Motion for En Banc Reconsideration Granted, Affirmed, and En Banc Majority, Concurring, and Dissenting Opinions filed December 30, 2021.

In The

Fourteenth Court of Appeals

NO. 14-18-00849-CV

HNMC, INC., Appellant

V.

FRANCIS S. CHAN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LENY REY CHAN, JONATHAN CHAN, AND JUSTIN CHAN, Appellees

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 2015-18367

E N B A N C C O N C U R R I N G O P I N I O N

The majority of this en banc Court concludes HNMC owed Chan a duty of ordinary care and I agree therewith. I write separately to articulate my firmly held view against our dissenting colleague's analysis concerning duty.

I. Duty

Our dissenting colleague first opines that we have mistakenly disregarded the truth, *i.e.*, that "[t]he unreasonable hazard in this case is the risk posed to pedestrians by inattentive drivers." Dissenting Op. at 17 (Jewell, J.). This calculated limitation of potential sources of danger is myopically contrary to basic principles of tort law. *See Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992) ("There can be concurrent proximate causes of an accident. All persons whose negligent conduct contributes to the injury, proximately causing the injury, are liable.") (citations omitted); *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991) ("There may be more than one proximate cause of an event.") (citations omitted).[1] Further, it also disregards reasonable inferences that support the verdict despite clear instructions to refrain from doing so. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005).

While I agree that moving cars are a proximate cause of vehicle-pedestrian

[1] *See Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 784 (Tex. 2001) ("More than one act may be the proximate cause of the same injury.") (citing *Travis*, 830 S.W.2d at 98); *McClure v. Allied Stores of Tex., Inc.*, 608 S.W.2d 901, 903 (Tex. 1980) (failure to use ordinary care "need not be the sole cause, but it must be a concurring cause and such as might reasonably have been contemplated as contributing to the result under the attending circumstances") (citing *Mo. Pac. R.R. Co. v. Am. Statesman*, 552 S.W.2d 99, 103-104 (Tex. 1977)); *Brookshire Bros., Inc. v. Lewis*, 911 S.W.2d 791, 793 (Tex. App.—Tyler 1995, writ denied); *Nw. Mall, Inc. v. Lubri-Lon Int'l, Inc.*, 681 S.W.2d 797, 803 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) ("Where the failure to use ordinary care actively aids in producing an injury, it need not be the sole cause."); *see also Lane v. Halliburton*, 529 F.3d 548, 566 (5th Cir. 2008) ("'[I]f the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.' Rest. (2d) Torts § 449. Texas courts have applied this theory of liability in previous cases.") (citing *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 549 (Tex. 1985); *Kimbriel Produce Co. v. Mayo*, 180 S.W.2d 504, 507 (Tex. App.—San Antonio 1944, writ ref'd w.o.m.); *Engle v. Dinehart*, No. 99-10087, 2000 WL 554942, at *11-12 (5th Cir. Apr. 19, 2000) (noting that Texas courts have adopted the causation theory embodied in Sections 448 and 449 of the Restatement)); Restatement (Second) of Torts § 449 cmt. b (Am. Law Inst. 1965); *id.* at reporter's n. cmt. b (citing *Jesse French Piano & Organ Co. v. Phelps*, 105 S.W. 225 (Tex. App.—Austin 1907, no writ)).

collisions at the crosswalk in question (and a *sine qua non* of Chan's death), the evidence in this case tends to prove several particularized facts that inescapably affect this Court's conclusions, the trial court's conclusions, and the jury's findings (particularly when viewed in the light most favorable to the verdict and when all reasonable inferences in favor thereof are indulged). *See id.* These facts (and reasonable inferences) include:

(1) there had been a crosswalk at that location;

(2) HNMC knew there had been a crosswalk at that location;

(3) there were previous vehicle-pedestrian collisions at that crosswalk;

(4) HNMC had notice of said vehicle-pedestrian collisions at that crosswalk;

(5) the crosswalk had been abandoned;

(6) HNMC knew the crosswalk had been abandoned;

(7) HNMC at least had reason to know no one provided notice to pedestrians that the crosswalk had been abandoned;

(8) HNMC at least had reason to know that pedestrians were not warned of the danger at that particular crossing area;

(9) HNMC's employees were "funneled" into a "dangerous zone";

(10) HNMC knew its employees still used the crosswalk in question;

(11) HNMC knew (or at least had reason to know) that drivers of vehicles "may not see or recognize the risk of pedestrians attempting to cross the street";

(12) HNMC knew the risk at issue presented "a life safety issue too serious to ignore for the protection of our patients, visitors, staff, and physicians";

(13) HNMC knew (or at least had reason to know) its employees were exposing themselves to an unreasonable risk when utilizing an abandoned crosswalk where other vehicle-pedestrian collisions had occurred; and (despite the foregoing)

(14) HNMC failed to warn:

- pedestrians that the crosswalk had been abandoned;
- pedestrians not to cross there;
- drivers that pedestrians were present (particularly at a crosswalk HNMC knew (a) was abandoned; (b) pedestrians had no reason to know was abandoned; and (c) was the site of previous vehicle-pedestrian collisions); and
- drivers and pedestrians that the crosswalk at issue was a particularly dangerous area because it had been the site of previous vehicle-pedestrian collisions under materially similar circumstances.

Whether a duty exists is a "question of law for the court to decide from the facts surrounding the occurrence in question." *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). We are obliged to credit each piece of the foregoing evidence in support of the judgment if reasonable jurors could have done so and to disregard contrary evidence unless reasonable jurors could not have done so. *City of Keller*, 168 S.W.3d at 827. The jury heard evidence supporting the court's judgment that HNMC (1) exercised control over the roadway (when it built two vision-obstructing signs and a concrete pad on the county's right-of-way) and (2) took one or more affirmative actions with respect thereto that proximately caused Chan's death. These actions (including, *e.g.*, funneling into a dangerous zone) imposed a duty upon HNMC to use ordinary care to protect pedestrians like Chan from a risk it described as "a life safety issue too serious to ignore for the protection of our patients, visitors, staff, and physicians." In my view, this concession (in connection with the remaining facts of this case) is sufficient to support the trial court's implicit post-verdict conclusion that HNMC (1) exposed Chan to a known and significant risk and (2) therefore owed Chan a duty to exercise ordinary care.

The trial court implicitly denied HNMC's motion for summary judgment

and said motion is not the subject of this appeal; therefore the propriety of the trial court deferring to the jury for determinations of disputed fact is not before us. *See generally* Tex. R. App. P. 38.1(i). Additionally, the trial court properly deferred to the jury concerning fact questions in accordance with this court's precedents. *See Barnes v. Wendy's Int'l, Inc.*, 857 S.W.2d 728, 729 (Tex. App.—Houston [14th Dist.] 1993, no writ) ("[W]hether *facts* giving rise to a duty exist, is a question for the fact finder . . . .") (emphasis in original) (citing *Fuqua v. Taylor*, 683 S.W.2d 735, 737 (Tex. App.—Dallas 1984, writ ref'd n.r.e.)); *accord Axelrod R & D, Inc. v. Ivy*, 839 S.W.2d 126, 129 (Tex. App.—Austin 1992, writ denied) ("Negligence is a question for the jury when facts are such that the jury could draw an inference either way.") (citing *Lyons v. Paul*, 321 S.W.2d 944, 950 (Tex. App.—Waco 1958, writ ref'd n.r.e.)); *see also* 53 Tex. Jur. 3d, Negligence § 132 (2021) ("In the absence of a law characterizing the actor's conduct as negligent, the issue whether the actor should have foreseen and prevented the calamity and has, therefore, been negligent is one to be determined by the jury by reference to the facts.") (citing *Tex. & Pac. Ry. Co. v. Murphy*, 46 Tex. 356 (1896); *Panhandle & S.F. Ry. Co. v. Willoughby*, 58 S.W.2d 563 (Tex. App.—Amarillo 1933, writ dism'd)). It is not within our province to eradicate plaintiffs' victories by viewing the facts in anything less than the light most favorable to the jury's verdict. Viewed in hindsight, it is simply not extraordinary that a pedestrian was hit by a car at an abandoned crosswalk where other pedestrians had been hit without warnings that the crosswalk (1) had been abandoned or (2) was subject to drivers who did not know there were pedestrians crossing at that particularly dangerous point. *See Critical Path Res., Inc. v. Cuevas*, 561 S.W.3d 523, 559 (Tex. App.—Houston [14th Dist.] 2018, pet. granted, judgm't vacated w.r.m.) (Busby., J.) ("Viewed in hindsight, the operation of these third-party forces in bringing about the harm was not extraordinary; the turnaround process was designed to have third parties follow

the schedule Critical Path created.") (citing Restatement (Second) of Torts §§ 435(2), 442(b) (Am. Law Inst. 1965)); *cf.* Tex. R. App. P. 56.3 ("In any event, the Supreme Court's order [concerning settled cases] does not vacate the court of appeals' opinion unless the order specifically provides otherwise."). Indulging every reasonable inference in the jury's favor, HNMC owed Chan a duty to exercise reasonable care.

The strength of my conviction on this issue is only reinforced by the Texas Supreme Court's clear instructions: "In determining whether a legal duty exists we take into account not only the law and policies of this State, but the law of other states and the United States, and the views of respected and authoritative restatements and commentators." *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 351 (Tex. 1995). The *Restatement (Second) of Torts* is (at least) a respected and authoritative restatement. Section 449 of the *Restatement* succinctly summarizes the relevant law: "**If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.**" Restatement (Second) of Torts § 449 (Am. Law Inst. 1965) (emphasis added); *see also id.* cmt. a ("It is only where the actor is under a duty to the other, because . . . his conduct has created or increased the risk of harm through the misconduct, that he becomes negligent."). Section 449 has previously been adopted by this court. *See Critical Path Res., Inc.*, 561 S.W.3d at 555;[2] *Barrick v.*

[2] ("Second, where the defendant's negligence creates or increases the foreseeable risk of harm through the intervention of another force, the defendant is not relieved of liability by the fact that the risk to which he subjected the plaintiff has indeed come to pass. Restatement § 442A; *Dew*, 208 S.W.3d at 453. Similarly, if the likelihood that a third person may act in a particular manner is one of the hazards that makes the defendant negligent, that act (even if criminal or intentional) does not prevent the defendant from being liable. Restatement § 449. Thus, where the original negligence enables the intervening force to occur and contributes to the

CRT Disaster Servs., No. 14-06-00853-CV, 2007 WL 2790386, at *4 (Tex. App.—Houston [14th Dist.] Sept. 27, 2007, no pet.) (mem. op.); *accord Hale v. Burgess*, 478 S.W.2d 856, 858 (Tex. App.—Waco 1972, no pet.). I believe that under our rules, this court's previous adoption of section 449 should have been enough to affirm the existence of HNMC's duty (based on the evidence, the verdict, and all reasonable inferences from the evidence that support the verdict) without requiring en banc review to maintain the uniformity of this court's precedents. *See* Tex. R. App. P. 41.2(c).[3]

Continuing to examine other respected authorities, the Texas Supreme Court has previously cited to the treatise *Modern Tort Law*. *See Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 451 (Tex. 2006). There, the authors observe that this particular "problem is made more difficult when foreseeability is incorrectly applied to both duty and causation. The correct rule is that if it is foreseeable that a third person might conduct himself or herself to the injury of the plaintiff, this may be a foundation for liability." Barry A. Lindahl, Modern Tort Law: Liability and

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resulting harm, the intervening force is a concurring cause. *Stanfield*, 494 S.W.3d at 99; *see also Dew*, 208 S.W.3d at 453 (concluding intervening act that 'exploited th[e] inadequacy' created by defendant's negligence 'did not fundamentally alter the foreseeable consequences of [defendant's] original negligence').").

[3] Even if this were not enough, we are obliged to examine other states' jurisprudence when determining whether a duty exists. *SmithKline Beecham Corp.*, 903 S.W.2d at 351. Section 449 of the *Restatement* has been quoted by other state courts as well. *See, e.g., Hurn v. Greenway*, 293 P.3d 480, 484 (Alaska 2013); *Petolicchio v. Santa Cruz Cty. Fair & Rodeo Ass'n, Inc.*, 866 P.2d 1342, 1349 (Ariz. 1994); *Keck v. Am. Emp't Agency, Inc.*, 652 S.W.2d 2, 6 (Ark. 1983); *Sharp v. W.H. Moore, Inc.*, 796 P.2d 506, 511 (Idaho 1990); *Tenney v. Atl. Assocs.*, 594 N.W.2d 11, 21 (Iowa 1999); *State v. Anderson*, 12 P.3d 883, 887 (Kan. 2000); *Horridge v. St. Mary's Cty. Dep't of Soc. Servs.*, 854 A.2d 1232, 1246 (Md. 2004); *Small v. McKennan Hosp.*, 437 N.W.2d 194, 202 (S.D. 1989); *Stewart v. Wulf*, 271 N.W.2d 79, 87 (Wis. 1978); *see also Lacy v. D.C.*, 424 A.2d 317, 323 (D.C. 1980). Section 449 has also been cited by several federal courts as well. *See, e.g., F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 236, 246 (3d Cir. 2015); *Fisher v. Halliburton*, 667 F.3d 602, 616 (5th Cir. 2012); *Mitchell v. Archibald & Kendall, Inc.*, 573 F.2d 429, 435 n.4 (7th Cir. 1978).

Litigation § 3:31 (2d ed. 2019) (citations omitted). The authors are familiar with our dissenting colleague's approach and reject it as incorrect. *See id.* ("[T]he intervening act of a third person does not relieve the original wrongdoer of liability if the third party's conduct was a reasonably foreseeable result of the actor's wrongdoing . . . if an independent, illegal, or willful act is of such a nature that it might have been anticipated, the duty arises out of that fact and the original wrongdoer will be liable for the resulting injuries.");[4] *see also id.* ("Another basis for liability is where the actor's own affirmative act has created or exposed the plaintiff to a recognizable high degree of risk of harm through such conduct which a reasonable person would take into account."); Dan B. Dobbs, Paul T. Hayden, & Ellen M. Bublick, The Law of Torts § 125 (2d ed. 2011) ("It is also possible to use the term duty in a radically different way by speaking of duties that are not standards at all. Instead of saying that the defendant is under a duty of reasonable care, a judge could say the defendant is under a duty to keep a lookout or to drive

[4] (citing *Abdallah v. Caribbean Sec. Agency*, 557 F.2d 61 (3d Cir. 1977) (question as to whether security company, which was on notice as to malfunctioning burglar alarm, could be held liable for burglary losses); *Hannah v. Gulf Power Co.*, 128 F.2d 930 (5th Cir. 1942); *Romero v. Superior Court*, 107 Cal. Rptr. 2d 801 (Cal. Dist. Ct. App. 2001) (adult defendant who assumed special relationship with minor by inviting minor into his or her home will be deemed to have owed duty of care to take reasonable measures to protect minor against assault by another minor invitee while in defendant's home when evidence and surrounding circumstances establish that defendant had actual knowledge of and thus must have known the offending minor's assaultive propensities); *Kane v. Hartford Accident & Indem. Co.*, 159 Cal. Rptr. 446 (Cal. Dist. Ct. App. 1979); *Adam v. L.A. Transit Lines*, 317 P.2d 642 (Cal. Dist. Ct. App. 1957); *Williams v. Grier*, 26 S.E.2d 698 (Ga. 1943); *Childers v. Franklin*, 197 N.E.2d 148 (Ill. App. Ct. 1964); *Blessing v. Welding*, 286 N.W. 436 (Iowa 1939); *Hall v. Midwest Bottled Gas Distribs., Inc.*, 532 S.W.2d 449 (Ky. 1975); *State, to Use of Schiller v. Hecht Co.*, 169 A. 311 (Md. 1933); *Quinn v. Winkel's, Inc.*, 279 N.W.2d 65, 68 (Minn. 1979) (bartender has duty to protect patron from persons who the bartender knows to have a violent nature and who are known to frequent the premises); *Christiansen v. St. Louis Pub. Serv. Co.*, 62 S.W.2d 828 (Mo. 1933); *Daniels v. Andersen*, 237 N.W.2d 397 (Neb. 1975) (duty of jailer to provide his prisoners with adequate protection); *Eitel v. Times, Inc.*, 352 P.2d 485 (Or. 1960); *Morris v. Barnette*, 553 S.W.2d 648 (Tex. App.—Texarkana 1977, writ ref'd n.r.e.); *Alonge v. Rodriquez*, 279 N.W.2d 207, 210 (Wis. 1979); *Korenak v. Curative Workshop Adult Rehab. Ctr.*, 237 N.W.2d 43 (Wis. 1976) (duty of vocational school to protect students from trainees with known and demonstrated tendencies to violence); Restatement (Second) of Torts § 448 (Am. Law Inst. 1965)).

so that he could stop within the range of his vision. This kind of usage is almost always a shorthand expression that really refers to something else."). A majority of this en banc Court has elected to continue this court's rejection of the dissent's approach and I expressly join therewith. *See generally Critical Path Res., Inc.*, 561 S.W.3d at 579-89 (Jewell, J., dissenting).

Finally, the *Restatement* contains another seemingly relevant point: "If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect." Restatement (Second) of Torts § 321 (Am. Law Inst. 1965); *see also Lear Siegler, Inc.*, 819 S.W.2d at 472 & n.1. While this section is informative and satisfied by reasonable inferences from the jury's findings, it is not yet the law of the land and a majority of this en banc Court does not rely upon it. *See Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 438 (Tex. 1997) ("This Court has not recognized claims based on *Restatement* sections 321 . . . or 389 . . . . These sections are particularly ill-suited for application to what are essentially products liability claims because they impose liability even when the manufacturer provides adequate warnings.").

II. Relevance

Our dissenting colleague also opines that "vision-obstructing signs" are "irrelevant to the facts of this case". Dissenting Op. at 22 (Jewell, J.). This conclusion effectively refuses to credit evidence concerning vision-obstructing signs, presumably on the implied basis that a jury could not have given it any credit at all. However, this argument was waived because it was not briefed.

Our dissenting colleague proceeds to take issue with the majority's implied conclusion that drivers who turn left will look right when they do so. *See id*. at 23 ("[A]ppellees contend that drivers will be looking *right* when turning *left*, and that

the hospital is responsible for guarding against such negligent behavior."). The majority does not contend HNMC was negligent by preventing such negligence, in large part because the majority never concludes (nor even implies) that looking right when turning left is negligent. Instead, looking right when turning left is required by Texas law. *See* Tex. Transp. Code Ann. § 545.152 ("To turn left at an intersection or into an alley or private road or driveway, an operator shall yield the right-of-way to a vehicle that is approaching from the opposite direction and that is in the intersection or in such proximity to the intersection as to be an immediate hazard."); *see also* Tex. Dep't of Pub. Safety, Tex. Driver Handbook at 42-43 (Sept. 2017), https://www.dps.texas.gov/internetforms/forms/dl-7.pdf ("Turning a corner appears to be a simple operation. However, many crashes and confusion in traffic are caused by drivers who do not turn properly . . . . How to Make a Left Turn . . . . *Look in all directions* before starting to turn . . . . Yield the right-of-way to any vehicle approaching from the opposite direction . . . enter[] the lane in which you will interfere the least with traffic.") (emphasis added). The dissent's conclusion that HNMC "had every right" to expect drivers to "exercise due care" only highlights the correctness of Appellees' argument.

III. Risk-Utility Analysis

Our dissenting colleague also criticizes the majority for failing to mention that Chan did not expressly invoke the risk-utility test in the trial court and that it "remains unexplained" as to why HNMC would address those issues in its opening brief. Respectfully, I do not believe that a majority en banc opinion needs to explain that when appellants contend the trial court erred, their briefs "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." Tex. R. App. P. 38.1(i); *see also In re Ernst*, No. 04-10-00319-CV, 2011 WL 192654, at *2 (Tex. App.—San Antonio

Jan. 12, 2011, no pet.) (mem. op.) (reversing a plaintiff's judgment under the risk-utility test where plaintiff/appellee only briefed foreseeability). The risk-utility test is utilized by Texas courts (and many others) when analyzing whether a duty was owed. *See, e.g.*, *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 312 (Tex. 1983) (citing *Robertson v. LeMaster*, 301 S.E.2d 563 (W. Va. 1983); *Turner v. Grier*, 608 P.2d 356 (Colo. App. 1979)); *see also Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 714-15 (Tex. 2003); *Greater Houston Transp. Co.*, 801 S.W.2d at 525 (citing *Otis Eng'g Corp.*, 668 S.W.2d at 312); *Russell v. Allstate Ins. Co.*, No. 07-21-00046-CV, 2021 WL 3857604, at *3 (Tex. App.—Amarillo Aug. 30, 2021, no pet. h.) (mem. op.); *In re Ernst*, 2011 WL 192654, at *2 (citing *Bird v. W.C.W.*, 868 S.W.2d 767, 769 (Tex. 1994)); *Midwest Emp'rs Cas. Co. ex rel. English v. Harpole*, 293 S.W.3d 770, 779 (Tex. App.—San Antonio 2009, no pet.) ("Appellate courts apply a risk-utility balancing test in determining whether a duty exists under common law.") (citing *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 736 (Tex. 1998)); *Orozco v. Dallas Morning News, Inc.*, 975 S.W.2d 392, 394 (Tex. App.—Dallas 1998, no pet.); *cf. Gonzales v. O'Brien*, 305 S.W.3d 186, 189 (Tex. App.—San Antonio 2009, no pet.); *Cohen v. Hoose*, No. 09-06-297-CV, 2007 WL 3034938, at *2 n.2 (Tex. App.—Beaumont 2007, no pet.) (mem. op.). Under the circumstances, I believe (1) HNMC's failure to argue the risk-utility test constitutes briefing waiver and (even if it did not constitute briefing waiver) (2) HNMC failed to satisfy its burden on appeal. I believe both of these conclusions are further supported by the fact that Appellees' brief cited to *Greater Houston Transportation Co.* (801 S.W.2d at 525) for the proposition that, "[i]n deciding whether a duty exists, the Court must consider several factors" and said citation contains the risk-utility test.[5]

[5] *See Greater Houston Transp. Co.*, 801 S.W.2d at 525 ("In determining whether the

To the extent HNMC did not waive this issue, the jury nonetheless heard evidence that it would have been "relatively simple" for HNMC to encourage their employees not to use the crosswalk or exit. We are obliged to credit this piece of evidence that supports the judgment because reasonable jurors could have done so. *See City of Keller*, 168 S.W.3d at 822. Therefore, the "consequences of placing the burden on the defendant" are low, particularly when measured against the known and substantial risk at issue, *i.e.*, "a life safety issue" HNMC characterized as "too serious to ignore for the protection of our patients, visitors, staff, and physicians." When combined with the foreseen harms herein, I conclude HNMC owed Chan a duty of ordinary care. *See, e.g.*, *Nguyen v. SXSW Holdings, Inc.*, 580 S.W.3d 774, 795 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (Hassan, J., dissenting) (concluding "there is simply no balance to be had . . . [and] Appellees . . . had an inescapable duty under the risk-utility test").

Finally, we are instructed to consider "the views of respected and authoritative restatements and commentators" when determining whether a legal duty exists. *See SmithKline Beecham Corp.*, 903 S.W.2d at 351. Section 291 of the *Restatement (Second) of Torts* states: "Conduct is not negligent unless the magnitude of the risk involved therein so outweighs its utility as to make the risk unreasonable. Therefore, one relying upon negligence as a cause of action or defense must convince the court and jury that this is the case." Restatement (Second) of Torts § 291 (Am. Law Inst. 1965). This court first applied section 291's risk-utility test 49 years ago. *See Metal Window Prods. Co. v. Magnusen*, 485 S.W.2d 355, 359 (Tex. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.); *accord Hendricks v. Todora*, 722 S.W.2d 458, 461 (Tex. App.—Dallas 1986, writ

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defendant was under a duty, the court will consider several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant.").

ref'd n.r.e.) ("Thus the occupier's duty to protect invitees against the reckless or criminal acts of third persons is determined by whether the risk of harm from such conduct is unreasonable under the circumstances. A risk is unreasonable if it is of such magnitude as to outweigh what the law regards as the utility of the alleged negligent act or omission.") (citing Restatement (Second) of Torts § 291 (Am. Law Inst. 1965)). This precedent has not been briefed, challenged, or overturned. Therefore, it was binding on the panel and I concur in the granting of en banc reconsideration to maintain the uniformity of this court's precedents. *See* Tex. R. App. P. 41.2(c).

/s/ Meagan Hassan
Justice

En banc court consists of Chief Justice Christopher and Justices Wise, Jewell, Bourliot, Zimmerer, Spain, Hassan, Poissant, and Wilson. Justice Poissant authored an En Banc Majority Opinion, which was joined by Justices Bourliot, Zimmerer, Spain, and Hassan. Justice Hassan authored an En Banc Concurring Opinion, which was joined by Justices Bourliot and Spain. Chief Justice Christopher authored an En Banc Dissenting Opinion, which was joined by Justice Wilson. Justice Jewell authored an En Banc Dissenting Opinion, which was joined by Chief Justice Christopher and Justices Wise and Wilson.