be suffered will suffice to impose a duty upon the tortfeasor . . .").

[80] *Id.* at 263, 495 A.2d at 116 (emphasis added). The court stressed that the class need be identifiable, and not merely foreseeable, so that a defendant could avoid liability for injuries due to "fortuitous" presence. *See id.*

[81] *Id.* at 255, 495 A.2d at 111.

[82] *See supra* notes 58-70 and 71-81 and accompanying text (discussing Portee v.

(2) The Supreme Court of New Jersey generally disapproves of per se rules that restrict certain causes of action and, thus, favors in-depth, case-by-case duty analysis instead.[83] Most importantly, however, these cases illustrate the receptiveness of New Jersey courts to notions of liability that *widen* the scope of a defendant's *existing* duty of care.[84] In addition to such support for the broadening of the scope of some duties, the New Jersey courts have continually demonstrated a collective open-mindedness toward novel theories that create duties — particularly those that seek to impose a duty upon a party to warn, prevent, or rescue another so as to thwart some specific harm that may result from the tortious and/or criminal acts of a third party.[85]

In 1979, the New Jersey Superior Court, Law Division, decided *McIntosh v. Milano*,[86] one of the earliest cases in which the plaintiffs advanced a duty to rescue in connection with a third party's criminal act.[87] In *McIntosh*, the court addressed the plaintiff's allegation that the defendant-psychiatrist had breached a duty of care to take reasonable steps to protect the plaintiff's decedent daughter once the defendant-psychiatrist determined or should have determined that his patient posed a serious danger to her.[88] Because the plaintiff's theory of liability was novel to the New Jersey courts as well as the courts of many other states, the trial judge relied upon the seminal case regarding therapist liability — *Tarasoff v. Regents of University of*

Jaffee, 84 N.J. 88, 417 A.2d 521 (1980) and People Express Airlines, Inc. v. Consolidated Rail Corp., 100 N.J. 246, 495 A.2d 107 (1985)).

[83] *See People Express*, 100 N.J. at 263, 495 A.2d at 116.

[84] *See supra* notes 58-70 and 71-81 and accompanying text (discussing *Portee* and *People Express*).

[85] *See supra* note 18 (introducing three New Jersey cases analyzed *infra* notes 86-123 and accompanying text).

[86] 168 N.J. Super. 466, 403 A.2d 500 (Law Div. 1979).

[87] *See id.* at 470-71, 403 A.2d at 502. For the purposes of this Note, a duty to rescue is any duty that calls upon the defendant: (1) to control the behavior of a third person, (2) to warn a potential victim of the harm that a third person might cause, or (3) to prevent the harm that a third person might cause or protect against the harm itself. *See generally*, RESTATEMENT (SECOND) OF TORTS §§ 314-15 (1965).

[88] *See McIntosh*, 168 N.J. Super. at 476, 403 A.2d at 505. The plaintiff's daughter (decedent) was killed by the defendant's psychiatric patient. *See id.* at 470, 403 A.2d at 502. During the course of his therapy, the patient, who was also a next-door neighbor of the decedent, had communicated to the defendant several "fantasies" he had concerning the decedent as well as several incidents in which he tried to harm her with a B.B. gun. *See id.* at 472-73, 403 A.2d at 503. Shortly before the date of the murder, the patient told the defendant that he was very angry toward the decedent and that he hoped that she would suffer. *See id.* at 473, 403 A.2d at 503. Ultimately, the patient exercised this aggression against the decedent, luring her to a local park under the guise of his friendship in order to shoot her in the back. *See id.* at 474, 403 A.2d at 504.

California.[89] Recognizing that foreseeability seemed to be a "given" under its factual predicate, the *Tarasoff* court had grounded its decision in terms of public policy instead.[90] Despite its acknowledgment of a public interest in the effective treatment of psychiatric disorders via the right to confidentiality,[91] the *Tarasoff* court had stated that the public interest in safety clearly outweighed that concern.[92]

Following the lead of the *Tarasoff* court, Judge Petrella, the trial judge in *McIntosh*, relied on New Jersey case law,[93] statutory duty,[94]

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[89] *See id.* at 471, 403 A.2d at 502 (citing Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976)). In *Tarasoff*, the facts were extremely similar to those of *McIntosh*, except that the murderer had affirmatively confided in his therapist his intention to kill the decedent-plaintiff, Tatiana Tarasoff. *See Tarasoff*, 551 P.2d. at 339-40. In *Tarasoff*, the Supreme Court of California ultimately held that "when a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger." *Id.* at 340.

For an interesting analysis that utilizes *Tarasoff* as a backdrop for examining the common law rule of nonfeasance (referred to as the "affirmative duty rule"), see Shlomo Twerski, Note, *Affirmative Duty After* Tarasoff, 11 HOFSTRA L. REV. 1013, 1014, 1041 (1983) (arguing that "it would be premature to eulogize the affirmative duty rule" while suggesting that the areas of affirmative duty can be broadened "without encroaching on the interests that the common law rule" had sought to protect).

[90] *See Tarasoff*, 551 P.2d at 347-48 (discussing the more weighty interest of public safety as opposed to "the open and confidential character of therapeutic dialogue . . . ").

[91] *See id.* at 347. ("Certainly a therapist should not be encouraged routinely to reveal such threats [of violence]; such disclosures could seriously disrupt the patient's relationship with his therapist and with the persons threatened.").

[92] *See id.* The court stated:

> Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal. If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment. The containment of such risks lies in the public interest.

Id.

[93] *See McIntosh*, 168 N.J. Super. at 484, 403 A.2d at 509. Judge Petrella recognized that "the concept of legal duties for the medical profession is not new." *Id.* The trial judge explained that a physician owes a duty to warn others of contagious diseases and to warn third parties against exposure to such diseases. *See id.* Additionally, the trial judge stated that a failure to perform this duty would result in liability. *See id.*

[94] *See id.* at 485-86, 403 A.2d at 510. The court cited title 2A, section 113-8 of the New Jersey Statutes, which criminalized threats upon someone's life. *See id.* (citing N.J. STAT. ANN. § 2A:113-8, *repealed by* L. 1978 ch. 95, § 2C:98-2 (effective Sept. 1, 1979)). The court also cited title 2A, section 97-2 of the New Jersey Statutes, which criminalized the withholding of knowledge of the actual commission of certain

and public policy[95] to suggest that the duty should be imposed.[96] In recognizing a duty on the part of the psychiatrist,[97] the judge exhibited the general open-mindedness with which New Jersey courts have repeatedly responded to issues of duty, especially where overriding public policy is concerned.[98] More notably, the *McIntosh* decision signaled the opportunity for further upheaval of the traditional nonfeasance rule.[99]

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crimes. *See id.* (citing N.J. STAT. ANN. § 2A:97-2, *repealed by* L. 1978 ch. 95, § 2C:98-2 (effective Sept. 1, 1979)). Based upon his reading of these provisions, Judge Petrella reasoned that the defendant had a statutory duty to report his patient's threat (even if implied). *See id.*

[95] *See id.* at 487, 403 A.2d at 510. The court stated: "As for public policy, the strongest policy which appeals to us is that fundamental theory of the common law that for every wrong there should be a remedy." *Id.*

[96] *See supra* notes 93-95.

[97] *See McIntosh*, 168 N.J. Super. at 489-90, 403 A.2d at 511-12. Specifically, the court held that:

> [A] psychiatrist or therapist may have a duty to take whatever steps are reasonably necessary to protect an intended or potential victim of his patient when he determines, or should determine, in the appropriate factual setting and in accordance with the standards of his profession established at trial, that the patient is or may present a probability of danger to that person. The relationship giving rise to that duty may be found either in that existing between the therapist and the patient, as was alluded to in *Tarasoff II*, or in the more broadly based obligation a practitioner may have to protect the welfare of the community, which is analogous to the obligation a physician has to warn third persons of infectious or contagious disease.

Id. (citation omitted).

The tort liability of psychotherapists has been the topic of many commentaries. *See, e.g.*, James C. Beck, *The Psychotherapist's Duty to Protect Third Parties From Harm*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 141, 147 (1987) (stressing that liability hinges upon the verification of a reasonably identifiable victim and suggesting that "[b]ecause an assessment of a patient's potential for violence requires professional judgment, malpractice rather than simple negligence is the appropriate standard for determining liability"); Sherrie A. Wolf, Note, *The Scope of a Psychiatrist's Duty to Third Persons: The Protective Privilege Ends Where the Public Peril Begins*, 59 NOTRE DAME L. REV. 770, 789 (1984) (advising psychiatrists to take three steps to protect themselves from liability until the emergence of some consensus regarding the proper protocol for warning the public of a patient's violent threats: (1) to know the state law regarding the scope of one's duty to the public and to one's patients, (2) to follow the procedures commonly practiced in one's community by fellow psychiatric professionals, and (3) to purchase substantial malpractice insurance coverage).

[98] *See McIntosh*, 168 N.J Super. at 487, 403 A.2d at 510-11 (noting the nature of New Jersey courts to "allow[ ] liberal access of litigants to the courts for redress of grievances"). Judge Petrella evinced this liberality when he stated, "Obviously, the courts should not dismiss a complaint on the sole ground that a question or issue is *too complex* . . . ." *Id.* at 487, 403 A.2d at 510 (emphasis added).

[99] *See supra* notes 10-16 and accompanying text (explaining the genesis and evolution of the nonfeasance rule).

In 1984, in *Kelly v. Gwinnell*,[100] the Supreme Court of New Jersey again considered the propriety of implementing a duty to rescue in the context of drunk driving.[101] In *Kelly*, the court examined the plaintiff's theory that the defendants breached a duty of care to act as reasonable social hosts when they served alcohol to a friend despite knowledge that he was intoxicated and would thereafter be driving a car.[102] Chief Justice Wilentz, writing for a majority of the court, emphasized that an analysis of public policy would ultimately determine whether a court should impose a duty of care upon social hosts serving alcohol.[103] The chief justice noted that the efforts of the New Jersey Legislature[104] indicated that its hard-line approach toward drunk driving was "practically unanimously accepted by society."[105] Out of deference to the state's well-recognized policy,[106] the *Kelly* court held that any social host who directly serves alcohol to a guest, with knowledge that the guest is both intoxicated and will thereafter be driving an automobile, will be jointly liable in tort for any harm that the

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[100] 96 N.J. 538, 476 A.2d 1219 (1984).

[101] *See id.* at 540-41, 476 A.2d at 1220.

[102] *See id.* at 541, 476 A.2d at 1220. The plaintiff was seriously injured in a head-on collision caused by Donald Gwinnell. *See id.* Immediately prior to this accident, Gwinnell had consumed several drinks at the home of Joseph and Catherine Zak. *See id.* Based upon the fact that Gwinnell had a blood alcohol concentration of 0.286 percent at the time of the accident, the plaintiff's expert hypothesized that Gwinnell must have been visibly drunk at the time the Zaks served him. *See id.* In light of this fact, the plaintiff not only filed a lawsuit against Gwinnell for his negligence in driving drunk, but also against the Zaks for their negligence in serving alcohol to someone who would later be driving. *See id.* at 541-42, 476 A.2d at 1220.

The defendant social hosts asserted that they carried no duty under New Jersey law to act as reasonable social hosts in the service of alcohol. *See id.* at 542, 476 A.2d at 1220-21. The trial court granted the defendants' summary judgment motion on this ground. *See id.* at 542, 476 A.2d at 1221. The appellate division affirmed this grant of summary judgment. *See id.* (citing Kelly v. Gwinnell, 190 N.J. Super. 320, 463 A.2d 387 (App. Div. 1983)).

[103] *See id.* at 544, 476 A.2d at 1222. Chief Justice Wilentz stated that since the "usual elements of a cause of action for negligence [an unreasonable risk of harm, foreseeability of that risk, and a foreseeable injury from that harm] are clearly present . . . the only question remaining is . . . whether this court should impose such a duty." *Id.* Accordingly, the chief justice stated that public policy would be determinative. *See id.*

[104] *See id.* at 544-45, 476 A.2d at 1222. The chief justice relied in particular upon the fact that New Jersey's "long-standing criminal sanctions against drunk driving have recently been significantly strengthened to the point where the Governor notes that they are regarded as the toughest in the nation." *Id.* at 545, 476 A.2d at 1222.

[105] *Id.*

[106] *See Kelly*, 96 N.J. at 545, 476 A.2d at 1222. The chief justice remarked that the plaintiff's plea for "the imposition of a duty is both consistent with and supportive of a social goal — the reduction of drunken driving . . . ." *Id.*

guest causes to a third person as a result of negligent driving.[107] The *Kelly* majority also addressed the dissent's protests[108] that the Legislature, rather than the courts should resolve such matters.[109] The majority stressed that the Supreme Court of New Jersey was not required

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[107] *See id.* at 548, 476 A.2d at 1224. The theory of social host liability, although it succeeded in New Jersey via *Kelly*, has experienced mixed results amongst the other jurisdictions. *See, e.g.*, John R. Ashmead, *Putting a Cork on Social Host Liability: New York Rejects a Trend*, D'Amico v. Christie, 55 BROOK. L. REV. 995, 996-97 (1989) (supporting the decision of the *D'Amico* court whereas the court "[r]efus[ed] to be swayed by the current emotional outcry against drunk driving" and it "looked to the language of the Dram Shop Act and correctly applied case law in determining that social host liability should not be imposed;" arguing that social host liability is not only unfair, but also is ineffective in deterring drunk driving); Mary H. Seminara, Note, *When the Party's Over:* McGuiggan v. New England Telephone and Telegraph Co. *and the Emergence of a Social Host Liability Standard in Massachusetts*, 68 B.U. L. REV. 193, 213 (1988) (suggesting a change from Massachusetts's prevailing negligence standard for social host liability to a recklessness standard so as to minimize confusion and to allow social hosts more protection from liability than bar owners possess).

For an interesting article discussing the extension of the theory of social host liability, see generally Spring J. Walton et al., *The High Cost of Partying: Social Host Liability for Fraternities and Colleges*, 14 WHITTIER L. REV. 659 (1993).

[108] *See Kelly*, 96 N.J. at 560-70, 476 A.2d at 1230-36 (Garibaldi, J., dissenting). The dissent asserted two arguments. *See id.* at 563-67, 476 A.2d at 1232-34. (Garibaldi, J., dissenting). First, and perhaps most importantly, the dissent urged that the Legislature was the preferred source for determinations that carry such significant ramifications. *See id.* at 563, 476 A.2d at 1232 (Garibaldi, J., dissenting). The dissenting justice voiced a general agreement with "the holdings of our sister states and with their misgivings about the *judicial* imposition of the duty that the majority places on social hosts." *Id.* at 562, 476 A.2d at 1231 (Garibaldi, J., dissenting) (emphasis added). In addition, the dissent referred to specific opinions from several of these other jurisdictions. *See id.* at 562-63, 476 A.2d at 1231-32 (Garibaldi, J., dissenting) (referring to the opinions of the Supreme Court of Wisconsin, the New York Supreme Court (Appellate Division), and the Supreme Court of Nebraska on the issue of judicial imposition of social host liability).

Second, the dissent stated that the majority's decision would impose a heavy burden upon social hosts by requiring them to monitor the alcohol consumption of their guests. *See id.* at 560, 476 A.2d at 1230 (Garibaldi, J., dissenting). The dissent noted that the duty created by the majority was improper because: (1) It requires a subjective determination of intoxication whereas the majority relied upon objective evidence, Gwinnell's blood alcohol concentration, to show his drunkenness; (2) It ignores the fact that guests often serve themselves because a host is too busy entertaining others; (3) It ignores the social pressures incumbent upon a social host in telling someone that they will not be served another drink; and (4) It imposes significant financial burdens because of the inability for a social host to spread the cost of liability. *See id.* at 565-67, 476 A.2d at 1233-34 (Garibaldi, J., dissenting). The majority responded to these concerns with the following question: "Should we be so concerned about disturbing the customs of those who knowingly supply that which causes the offense, so worried about their costs, so worried about their inconvenience, as if they were victims rather than the cause of the carnage?" *Id.* at 558, 476 A.2d at 1229.

[109] *See id.* at 552-59, 476 A.2d 1226-29 (refuting the dissent).

to wait for a legislative solution to the problem.[110] In sum, the court again demonstrated that it would not hesitate to accept new theories of duty, even if those duties clashed with the traditional nonfeasance rule.[111]

In 1997, the Supreme Court of New Jersey put another stamp of approval on duty to rescue liability with its decision in *Clohesy v. Food Circus Supermarkets, Inc.*[112] Specifically, the *Clohesy* court addressed the issue of whether a supermarket may be liable in tort for the abduction and murder of one of its customers if the supermarket failed to provide security or surveillance in its parking lot.[113] In *Clohesy*, the court announced that it would no longer require "prior similar criminal incidents"[114] on the defendant's premises to impose a duty

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[110] *See id.* at 555, 476 A.2d at 1227. The court stated that "[d]eterminations of the scope of duty in negligence cases has traditionally been a function of the judiciary." *Id.* at 552, 476 A.2d at 1226. In addition, the court maintained that scientific proof is not a necessary condition upon the court's imposition of a duty. *See id.* at 551-52, 476 A.2d at 1226. The court also reminded that it had "decided many significant issues without prior legislative study." *Id.* at 555, 476 A.2d at 1227.

The *Kelly* court did, however, openly invite the Legislature to amend its decision. *See id.* The court stated, "In any event, if the Legislature differs with us on issue of this kind, it has a clear remedy." *Id.* Post-*Kelly*, the Legislature accepted the court's "invitation," enacting title 2A, sections 15-5.6 to 5.8. of the New Jersey Statutes, which did not abrogate social host liability, but instead limited it by increasing the culpability standard from "negligently" to "willfully and knowingly" and creating a set of presumptions as to the visible intoxication of the guest. *See* N.J. STAT. ANN. §§ 2A:15-5.6 to 5.8 (West 1987).

[111] *See supra* notes 10-16 and accompanying text (discussing the concept of the nonfeasance rule).

[112] 149 N.J. 496, 520, 694 A.2d 1017, 1030 (1997) (concluding that the defendant owed "a legal duty of care to provide some measure of security in the parking lot" of its place of business so as to protect against criminal acts of third parties).

[113] *See id.* at 500, 694 A.2d at 1019. On July 15, 1991, Kathleen Dalton was abducted from the parking lot of the Foodtown Supermarket on Broad Street in Red Bank, New Jersey. *See id.* at 500, 694 A.2d at 1019. Dalton, 79 years old, was forced into her car by Philip Reardon, Jr., who covered her mouth and nose with duct tape. *See id.* The duct tape later caused Dalton to die of asphyxiation. *See id.* Plaintiff Mary Clohesy, Dalton's executrix, instituted a wrongful death action against the supermarket for its failure to furnish adequate security or warnings in its parking lot. *See id.* The defendant supermarket moved for summary judgment on the grounds that it owed no legal duty to Dalton because its premises had not been the location of prior similar criminal incidents. *See id.* at 500-01, 694 A.2d at 1019-20. The trial court granted summary judgment on these grounds, and the appellate division affirmed. *See id.* at 501, 694 A.2d at 1020.

[114] *See id.* at 508-09, 694 A.2d at 1024. The court noted that several other jurisdictions had abandoned the prior similar criminal incidents approach. *See id.* at 509, 694 A.2d at 1024 (listing Pennsylvania, Florida, Minnesota, Nevada, and South Dakota). Likewise, the court detailed the California Supreme Court's rejection of the rule. *See id.* at 509-10, 694 A.2d at 1024-25 (citing Issacs v. Huntington Mem'l Hosp., 38 Cal. 3d 112, 125-26 (1985)) (explaining that the rule was rejected because: (1) It always denied recovery to the first victim, (2) It had inherent uncertainty as to the

on the defendant business owner to protect its customers from harm from third parties.[115] Instead, the court adopted a "totality of the circumstances" approach.[116] The court then held that a business owner would assume a legal duty to provide security in its parking lot if, after considering all of the circumstances, it was reasonably foreseeable that customers might suffer injuries at the hands of third persons in an unsecured lot.[117] In fashioning this holding, the *Clohesy* court vindicated notions of fairness and foreseeability.[118] With regard to foreseeability, the court remarked that "[t]he mere fact that a particular kind of incident [has] not happened before is not a sound reason to conclude that such an incident might not reasonably have been anticipated."[119] With respect to fairness, the court pointed out that "our tort law . . . does not require the first victim to lose while subsequent victims are permitted to submit their cases to a jury."[120] Finally, in addition to evaluating the potential repercussions of its holding,[121] the *Clohesy* court implied that the species of duty it had imposed — the duty to rescue — had become entrenched in New Jersey tort law.[122] To this end, the court commented that its decision merely "'nudge[d] the law . . . forward an inch or so.'"[123]

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similarity required in the prior incidents, (3) It incorrectly re-defined foreseeability, and (4) It removed many cases from the jury's determination).

[115] *See id.* at 514, 694 A.2d at 1027. ("[We] reject the prior similar incident rule in favor of the totality of the circumstances approach.").

[116] *See id.* The "totality of the circumstances" approach entails the consideration of "all prior criminal incidents occurring on the landowner's premises and adjacent properties, whether similar or not, as well as other types of evidence such as the nature, location, condition, and the architectural design of the landowner's property." *Id.* at 509, 694 A.2d at 1024.

[117] *See id.* at 519-20, 694 A.2d at 1030.

[118] *See Clohesy*, 149 N.J. at 516-17, 694 A.2d at 1028 (relying on the "totality of the circumstances" approach).

[119] *Id.* at 516, 694 A.2d at 1028. With this in mind, the court clarified that "foreseeability can stem from prior criminal acts that are lesser in degree than the one committed against a plaintiff." *Id.* at 516-17, 694 A.2d at 1028. Likewise, the court stated that "[i]t can also arise from prior criminal acts that did not occur on the defendant's property, but instead occurred in close proximity to the defendant's premises." *Id.*

[120] *Id.* at 516, 694 A.2d at 1028.

[121] *See id.* at 519-20, 694 A.2d at 1030. The court acknowledged the great impact that its holding could have on smaller businesses situated within shopping malls. *See id.* at 520, 694 A.2d at 1030. The court stated that a different result may be compelled when a small business is concerned. *See id* The court, however, stated that any risk determination would be done via a case-by-case approach. *See id.*

[122] *See id.*

[123] *Id.* (quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 451, 625 A.2d 1110, 1122 (1993) (Clifford, J., concurring)).

In *J.S. v. R.T.H.*,[124] the Supreme Court of New Jersey explored duty to rescue liability in a unique context — the sexual abuse of minors.[125] In *J.S.*, the Supreme Court of New Jersey held that considerations of foreseeability and public policy mandated the imposition of a duty to rescue upon the spouse of someone who poses a threat of sexual abuse to young children.[126] The *J.S.* court also held that a spouse's breach of this special duty to rescue might constitute a proximate cause of the harm suffered by minor plaintiffs due to such sexual abuse.[127]

Justice Handler, writing for a unanimous court, first announced that the court would perform a complex, four-factor analysis of the suggested duty.[128] The court stated that its analysis would focus on the foreseeability of the harm experienced, the relationships between the parties, notions of fairness, and public policy in general.[129] The court then carefully applied each factor of the analysis, in the abstract, to determine if a duty to rescue should be imposed in the case of sexual abuse.[130] Paralleling its conceptual analysis of duty, the court then addressed the issue of whether a breach of the proposed duty to rescue could constitute a proximate cause of the physical and emotional injuries experienced in the sexual abuse context.[131] Finally, the court implemented its duty and proximate cause analyses to the precise facts of the instant case.[132] The court ultimately ruled that

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[124] 155 N.J. 330, 714 A.2d 924 (1998).

[125] *See id.* at 334, 714 A.2d at 926.

[126] *See id.* at 352, 714 A.2d at 935.

[127] *See id.*

[128] *See id.* at 337, 714 A.2d at 928.

[129] *See id.* Specifically, the court described its analysis as one that

> weighs and balances several, related factors including the nature of the underlying risk of harm, that is, its foreseeability and severity, the opportunity and ability to exercise care to prevent the harm, the comparative interests of, and the relationships between or among, the parties, and, ultimately, based on considerations of public policy and fairness, the societal interest in the proposed solution.

Id. (citing *Hopkins*, 132 N.J. at 439, 625 A.2d at 1116).

[130] *See J.S.*, 155 N.J. at 340-51, 714 A.2d at 929-35.

[131] *See id.* at 351-52, 714 A.2d at 935.

[132] *See id.* at 353, 714 A.2d at 935-36; *see also infra* notes 170-75 and accompanying text (discussing proximate causation).

the facts of the case[133] could sustain a finding of negligence on the part of Mary, the passive defendant spouse.[134]

In performing its four-factor analysis, the court first applied the foreseeability factor.[135] The court prefaced its use of the foreseeability factor by noting that it "is the foundational element in the determination of whether a duty exists"[136] and by defining foreseeability as the defendant's knowledge of the risk of harm.[137] The court then noted that a defendant's knowledge could be either actual or constructive.[138] Additionally, the court stated that the knowledge at issue might even correspond to the risk of harm posed by a third person.[139]

With this foundation, the court addressed the ability of a spouse to foresee sexual abuse.[140] The court noted that, although sexual abuse is often an extremely clandestine act, several considerations might logically suggest that it was "foreseeable to a wife that her husband would sexually abuse a child."[141] The court listed these factors[142] without labeling any one of them as dispositive, and cited several cases in other jurisdictions in which the factors had been used to

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[133] *See J.S.*, 155 N.J. at 353, 714 A.2d at 935-36. Pursuant to the required summary judgment standard of review, the *J.S.* court had accepted as true "all the evidence and favorable legitimate inferences that support the non-moving party." *Id.* at 336, 714 A.2d at 927 (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523, 666 A.2d 146, 147 (1995)).

[134] *See id.* at 353, 714 A.2d at 936.

[135] *See id.* at 337-38, 714 A.2d at 928.

[136] *Id.* at 337, 714 A.2d at 928.

[137] *See id.* at 338, 714 A.2d at 928.

[138] *See id.* The court explained that a "defendant may [also] be charged with knowledge if she is 'in a position' to 'discover the risk of [some] harm.'" *Id.* (quoting Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 576-77, 675 A.2d 209, 214-15 (1996)).

[139] *See J.S.*, 155 N.J. at 338, 714 A.2d at 928.

[140] *See id.* at 340-43, 714 A.2d at 929-30.

[141] *Id.* at 340, 714 A.2d at 929.

[142] *See id.* The court enumerated the following factors:

> whether the husband had previously committed sexual offenses against children; the number, date, and nature of those prior offenses; the gender of prior victims; the age of prior victims; where the prior offenses occurred; whether the prior offense was against a stranger or a victim known to the husband; the husband's therapeutic history and regimen; the extent to which the wife encouraged or facilitated her husband's unsupervised contact with the current victim; the presence of physical evidence such as pornographic materials depicting children and the unexplained appearance of children's apparel in the marital home; and the extent to which the victims made inappropriate sexual comments or engaged in age-inappropriate behavior in the husband and wife's presence.

Id.

demonstrate foreseeability.[143] In addition to these factors, the court referred to empirical data that sustained the conclusion that women can foresee the risk of sexual abuse of children by their husbands.[144]

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[143] *See generally* Pamela L. v. Farmer, 112 Cal. App. 3d 206 (1980); Doe v. Franklin, 930 S.W.2d 921 (Tex. Ct. App. 1996). For example, in *Pamela L.*, the court allowed the plaintiffs' negligence action against the spouse of a sexual abuser because of the particular foreseeability of harm involved. *See Pamela L.*, 112 Cal. App. 3d at 210. The court pointed directly to the fact that the defendant spouse had knowledge that her husband "had molested women and children in the past and that it was reasonably foreseeable he would do so again if left alone with children on the premises." *Id.*

As previously stated in this Note, *J.S.* is a unique decision in spite of the existence of what might seem to be extra-jurisdictional precedent. The decision proves to be momentous because in *J.S.* no "special relationship" existed between the spouse of the abuser (Mary) and the victims (the minor children of J.S.). *Cf. Pamela L.*, 112 Cal. App. 3d at 210 (suggesting that a "special relationship" had been created when the defendant spouse invited the children to play at her home, "enticed" them with refreshments, and "encouraged" the parents of the children that they would be safe with the defendants); Lane v. Commonwealth, 956 S.W.2d 874 (Ky. 1997), *cert. denied*, 118 S. Ct. 1067 (1998) (establishing that, even in the criminal context, the relationship between parent and child satisfies the "special relationship" requirement and triggers a "duty to rescue"); A.R.H. v. W.H.S., 876 S.W.2d 687 (Mo. Ct. App. 1994) (locating a "special relationship" in the grandparent-grandchild context). When the *J.S.* court could not find a "special relationship" between the spouse and the victims of the sexual abuser, it instead focused upon the relationship between the sexual abuser and his spouse — the relationship between a husband and wife. *See J.S.*, 155 N.J. at 341, 714 A.2d at 930. The court ruled that this relationship would satisfy the "special relationship" requirement, especially in light of the fact that "the wife of a sexual abuser is in a unique position to observe firsthand telltale signs of sexual abuse." *Id.*

The issue of negligence liability within the sexual abuse context has been the subject of numerous commentaries. *See, e.g.*, Mary Kate Kearney, *Breaking the Silence: Tort Liability for Failing to Protect Children from Abuse*, 42 BUFF. L. REV. 405, 460 (1994) (stating that the justification for imposing a duty "is based on society's overwhelming need to identify child abuse early and to intervene to prevent it before the harm is irreparable"); Keldon K. Scott, *Negligence Actions by Abused Children Against Parents and Caretakers*, 75 MICH. B.J. 654, 658 (1996) (applauding the success of the cause of action in light of the vulnerability of children and the long-lasting effects that abuse had on children and acknowledging that homeowners' insurance coverage can be utilized to pay judgments of negligence); Rachel S. Zahniser, *Morally and Legally: A Parent's Duty to Prevent the Abuse of a Child as Defined by* Lane v. Commonwealth, 86 KY. L.J. 1209, 1236 (1998) (criticizing the *Lane* opinion whereas it "subjects the professionals specified in the statute — doctors, teachers, social workers, and others — to criminal complicity charges for failing to report or otherwise prevent the abuse of a child"); Barbara A. Micheels, Comment, *Is Justice Served? The Development of Tort Liability Against the Passive Parent in Incest Cases*, 41 ST. LOUIS U. L.J. 809, 867 (1997) (arguing in favor of the cause of action against passive parents because "[c]hildren depend upon their parents for care and protection and society expects parents who know that children are in danger to act on that information").

The other side of this issue, however, has not been ignored — there have been commentaries regarding the liability to those falsely accused of sexual abuse; such commentaries recognize the stigma that accompanies allegations of sexual abuse and advocate the exercise of due care before going public with such allegations. *See generally* Joel Jay Finer, *Therapists' Liability to the Falsely Accused for Inducing Illusory*

Based upon these considerations, the court recognized that "the wife of a sexual abuser of children is in a unique position to observe firsthand the telltale signs of sexual abuse" of particular children or groups of children.[145] The court then declared that the appropriate standard for foreseeability in the sexual abuse context would require a showing that a passive defendant spouse had "'particular knowledge' or 'special reason to know' that a 'particular plaintiff' or 'identifiable class of plaintiffs' would suffer a 'particular type' of injury" — physical and emotional harm from the sexually abusive conduct of the abuser-spouse.[146] Justice Handler reasoned that this heightened standard of "'particularized foreseeability' [in the sexual abuse context] . . . will accommodate the concerns over the inherent difficulties in predicting such furtive behavior" and will still manage to preserve a plaintiff's ability to assert duty to rescue liability.[147]

Proceeding to the second factor in its analysis, the court balanced the comparative interests of the parties within the sexual abuse scenario.[148] The court first addressed the interests of the minor victims.[149] The court stated that the policy reasons for protecting a child from sexual abuse are "so obvious and so powerful that [they] can draw little argument," especially when considering the mental and emotional scars that children usually suffer as a result of such abuse.[150] The court specifically referred to several provisions of the state's comprehensive legislative scheme regarding child abuse in order to illustrate the consensus within society as to the significance of the plaintiff's interests.[151]

Memories of Childhood Sexual Abuse — Current Remedies and a Proposed Statute, 11 J.L. & HEALTH 45 (1997); Heather J. Rhoades, Note, Zamstein v. Marvasti: *Is a Duty Owed to Alleged Child Sexual Abusers?*, 30 CONN. L. REV. 1411 (1998). *But see* F.A. v. W.J.F., 280 N.J. Super. 570, 582, 656 A.2d 43, 49 (App. Div. 1994) (dismissing the plaintiff's complaint and upholding the statutory immunity for defendant neighbor who had acted reasonably in reporting suspicions of child abuse to the Division of Youth and Family Services (DYFS)).

[144] *See J.S.*, 155 N.J. at 341, 714 A.2d at 930 (discussing statistics that reveal that most sexual molesters are male, most molesters are married, and most victims are either members of the immediate family or family acquaintances).

[145] *Id.* at 341, 714 A.2d at 930.

[146] *Id.* at 342, 714 A.2d at 930 (citing *People Express Airlines, Inc. v. Consolidated Rail Corp.*, 100 N.J. 246, 263, 495 A.2d 107, 116 (1985)). The court borrowed this standard from *People Express*, which is discussed *supra* notes 71-81 and accompanying text.

[147] *Id.* at 342-43, 714 A.2d at 930.

[148] *See id.* at 343-46, 714 A.2d at 930-32.

[149] *See id.* at 343-45, 714 A.2d at 930-31 (discussing several legislative enactments that establish reporting requirements regarding reasonable suspicions of child abuse and/or child sexual abuse).

[150] *J.S.*, 155 N.J. at 343, 714 A.2d at 930.

[151] *See id.* at 343-45, 714 A.2d at 931. For example, the court cited: title 9, section

On the other side of the scale, the court weighed the defendants' interest in marital privacy and stability.[152] The court acknowledged two common-law concepts that suggested that defendants' marital interests were quite considerable — interspousal immunity[153] and marital testimonial disqualification.[154] The court also noted, however, that courts and legal commentators have grown increasingly skeptical of the rationale behind both of these concepts.[155] For the purposes of balancing the parties' interests, however, the court temporarily disregarded contemporary criticism and acknowledged

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6-8.8 of the New Jersey Statutes, which explains the public policy underlying the reporting scheme; title 9, section 6-8.10 of the New Jersey Statutes, which creates a statutory duty to report suspected instances of child abuse; and title 9, section 6-8.14 of the New Jersey Statutes, which makes it a disorderly persons offense not to report such instances.

The first provision explains:

> The purpose of this act is to provide for the protection of children under 18 years of age who have had serious injury inflicted upon them by other than accidental means. It is the intent of this legislation to assure that the lives of innocent children are immediately safeguarded from further injury and possible death and that the legal rights of such children are fully protected.

N.J. STAT. ANN. § 9:6-8.8 (West 1993). The second provision provides in pertinent part: "Any person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse shall report the same immediately to the Division of Youth and Family Services by telephone or otherwise." N.J. STAT. ANN. § 9:6-8.10 (West 1993). The third provision states: "Any person knowingly violating the provisions of this act including the failure to report an act of child abuse having reasonable cause to believe that an act of child abuse has been committed, is a disorderly person." N.J. STAT. ANN. § 9:6-8.14 (West 1993).

In addition to these specific provisions, the court pointed to "Megan's Law," N.J. STAT. ANN. §§ 2C:7-1 to -11, to illustrate the state's general "no holds barred" approach to providing protection against sexual abuse. *See* N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1995) (establishing a residence registration requirement for convicted sexual offenders, thus vindicating protection-based interests over privacy interests).

[152] *See J.S.*, 155 N.J. at 345-46, 714 A.2d at 931-32.

[153] *See id.* at 345, 714 A.2d at 931-32. The doctrine of interspousal immunity provided that "one spouse could not sue or be sued by another." *Id.* (citations omitted).

[154] *See id.*, 714 A.2d at 932. The testimonial disqualification provided that "one spouse was not permitted to testify for or against the other." *Id.* (citations omitted).

[155] *See id.* With respect to the doctrine of interspousal immunity, the *J.S.* court opined that "'[t]he threat to domestic harmony posed by a legal action between spouses is an imponderable; the cohesiveness of a marriage may be jeopardized as much by barring a cause of action as by allowing it.'" *Id.* (quoting Merenoff v. Merenoff, 76 N.J. 535, 551, 388 A.2d 951, 959 (1978)). With respect to the sensibility of maintaining the testimonial disqualification, the court observed that "'[w]hen one spouse is willing to testify against the other in a criminal proceeding — whatever the motivation — their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve.'" *Id.* (quoting Trammel v. United States, 445 U.S. 40, 52 (1980)).

marital privacy as a genuine concern.[156] Nonetheless, the court still found the interest in protecting children from sexual abuse to be paramount.[157]

Shifting to the third factor in its analysis, the court focused upon public policy.[158] In essence, the court pondered whether some compelling societal interests might be furthered by recognizing a cause of action for the plaintiffs based upon the duty to rescue theory.[159] The court recognized that the sexual abuse of a child not only caused personal trauma for the victim, but also contributed to far-reaching societal problems.[160] The court revealed that "'[r]ecent research indicates that a number of psychosocial problems . . . are more common among adults molested as children than among those with no such childhood experiences.'"[161] Based upon this evidence of the pervasive harm caused by the sexual abuse of children, the *J.S.* court concluded that public policy warranted a "private right of action" to complement the statutory protections[162] against child abuse that were already in place.[163]

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[156] *See id.* at 346, 714 A.2d at 932.

[157] *See id.* ("[T]he societal interest in enhancing marital relationships cannot outweigh the societal interest in protecting children from sexual abuse."). The court then stated that the Legislature's extensive scheme, *see supra* note 151, provided evidence that the opposing interests had already been balanced. *See id.* ("The child-abuse reporting statute itself has mandated that balance — it applies to every citizen, including a spouse."). Justifying its decision, the court noted that "'[t]he protective privilege ends where the public peril begins.'" *Id.* (quoting Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 347 (Cal. 1976)).

[158] *See J.S.*, 155 N.J. at 346, 714 A.2d at 932.

[159] *See id.* at 347, 714 A.2d at 932. The court prefaced this aspect of its analysis by stating that notions of public policy and fairness were best "determined in the context of contemporary circumstances and considerations." *Id.* at 339, 714 A.2d at 928.

[160] *See id.* at 347, 714 A.2d at 932.

[161] *Id.* (quoting Doe v. Poritz, 142 N.J. 1, 16, 662 A.2d 367, 374 (1995)). The psychosocial problems that the court noted included "'chronic depression and anxiety, isolation and poor social adjustment, substance abuse, suicidal behavior, and involvement in physically or sexually abusive relationships as either aggressor or victim.'" *Id.* (quoting Doe v. Poritz, 142 N.J. 1, 16, 662 A.2d 367, 374 (1995)).

[162] *See id.*, 714 A.2d at 933. The court stated that, because most sexual abuse occurs close to home, the effectiveness of the current legislative efforts "may not be sufficient to stem the tide." *Id.*

[163] *See id.* at 347-48, 714 A.2d at 933. To this end, the court expressly stated that "civil remedies will complement statutory protections and further the legislative efforts to enhance the protection of children." *Id.* With respect to these civil remedies, however, the court emphasized that a violation of any of the child abuse statutes, *see supra* note 151, would not constitute negligence per se. *See id.* at 349, 714 A.2d at 934. Instead, the violation of such statutes could only constitute evidence of negligence. *See id.* The court reasoned that, because the abuse statutes "[do] not purport to incorporate or codify any common-law standard ... [and because they do] not expressly attempt to resolve for purposes of civil liability the comparative

After discussing public policy, the court moved to the final prong in its duty analysis — the ability and opportunity available for a defendant to exercise reasonable care to prevent the harm.[164] The court rejected the defendant's general assertion that wives lack the power to control their husbands' behavior; likewise, the court rebuffed the defendant's argument that any recognition of a duty would require wives constantly to police their husbands' conduct.[165] Having already determined that a "wife may well be the only person with the kind of knowledge or opportunity to know that a particular person or class of persons is being sexually abused or is likely to be abused by her husband,"[166] the court concluded that the defendant's concerns were more relevant to the *scope* of the duty to rescue rather than to its *existence*.[167] Thus, the court announced that the defendant's "fairness concerns" would not prevent the *imposition* of a duty but, rather, would "be accommodated by a flexible duty of care . . . ."[168] To this end, the court suggested some ways in which a defendant might discharge her duty, none of which required "controlling" one's husband or continuously "policing" him.[169]

Having determined from its four-factor analysis that a duty to rescue could properly be assigned to the passive spouse of a sexual abuser, the court shifted its focus to the issue of proximate causation.[170] Initially, the court explained that it would focus upon whether the breach of the proposed duty to rescue could, in fairness, be connected to the ultimate harm experienced by the victims of the sexual abuse so as to warrant liability.[171] To this effect, the court ex-

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interests of the parties," it would undercut the intent of the Legislature to allow any single violation to serve as the dispositive factor for liability. *Id.* *See generally* KEETON ET AL., *supra* note 1, § 36, at 220-33 (explaining the ramifications of statutory violations within the negligence tort, including "negligence per se" and "evidence of negligence").

[164] *See J.S.*, 155 N.J. at 349, 714 A.2d at 934.

[165] *See id.* at 349-50, 714 A.2d at 934.

[166] *Id.* at 341-42, 714 A.2d at 930.

[167] *See id.* at 350, 714 A.2d at 934.

[168] *Id.* at 349, 714 A.2d at 934.

[169] *See id.* at 353, 714 A.2d at 936. The court hypothesized that

> Mary could have discharged her duty by confronting her husband and warning him, by insisting or seeing that the girls were not invited to ride or care for the horses, by keeping a watchful eye when she knew the girls to be visiting with her husband, by asking the girls' parents to ensure that the children not visit when she was not present, or by warning the girls or their parents of the risk she perceived.

Id. (citing *J.S. v. R.T.H.*, 301 N.J. Super. 150, 157, 693 A.2d 1191, 1194 (1997)).

[170] *See J.S.*, 155 N.J. at 351-52, 714 A.2d at 935.

[171] *See id.* at 351, 714 A.2d at 935. The court defined proximate causation as a concept that blends notions of common sense, fairness, and public policy and "'fixes

plained that, while proximate cause issues were primarily jury questions,[172] judges could refuse to impose liability where the ultimate harm experienced by a plaintiff was a highly extraordinary[173] repercussion of the defendant's breach of his duty.[174] Applying this uncomplicated maxim to the relevant sexual abuse context, the court announced that "[*i*]*t did not seem highly extraordinary* that a wife's failure to prevent or warn of her husband's sexual abuse or his propensity for sexual abuse would result in the occurrence or the continuation of such abuse [of children]."[175]

Upon completing this straightforward proximate causation analysis, the unanimous court handed down a precise two-part holding.[176] First, the court held that "when a spouse has actual knowledge or special reason to know of the likelihood of his or her spouse engaging in sexually abusive behavior against a particular person or persons, a spouse has a duty of care to take reasonable steps to prevent or warn of the harm."[177] Furthermore, the court held that "a

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a point in the chain of events, some foreseeable and some unforeseeable, beyond which the law will bar recovery.'" *Id.* (quoting People Express Airlines Inc. v. Consolidated Rail Corp., 100 N.J. 246, 264, 495 A.2d 107, 116 (1985)).

[172] *See id.*

[173] *See id.* at 352, 714 A.2d at 935.

[174] *See id.* The court provided two examples of New Jersey cases in which highly extraordinary consequences had severed a defendant's liability, despite the defendant's breach of a duty of care. *See id.* The court cited *Caputzal v. The Lindsay Co.*, 48 N.J. 69, 222 A.2d 513 (1966), in which the Supreme Court of New Jersey held that the manufacturer of a water softener had not proximately caused the plaintiff's harm since it was highly extraordinary that someone would suffer a heart attack when frightened by the sight of discolored water. *See J.S.*, 155 N.J. at 352, 714 A.2d at 935 (citing *Caputzal*, 48 N.J. at 77-80, 222 A.2d at 517-19). The *Caputzal* court concluded that it would defy logic and fairness to hold the defendant liable to the plaintiff. *See id.* (citing *Caputzal*, 48 N.J. at 79, 222 A.2d at 518). The *J.S.* court also cited *Glaser v. Hackensack*, 49 N.J. Super. 591, 141 A.2d 117 (App. Div. 1958), wherein the appellate division held that the defendant water company had not proximately caused the plaintiff's harm. *See J.S.*, 155 N.J. at 352, 714 A.2d at 935 (citing *Glaser*, 49 N.J. Super. at 600-01, 141 A.2d at 122-23). The *Glaser* court reasoned that it was highly extraordinary that someone would fall down a flight of stairs and become injured when frightened by the presence of a water company employee checking a water meter in one's garage without notice. *See id.* (citing *Glaser*, 49 N.J. Super. at 600-01, 141 A.2d at 122-23) (stating that "[t]here is a marked difference between a physical injury resulting directly from the fright, and the mode and manner in which the plaintiff's injury in the case at bar was occasioned").

[175] *J.S.*, 155 N.J. at 352, 714 A.2d at 935 (emphasis added). The court then concluded that "[t]he harm from the wife's breach of duty is both direct and predictable." *Id.*

[176] *See id.*

[177] *Id.* Again, the result in *J.S.* was unique because a "duty to rescue" was imposed upon a defendant who had no special relationship with the victim(s). *See supra* note 143 (discussing special relationships). The decision in *J.S.* implied that a heightened foreseeability standard, which could only be satisfied when the focus of the

'breach of [this] duty constitutes a proximate cause of the resultant injury, the sexual abuse of the victim."[178]

Finally, after setting forth these conceptual holdings regarding a new duty to rescue, the court applied the rule to the specific facts of the case at hand.[179] Directing attention to several crucial facts,[180] the court ultimately resolved that "it may be determined that it was particularly foreseeable that John was abusing the young girls."[181] Based upon this finding, the court ruled that "evidence at trial could support a finding of negligence on Mary's part."[182] As a result, the court ruled that the trial court had entered summary judgment both erroneously and prematurely.[183] Ultimately, the court ordered[184] that the

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spouse's behavior was a *particular* person or group of persons, obviated the need for the relational tie that had been a linchpin for decisions in other jurisdictions. *See J.S.*, 155 N.J. at 342, 714 A.2d at 930.

Unlike those decisions that preceded it, the decision in *J.S.* recognized that a duty to rescue could derive from a wife's special relationship with her husband rather than from some relationship with her husband's victims. *See id.* at 341-42, 714 A.2d at 930 (stressing that "the wife of a sexual abuser is in a unique position to observe firsthand telltale signs of sexual abuse" and "[a] wife may well be the only person with the kind of knowledge or opportunity to know that a particular person or particular class of persons is likely to be abused by her husband").

In deeming the marital relationship as the one essential to finding a duty in the sexual abuse context, the court seemingly relied on the principles of Section 315 of the Restatement (Second) of Torts, as expressed by *Tarasoff* and its progeny, including *McIntosh* and *Kelly*. *See* RESTATEMENT (SECOND) OF TORTS § 315 (1965) (providing that there may be an affirmative duty to control the conduct of a third person so as to protect another person if there is "a special relation [that] exists between the actor and the third person . . . or . . . a special relation [that] exists between the actor and the other which gives the other a right to protection"); *see also* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 343 (Cal. 1976) (citing with approval RESTATEMENT (SECOND) OF TORTS § 315).

[178] *J.S.*, 155 N.J. at 352, 714 A.2d at 935.

[179] *See id.* at 353, 714 A.2d at 935-36. Because the case had been decided by the trial court at the summary judgment stage, the court disclosed that it had an obligation to "view the facts in the light most favorable to the plaintiffs." *Id.*, 714 A.2d at 935 (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523, 666 A.2d 146, 147 (1995)).

[180] *See id.*, 714 A.2d at 936. Among the most compelling were the facts that:

> Mary knew that the neighbors' adolescent girls were visiting at her home nearly every day and that they spent considerable amounts of time there alone with her husband. Moreover, she never "confronted" her husband about the unsupervised time he was spending with the girls. At both the trial level and on appeal, Mary conceded for the purposes of argument that "at all relevant times" she "knew or should have known of her husband's proclivities/propensities."

Id. (citations omitted).

[181] *Id.*

[182] *Id.* (indicating via precise language that the plaintiffs had satisfied their burden of production so as to warrant submission of the issue to a jury).

[183] *See id.*

discovery period be extended in order to permit the plaintiffs to solidify their evidence as to whether Mary "knew [or had special reason to know] of the abuse and could have taken reasonable actions to have prevented such abuse."[185]

In imposing a duty to rescue upon the spouse of a sexual abuser in *J.S. v. R.T.H.*, the Supreme Court of New Jersey reached a logical conclusion that is consistent with the principles of the court's prior accomplishments[186] in duty analysis and, perhaps more importantly, the general principles that underscore tort law. The *J.S.* court appropriately vindicated the rights of children — the class most consistently safeguarded by our society[187] — by providing both protection

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[184] *See J.S.*, 155 N.J. at 353, 714 A.2d at 936. The court affirmed the appellate division's prior order to re-open and extend discovery so that the plaintiffs might have the occasion to depose John and others whose testimony may have relevance. *See id.* at 353-54, 714 A.2d at 936 (citing J.S. v. R.T.H., 301 N.J. Super. 150, 157-58, 693 A.2d 1191, 1194 (1997)).

[185] *Id.* at 354, 714 A.2d at 936.

[186] *See supra* notes 50-123 and accompanying text (discussing, specifically, progressive duty analysis in several important New Jersey cases).

[187] Shaping the law to afford special protection for children is a regular occurrence in the United States — for example, the states uniformly allow minors the protection of recission for contractual obligations they may undertake before reaching majority. *See* RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981) ("Unless a statute provides otherwise, a natural person has the capacity to incur only *voidable* contractual duties until the beginning of the day before the person's eighteenth birthday.") (emphasis added); *see also* Mechanics Fin. Co. v. Paolino, 29 N.J. Super. 449, 455-56, 102 A.2d 784, 787 (App. Div. 1954) (explaining that, while an infant is required to disaffirm a contract within a reasonable time after attaining majority, mere silence by the minor after coming of age will not be equated with a ratification and holding that the three months that the defendant waited cannot be, as a matter of law, more than a reasonable time); Halbman v. Lemke, 298 N.W.2d 562, 564 (Wis. 1980) (recognizing an "absolute right of a minor to disaffirm a contract for the purchase of items which are not necessities"). *Cf.* Dodson v. Shrader, 824 S.W.2d 545, 549 (Tenn. 1992) (honoring the long-standing common law rule that contracts made by minors are voidable, but reforming this rule such that the minor may not do so "without allowing the vender of the goods reasonable compensation for the use of, depreciation, and willful or negligent damage to the article purchased, while in his hands"). For an interesting discussion advocating the expungement of this special treatment for minors, see Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 524 (1994) (explaining that general fairness demands an approach that would replace the common law rule with a case-by-case analysis of "whether the minor was capable of understanding the nature and purpose of the contract" as well as the minor's "intelligence, experience, knowledge, and sophistication . . .").

Minors are also "protected" in the sense that, upon commission of crimes, they are criminally tried in juvenile court and often receive less harsh penalties in the hopes of rehabilitation. *But see* State v. Bessix, 309 N.J. Super. 126, 128-29, 706 A.2d 799, 801 (App. Div. 1998) (recognizing that it is within the discretion of the family court judge to find a "waiver" of the right to be tried as a juvenile and explaining that among opposing factors in this decision are the defendant's likelihood for rehabilitation and the gruesomeness of the crime committed). For a response to cases

from and legal redress against those who exploit positions of trust either by acting in a sexually abusive manner or by tacitly condoning such behavior by a spouse. The court's decision, however, did not entirely ignore the concerns of the defendant. In fact, the precise language of the court's holding[188] assured that a spouse's potential liability for her husband's sexually abusive conduct would not be limitless.[189] On the one hand, the court's decision assured that many in-

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like *Bessix*, see generally Kimberly S. May, *Shifting Away from Rehabilitation:* State v. Ladd*'s Equal Protection Challenge to Alaska's Automatic Waiver Law*, 15 ALASKA L. REV. 367 (1998) (opposing Alaska's "automatic waiver" of the right to be tried as a juvenile upon the commission of serious crimes and suggesting ways to promote the rehabilitation of juvenile offenders); Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163 (1993) (acknowledging some of the general drawbacks of the juvenile court system, yet encouraging that it remain in place).

Finally, and perhaps most relevant to the context in *J.S.*, this nation's highest court has itself demonstrated the extra weight that is "balanced into" law-making when children are sexually exploited for the making of pornographic materials. In 1982, the Court explained its motivations for harsh criminal penalties for child pornographers when it upheld a New York statute that punished those who knowingly promoted or distributed materials that depicted the sexual performance of a child under the age of 16. *See* New York v. Ferber, 458 U.S. 747, 760 (1982) (reasoning that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product"). Eight years later, the Court extended its reasoning in *Ferber* and, thus, expanded the blanket of protection for children. *See* Osborne v. Ohio, 495 U.S. 103, 110 (1990) (reasoning that "it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution . . ." such that the best way to destroy the market for child pornography is to punish private possession of such materials as well; accepting Ohio's compelling state interest in protecting the victims of child pornography, such that the law prohibiting possession does not violate the First or Fourteenth Amendments); *cf.* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that mere private possession of pornographic materials depicting adults is not punishable because of the protections afforded by the First and Fourteenth Amendments); *see also* Lisa S. Smith, *Private Possession of Child Pornography: Narrowing At-Home Privacy Rights*, 1991 ANN. SURV. AM. L. 1011, 1045 (1992) (recognizing that the crux of *Osborne* was "the uniquely vulnerable position of children in society."). For an interesting article regarding the implications of *Ferber* and *Osborne* in the Internet era, see generally David B. Johnson, *Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited*, 4 ALB. L.J. SCI. & TECH. 311 (1994).

[188] *See supra* note 177 and accompanying text for the precise language of the court's holding, requiring "knowledge or special reason to know" that sexual abuse would befall "a particular person or persons."

[189] The court's holding imposed limits in two ways. First, it provided that the liability only attached to spouses, because of their "unique position to observe firsthand the telltale signs of sexual abuse . . . ." *J.S.*, 155 N.J. at 341, 714 A.2d at 930. With this limitation, the court assured that next-door neighbors will not be held liable. Second, by stating that the duty to rescue only entailed taking reasonable steps to prevent harm directed against a particular person or persons, the court obviated the need for an affirmative warning of all neighbors. *See id.* at 352, 714 A.2d at 935. With the flexible standard of care of "reasonable steps to prevent or warn of the

nocent victims would have a remedy for the unreasonable harm they experienced; likewise, the decision attempted to deter the recurrence of such harm by exacting accountability from a more expansive class of people. On the other hand, the decision fashioned a sound protection against the unjust attachment of liability when it instilled the heightened foreseeability requirement. In sum, the decision in *J.S.* soundly balanced the opposing goals of tort law.

In addition to achieving this balance, *J.S.* proves to be noteworthy for two other unrelated reasons. First, the case provides an example in which savvy lawyering and a unique theory of liability, aimed at reaching the "deep pockets" of an insurance company,[190] achieved an extremely positive outcome with respect to public policy. Second, and more importantly, with the court's recognition of yet another duty to rescue, the decision stands as a benchmark in the judiciary's gradual eradication of the common law rule of nonfeasance.

In spite of the fact that it stands as another example of the imagination and versatility of the court's duty analysis, the *J.S.* decision has left several considerations in its wake — concerns that transcend the sexual abuse context. First, although the *J.S.* court mentioned some ways in which the spouse of a sexual abuser could discharge[191] a duty to rescue, the determination of reasonableness is always ultimately left to a jury. Thus, a substantial possibility looms that a jury might disregard the reasonable actions of a spouse in an effort to assure that a particularly sympathetic victim will be compensated. While this is a risk that routinely accompanies the submission of issues to juries, it would seem to add insult to injury in this scenario if a defendant, undoubtedly feeling humiliated and betrayed by the actions of his or her sexual-abuser spouse, were held liable for acts of sexual abuse that he or she had acted reasonably to prevent. In this vein, it is also disconcerting that, in imposing the duty to rescue, the court overlooked the distinct possibility that some of these spouses might themselves be victims of domestic violence and sexual abuse,[192] thus possessing little realistic ability or opportunity to pre-

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harm," the court sustained some measure of privacy for the defendant as well. *Id.*

[190] *See supra* note 33 (discussing the plaintiffs' reasons for litigating against Mary).

[191] *See supra* note 169 and accompanying text (restating the court's suggestions for ways in which Mary could have discharged her duty).

[192] The societal perception of such women, collectively, as "bad mothers" or "immoral people" often obfuscates the fact that many of them are also victims of their husbands, either by sexual or physical abuse. *See* Bernadine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1, 3 (1995) This fact has not, however, gone completely unrecognized. *See* Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 586 (1998). Many commentators have voiced their opinions as

vent harm. Because these concerns primarily relate to the scope of the duty of care rather than the existence of the duty itself, a remedy will not likely come from an affirmative rule of law. To this end, trial judges must take special care to draft jury instructions that account for these concerns; likewise, trial judges must not hesitate to set aside verdicts where the weight of the evidence shows that a defendant spouse had acted reasonably.

An additional concern regarding the decision in *J.S.* relates to the potential application of its holding to other factual scenarios. It is conceivable that a detached, out-of-context emphasis upon the foreseeability standard enunciated by the *J.S.* court — "knowledge or special reason to know [of harm to a] particular person or persons"[193] — could produce absurd results. For example, consider the potential imposition of liability on *A* — *B*'s former sexual partner — when *B*, infected with HIV, infects a third person via unprotected sexual intercourse. If *A* had knowledge or special reason to know that *B* was going to be sexually active with the third person, then *A* could be liable in negligence according to this standard. Similarly, if *A* were "date-raped" by *B*, then *A*'s knowledge of *B*'s subsequent date or relationship with *C* could form the basis for *A*'s liability to *C* in the event that *C*, too, is date-raped. In view of such troubling theories of liability, the courts of New Jersey must scrutinize *J.S.* beyond the plain words of its holding and take care to recognize that the decision blends an analysis of all of the considerations relevant to the existence of a duty, especially the overriding public policy against child abuse.

Merric J. Polloway

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to the unfairness that results when society assigns criminal or tortious liability to battered women who feel "powerless" to interfere with their husbands' behavior, including the sexual and/or physical abuse of children. *See* Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 606-46 (1988) In particular, these commentators have focused upon the portrayal and judicial treatment of these women when they are the mothers of the abused children. *See, e.g.*, Dohrn, *supra*, at 3 (acknowledging that "[d]omestic violence and child abuse, to an unknown extent, overlap and coincide . . . [such that] each is a strong predictor of the other."); Henderson, *supra*, at 586 (commenting on how unfortunate it was that someone like Hedda Nusbaum is never "seen as a victim of Joel Steinberg's horrific violence, but as a morally blameworthy person . . ."); Jacobs, *supra*, at 606-46 (focusing, in general, upon the issues that surround the criminal liability of this group of women).

[193] *J.S.*, 155 N.J. at 352, 714 A.2d at 935.