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Tort Law - Duty a Little Unthought Of: The Wyoming Supreme Court's Confused Duty Analysis in Glenn v. Union Pacific R.R. Co., 176 P.3d 640 (Wyo.2008)

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CASE NOTE

TORT LAW—Duty a Little Unthought Of: The Wyoming Supreme Court's Confused Duty Analysis in *Glenn v. Union Pacific R.R. Co.*, 176 P.3d 640 (Wyo. 2008)

*Kerry Luck-Torry**

Introduction

On June 30, 2006, Steve Glenn arrived for work at the Black Butte mine.[1] That day he did not proceed to his usual work assignment as a blaster, instead he reported to the coal-loading area.[2] Union Pacific coal cars arrived in the coal-loading area, where Black Butte's workers proceeded to open the coal car doors and securely lock them before they loaded coal.[3] A more experienced worker instructed Glenn on how to open the coal car doors with a pry bar, swinging them closed to engage the locking mechanism.[4] For some time, Glenn walked along the balloon track, opening and closing the coal car doors.[5] As he went about his job, he noticed some cars still contained coking coal.[6] At the fifteenth coal car, Glenn's pry bar slipped out of the door notch, and released an avalanche of coking coal pellets.[7] The coking coal scattered along the balloon track, causing Glenn to fall and severely break his leg.[8] An ambulance rushed him to the hospital, but despite medical intervention, Glenn could not return to work.[9]

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[1] Glenn v. Union Pacific R.R. Co., 176 P.3d 640, 641 (Wyo. 2008).

[2] *Id.*

[3] *Id.* at 642 n.2.

[4] *Id.* at 642.

[5] Brief of Appellant at 12, Glenn v. Union Pacific R.R. Co., No. 07-16 (Wyo. May 25, 2007). A balloon track consists of a long loop of rail, and acts as part of Union Pacific's right-of-way passage through the mine. *Id.*

[6] *Glenn*, 176 P.3d at 642. To produce coking coal, mines process coal into round pellets, similar to briquettes. *Id.* Coking coal presents a potential for harm because it rolls around under a person's feet. *See id.* at 643.

[7] *Id.* at 642.

[8] Brief of Appellant, *supra* note 5, at 12. After Glenn's accident, the mine's safety manager noted that most of the cars contained coking coal, which settled on the lip of the doors of the car, preventing them from closing and/or locking securely. *Id.* at 13. Workers load coal cars from above and unload them by releasing the dump doors below. *Id.* at 8. Thus, the load should fall straight down, completely emptying the car. *Id.* at 8.

[9] *Id.* at 32.

The Black Butte mine regularly delivered its coal to customers via a train of coal cars provided by Union Pacific.[10] Frequently, coal cars returning to Black Butte from the Union Pacific hub contained "carry-back" product (*i.e.*, residue from the shipment of coal).[11] Though Union Pacific's contracts with its customers stipulate that they must clear out the cars of any carry-back product or face fines, it rarely enforces these provisions.[12] Additionally, mine workers anticipate the coal cars contain carry-back product; however, this usually consists of unprocessed coal and not coking coal.[13] On the day of Glenn's injury, the train arrived with 40 unlocked or open doors out of 102, many containing coking coal.[14]

Glenn filed suit against Union Pacific claiming its negligence caused his injury.[15] The District Court for Sweetwater County granted Union Pacific's motion for summary judgment.[16] Specifically, the court found Union Pacific only owed a duty to provide coal cars free of defects.[17] This duty, in the district court's opinion, did not run to Glenn's situation.[18] Glenn timely appealed to the Wyoming Supreme Court.[19] The Wyoming Supreme Court disagreed with the district court.[20] Specifically, one issue proved dispositive: duty.[21] It found Union Pacific owed Glenn a duty to provide coal cars reasonably safe for their intended use.[22] Subsequently, the Wyoming Supreme Court reversed the district court's findings and remanded for further proceedings consistent with its opinion.[23]

The *Glenn* decision proves confusing for practitioners because it remains unclear whether it supports its finding of duty through (1) premises liability,

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[10] *Id.* at 5. Coal cars pick up the coal loaded by the mine workers and deliver it to customers. *Id.* The customer then unloads the car of its coal cargo, and its employees must close the car's doors. *Id.* In fact, the contracts between Union Pacific and its customers who receive the coal shipments explicitly state the customers must close the doors or pay a fine. *Id.* Although this fine can be in excess of $100 per car, Union Pacific refused to enforce this particular provision of its contracts for fear of losing customers. *Id.* Union Pacific forbids its employees who operate the train from closing the doors themselves. *Id.*

[11] *See id*. at 19.

[12] *Id.* at 9.

[13] Brief of Appellant, *supra* note 5, at 13.

[14] *Glenn*, 176 P.3d at 642.

[15] *Id*.

[16] *Id.*

[17] Brief of Appellant, *supra* note 5, at 16.

[18] *Id.*

[19] *Glenn*, 176 P.3d at 641.

[20] *Id.*

[21] *See id.* at 642–43.

[22] *Id.* at 643.

[23] *Id*. at 645.

(2) specific duty elsewhere, or (3) generalized duty.[24] Though the court reached a unanimous decision, nothing in the opinion explains how and why the Wyoming Supreme Court recognized this duty.[25] Additionally, the appellant's brief analyzed the facts using the eight-factor test first adopted by Wyoming in *Gates v. Richardson*.[26] The Wyoming Supreme Court adopted the *Gates* factor test as a tool for analyzing whether a new duty exists.[27] However, the *Glenn* court ignores this useful tool and issues what amounts to an ad hoc decision.[28] As such, the *Glenn* opinion offers no insight into how lower courts and practitioners could apply this new duty in negligence actions regarding railroads and their customers' employees.[29]

This case note evaluates the Wyoming Supreme Court's declaration of duty in *Glenn v. Union Pacific Ry. Co*.[30] First, this case note examines the adoption of generalized duty by the Restatement (Third) of Torts and the resultant backlash by those demanding duty remain an element of negligence claims.[31] Next, it examines Wyoming's *Gates* factor test, as a method of evaluating duty and resolving the confusion inherent in the discussion of duty.[32] Third, this note walks through the principal case and the court's discussion of duty.[33] Finally, it analyzes the *Glenn* court's confusion regarding duty and the role duty now plays as an element of negligence.[34] Additionally, as this note explains, application of the *Gates* eight-factor test would provide guidance for lower courts and practitioners likely to deal with similar situations in the future.[35]

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[24] *Glenn*, 176 P.3d at 643–44.

[25] *Id.*

[26] Brief of Appellant, *supra* note 5, at 30–33 (citing Borns ex rel. Gannon v. Voss, 70 P.3d 262, 273); Gates v. Richardson, 719 P.2d 193, 196 (Wyo. 1986).

[27] *Gates*, 719 P.2d at 196.

[28] *See Glenn*, 176 P.3d at 643–44.

[29] *See id.* at 641–45.

[30] *See infra* notes 112–72 and accompanying text (analyzing the *Glenn* court's duty discussion).

[31] *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 658–61 (2001); *see infra* notes 56–83 and accompanying text (discussing support and criticism regarding the Restatement (Third) of Torts).

[32] *See Gates*, 719 P.2d at 196; *see infra* notes 84–95 and accompanying text (discussing the *Gates* factor test).

[33] *See infra* notes 96–111 and accompanying text (analyzing the *Glenn* court's use of generalized and specialized duty).

[34] *See infra* notes 112–72 and accompanying text (discussing the danger of the Wyoming Supreme Court's confusion regarding duty, the general prevalence of confusion regarding duty, and why such puzzlement harms the practitioners and the courts).

[35] *See infra* notes 158–72 and accompanying text (discussing how the *Gates* factor test helps resolve confusion regarding duty).

BACKGROUND

Why Does the Question of Duty Matter?

Duty remains a difficult concept for practitioners, judges and courts alike.[36] First year law students learn duty is the first element of a negligence claim.[37] However, in actual practice, this certain knowledge gives way to confusion.[38] Often, practitioners and courts think of duty as a conundrum, rather than a vital element.[39] Searching through negligence decisions, one realizes that courts frequently mean different things when they invoke duty.[40] Additionally, courts do not always clearly articulate the principles and rules concerning duty.[41] In short, courts sometimes make mistakes because of their own confusion regarding duty.[42]

To make matters more complicated, much criticism surrounds the concept of duty.[43] The Restatement (Third) of Torts eliminates duty as an element for negligence claims.[44] Instead, it establishes a generalized duty requiring everyone to exercise reasonable care.[45] However, a backlash arose, insisting duty remain an integral part of a negligence claim.[46] This conflict regarding the role of duty creates

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[36] *See* Goldberg & Zipursky, *supra* note 31, at 657–95 (discussing confusion among attorneys and judges regarding the interpretation of duty as an element of a negligence claim evidenced by many confusing and contradictory opinions).

[37] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 31, at 180 (2d ed. 1941).

[38] *See generally* Robert L. Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 VAND. L. REV. 787, 790 (2001).

[39] *See generally* Goldberg & Zipursky, *supra* note 31, at 697.

[40] *Id.*

[41] *See id.*

[42] *See id.*; *see also* Ky. Fried Chicken of Cal. v. Superior Court, 927 P.2d 1260, 1266–69 (Cal. 1997).

[43] Aaron D. Twerski, *The Cleaver, the Violin, and the Scalpel: Duty and the Restatement (Third) of Torts*, 60 HASTINGS L.J. 1, 2–3 (2008).

[44] RESTATEMENT (THIRD) OF TORTS: DUTY § 7 (2005):

> (a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm. (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

[45] *Id.*

[46] *See, e.g.,* Twerski, *supra* note 43, at 2–3; W. Johnathan Cardi, *Purging Foreseability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739 *passim* (2005); Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265 *passim* (2006); David Owen, *Duty Rules*, 54 VAND. L. REV. 767 *passim* (2001). *See generally* Jane Stapleton, *Evaluating Goldberg and Zipursky's Civil Recourse Theory*, 75 FORDHAM L. REV. 1529 *passim* (2006); Ernest J. Weinrub, *The Passing of Palsgraf?*, 54 VAND. L. REV. 803 *passim* (2001).

greater confusion among courts and practitioners.[47] Indeed, this misunderstanding of the role of duty has led courts to skip to examining affirmative defenses without ever analyzing the prima facie element of duty.[48] The court must recognize that between these two extremes lies substantial room to analyze the element of duty.[49]

The Restatement (Third) of Torts: The End of Duty?

The Restatement (Third) of Torts eliminates duty from the negligence equation.[50] Instead, everyone has a duty to act reasonably when a possibility of injury exits.[51] This generalized duty replaces the traditional four-element test for negligence.[52] As described in the Third Restatement, duty is not an element of a prima facie negligence case.[53] Under this negligence regime, an injured plaintiff need only show that the defendant failed to act reasonably to avoid causing harm to another.[54] Additionally, courts may relieve defendants of liability for otherwise negligent conduct because of policy reasons.[55] The removal of duty as an element of negligence represents the result of long-simmering criticism among tort scholars.[56] Many scholars denigrate duty as "wholly unnecessary or hopelessly confused."[57] Some commentators have thrown up their hands, claiming duty defies definition because of its changing nature.[58] The drafters of the Third Restatement intended to resolve this confusion and frustration by proclaiming a generalized duty applies to all, making duty a background principle rather than an element.[59]

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[47] Rabin, *supra* note 38, at 790–91. It must be recognized that this sort of analytical confusion cannot remain a matter of indifference. *Id.* at 791.

[48] *See id.* at 791. For example, courts routinely state baseball game attendees assume the risk when attending a game without examining whether the ballpark even owed the attendee a duty. *Id.*

[49] *See* Goldberg & Zipursky, *supra* note 31, at 730.

[50] RESTATEMENT (THIRD) OF TORTS: DUTY § 7(a) (2005).

[51] *Id.*

[52] *See* W. PAGE KEETON ET AL., PROSSER AND KEATON ON TORTS § 30 (1984); Stroup v. Oedekoven, 995 P.2d 125, 130 (Wyo. 1999). The elements of negligence remain duty, breach, proximate cause, and damage. *Id.*

[53] Goldberg & Zipursky, *supra* note 31, at 659–60.

[54] RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 101 (2005) ("An actor has a legal obligation, in the conduct of the actor's own affairs, to act reasonably to avoid causing legally cognizable harm to another.").

[55] *Id.* § 105. This approach represents a drastic difference from the model of finding no duty. *See* Goldberg & Zipursky, *supra* note 31, at 659–60. Instead, the court presumes duty and only relieves the defendant of liability because of an overarching policy reason. *See id.*

[56] *See* Twerski, *supra* note 43, at 2–3.

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

[58] Peter F. Lake, *Common Law "Duty" Analysis: The Conceptual Expansion of "Duty" in a Period of Doctrinal Consolidation/Retrenchment*, 10 KAN. J.L. & PUB. POL'Y 153, 154 (2000).

[59] *See* Esper & Keating, *supra* note 46, at 266–67.

The problem with this approach lies in the fact that it radically upsets recognized standards of tort law.[60] For example, in *Benton v. City of Oakland*, plaintiff would only need to establish the defendant failed to use reasonable care while maintaining a public swimming pool and this failure caused plaintiff's paralysis.[61] Similarly, in *McGlothin v. Anchorage*, by unreasonably failing to inform plaintiff that the scoreboard he was about to lift was extremely heavy, defendant committed negligence resulting in plaintiff's back injuries.[62] These examples demonstrate the significant difference between the Third Restatement and the traditional four-element negligence test.[63] The Third Restatement's shift to a generalized duty represents a substantial change in the law of negligence.[64] As such, it has engendered a considerable amount of controversy.[65]

The Backlash: Arguing for the Traditional Role of Duty

The major criticism rests in the fact that almost every state court handles negligence cases according to the traditional four-element test, which requires the plaintiff to satisfy the duty element.[66] Additionally, commentators argue the Third Restatement suffers from serious defects as a restatement of negligence law.[67] Specifically, duty often remains at issue in "straightforward cases involving 'accidental personal injury or physical damage.'"[68]

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[60] *See* Goldberg & Zipursky, *supra* note 31, at 665–66. "[The Third Restatement] is a substantial departure in the expression of the structure of negligence from that of the courts." *Id.* at 665. "Most notably, there is no duty requirement in this provision, even though there is according to the usual formulation." *Id.*

[61] *Id.* at 666 (citing Benton v. City of Oakland, 721 N.E.2d 224, 233 (Ind. 1999)). In *Benton*, the court held that in the face of confusing precedent, the city did owe the plaintiff a duty. *Benton*, 721 N.E.2d at 224. However, the court carefully analyzed whether a duty existed, rather than relying on the concept of general reasonable care, as advocated by the Third Restatement. *Id.* at 233.

[62] Goldberg & Zipursky, *supra* note 31, at 666 (citing McGlothin v. Anchorage, 991 P.2d 1273 (Alaska 1999)) (holding where plaintiff injured his back while lifting a sign owned by defendant, he owed no duty to plaintiff to warn him of the associated risks of lifting the sign).

[63] *See id.*

[64] *Id.* at 665–66.

[65] *See* Twerski, *supra* note 43, at 2–3.

[66] *See* Albert v. Hsu, 602 So. 2d 895, 897 (Ala. 1992) (quoting Rose v. Miller & Co., Inc., 432 So. 2d 1237, 1238 (Ala. 1983)) ("Where there is no duty, there can be no negligence."); Lauer v. City of New York, 733 N.E.2d 184, 187 (N.Y. 2000) (citing Pulka v. Edelman, 358 N.E.2d 1019 (N.Y. 1976)) ("Without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm."); Duncan v. Afton, Inc., 991 P.2d 739, 742 (Wyo. 1999) (quoting Goodrich v. Seamands, 870 P.2d 1061, 1064 (Wyo. 1994)) ("Essential to any negligence cause of action is proof of facts which impose a duty upon defendant.").

[67] *See* Goldberg & Zipursky, *supra* note 31, at 678.

[68] *Id.*

Even in "easy" physical injury cases, the duty element remains a point of contention which the courts must decide.[69] The case of *Mussivand v. David* illustrates this point.[70] Plaintiff acquired a sexually transmitted disease from his wife.[71] Plaintiff's wife contracted the disease from defendant, her secret lover.[72] When plaintiff sued defendant for negligence, defendant claimed the duty element remained unsatisfied.[73] However, the Ohio Supreme Court rejected defendant's argument, partly on the basis that he could have reasonably foreseen his lack of precautions put plaintiff at risk.[74] Thus, defendant owed a duty to plaintiff to not transmit the disease to him, at least until plaintiff's wife became aware of her own infection.[75] This case demonstrates a court need not find a generalized duty to provide relief to plaintiffs.[76] An analysis of duty, such as that found in *Mussivand*, remains the standard almost all courts use in negligence cases.[77] Critics argue the Third Restatement must lay bare the elements of negligence as defined by the courts, not impose a contrary definition.[78] Thus, the Third Restatement serves only to confuse courts and practitioners about the developing role of duty and its current place in a negligence analysis.[79]

Wyoming's Measure of Duty–Gates's *Factor Test*

Wyoming provides a test for determining and outlining duty that balances a generalized duty while respecting the traditional four-element test.[80] The Wyoming Supreme Court first introduced this test in *Gates v. Richardson*.[81] For twenty-two years, the Wyoming Supreme Court used the *Gates* test to (1) determine if a duty existed and (2) provide rationalization for a finding of duty.[82] This test provides a middle road in duty analysis, designed to provide

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[69] *Id.* at 678–79.

[70] Mussivand v. David, 544 N.E.2d 265, 266–67 (Ohio 1989).

[71] *Id.* at 266–67.

[72] *Id.* at 267.

[73] *Id.* at 272.

[74] *Id.* at 270.

[75] *Mussivand*, 544 N.E.2d at 272–73.

[76] *See* Goldberg & Zipursky, *supra* note 31, at 678–79.

[77] *See id.* at 676-77; Esper & Keating, *supra* note 46, at 268.

[78] Goldberg & Zipursky, *supra* note 31, at 676.

[79] *See generally id*. at 677.

[80] *See Gates*, 719 P.2d at 196.

[81] *Id.* (holding that Wyoming recognizes the tort of negligent infliction of emotional distress, and providing an eight-factor test to determine duty).

[82] *See, e.g.*, Mostert v. CBL & Associates, 741 P.2d 1090, 1093 (Wyo. 1987); R.D. v. W.H., 875 P.2d 26, 31 (Wyo. 1994); Natrona County v. Blake, 81 P.3d 948, 951 (Wyo. 2003); Black v. William Insulation Co., Inc., 141 P.3d 123, 127 (Wyo. 2006).

courts and practitioners with both an answer to a question of duty and a rationale for that answer.[83] Indeed, both practitioners and Wyoming courts use the *Gates* factor-test extensively to find duty in negligence cases.[84] Specifically, Glenn used the *Gates* factor-test to argue for a finding of duty in his brief.[85] However, the *Glenn* court ignored this test in its analysis.[86]

Factor tests try to balance fairness, public policy concerns and justice while providing flexibility for courts.[87] In Wyoming, the courts balance these sometimes conflicting goals by applying the following eight factors to the facts presented: (1) the foreseeability of harm to the plaintiff; (2) the closeness of the connection between the defendant's conduct and the injury suffered; (3) the degree of certainty that the plaintiff suffered injury; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden upon the defendant; (7) the consequences to the community and the court system; and (8) the availability, cost and prevalence of insurance for the risk involved.[88] The *Gates* factor test continues to serve as a valuable tool for the Wyoming Supreme Court and practitioners when questions of duty arise in new and difficult situations.[89] However, the court has become increasingly inconsistent in its approach to the *Gates* factor test by ignoring it in some cases or merely glossing over it in others.[90] This inconsistency may soon lead to more confusion among practitioners regarding duty as it now appears unclear when the Wyoming Supreme Court would use the *Gates* factor test to determine if a duty exists.[91]

PRINCIPAL CASE

The Wyoming Supreme Court held in a unanimous opinion that Union Pacific owed Glenn a duty to provide rail cars reasonably safe for their intended

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[83] *See Gates*, 719 P.2d at 196.

[84] *See, e.g.*, Brief of Appellant, *supra* note 5, at 31; Ortega v. Flaim, 902 P.2d 199, 203, 206 (Wyo. 1995).

[85] Brief of Appellant, *supra* note 5, at 33–43.

[86] *See Glenn*, 176 P.3d at 642–43.

[87] *See* David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1676 (2007).

[88] *Gates*, 719 P.2d at 196 (*citing* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976)).

[89] *See, e.g.*, Killian v. Caza Drilling, Inc., 131 P.3d 975, 980 (Wyo. 2006); Erpelding v. Lisek, 71 P.3d 754, 758 (Wyo. 2003); Larsen v. Banner Health Sys., 81 P.3d 196, 199 (Wyo. 2003).

[90] *See* Nulle v. Gillette–Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1173 (Wyo. 1990) (distinguishing from *Gates* and refusing to apply the *Gates* factors test); Hendricks v. Hurley, 184 P.3d 680, 686 (Wyo. 2008) (applying only the foreseeability aspect of the *Gates* factors test).

[91] *See Hendricks*, 184 P.3d at 686. In a fact pattern similar to *Gates*, the court did not apply the *Gates* factor test and only remarked on the foreseeability of injury as a basis for duty. *Id.*

use.[92] First the *Glenn* court, largely reasoning by analogy, discussed a generalized duty of reasonable care.[93] Then, again reasoning by analogy, the court switched to a discussion of specialized duty, including premises liability and carrier liability, before arriving at an ad hoc determination of duty.[94]

General Duty and Specific Duties: Trying to Find the Basis for Union Pacific's Duty

The *Glenn* court used reasoning by analogy to address Union Pacific's long-recognized duty to exercise ordinary and reasonable care and prudence in operating its railway.[95] Here, the court likened the railroad's obligation to clear its right-of-way to a generalized duty to operate in a reasonable manner.[96] It went on to state that if the railroad violates this generalized duty and an injury results, then liability could ensue.[97] The court then likened an injury resulting from a violation of this generalized duty to when a door from a rail car falls and hurts a railroad employee while he unloads cargo.[98]

The court next discussed *Chicago, B. & Q. R.R. v. Murray*, noting that a railroad's duty seems similar to that of a premises owner to an invitee.[99] The opinion analogizes Union Pacific's new-found duty regarding its rail cars to that of a premises owner who must keep her premises reasonably safe for the invitee's protection.[100] In a footnote to this discussion, the court notes that *Chicago & N.W. R.R. v. Ott* and *Murray* involve a railroad's liability to its own employees and no other, though it uses these cases to analogize a duty to a third party; in this case, Glenn.[101]

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[92] *Glenn*, 176 P.3d at 643.

[93] *Id.* at 642–43.

[94] *Id.* at 643.

[95] *Id.* at 642–43.

[96] *Id.* at 642.

[97] *Glenn*, 176 P.3d at 642.

[98] *Id.* at 643 (citing Chicago & N.W. Ry. v. Ott, 237 P. 238, 239 (Wyo. 1925)).

[99] *Id.* (citing Chicago, B. & Q. R.R. v. Murray, 277 P. 703, 707 (Wyo. 1929)).

[100] *Id.*

[101] *Id.* at 643 n.3 (citing Ott, 237 P. at 238); *Murray*, 277 P. at 707. The court also mentions Glenn's reliance upon a First Circuit case that also involved a railroad's liability to its own employees. *Glenn*, 176 P.3d at 643 n.3. The court then acknowledged Union Pacific's assertion that Boston & Maine R.R. Co. v. Sullivan, 275 F. 890 (1st Cir. 1928) and similar cases remain inapplicable because the Federal Employers Liability Act ("FELA") governs the railroads' liability to its own employees. *Id.* It did note that the principles of negligence form the foundation of FELA. *Id.* It also mentioned other states' cases holding railroads owe the same duty to its own employees as it does to non-employees authorized to load, unload, or work on its rail cars. *Id.*

The court next addressed Union Pacific's duty to perform a reasonable inspection of its rail cars.[102] This duty entails either remedying or warning customers about dangerous conditions.[103] The opinion goes on to agree with the district court's finding that Union Pacific's customer was Black Butte, and Black Butte's duty to Glenn as his employer included providing a safe place to work.[104] It then disagreed with the district court on the issue of whether a customer's duty to provide a reasonably safe workplace supplants the railroad's duty to provide reasonably safe rail cars.[105] The court determined the railroad's duty remained, and supported its finding with *Chicago, R.I. & P.R. Co. v. Williams*, which held an employer's duty to provide a reasonably safe workplace could not supplant a carrier's duty.[106] Ultimately, the court concluded Union Pacific owed Glenn a duty to provide rail cars reasonably safe for their intended use.[107]

ANALYSIS

This analysis section begins by exploring the court's own confusion about the place of duty, as evidenced in the *Glenn* opinion's shift between generalized duty and very specialized duty, like premises liability and carrier liability.[108] Next, it discusses the court's decision as part of a greater confusion regarding duty present among courts, practitioners, and the American Law Institute ("ALI").[109] Finally, this analysis argues that the only remedy for this continuing confusion resides in the Wyoming Supreme Court reaffirming the *Gates* factor test as the analysis for finding a new duty.[110]

The Glenn *Decision Demonstrates the Wyoming Supreme Court's Confusion Regarding Duty*

The *Glenn* court ignored the importance of grounding its decision on logic and past precedents.[111] To support its holding, the court rifles through various

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[102] *Glenn*, 176 P.3d at 643.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* (citing Chicago, R.I. & P.R. Co. v. Williams, 245 F.2d 397, 402 (8th Cir. 1957)).

[107] *Glenn*, 176 P.3d at 643.

[108] *See infra* notes 115–29 and accompanying text (discussing the *Glenn* court's disregard of past precedents and the relevance of such action to Wyoming practitioners).

[109] *See infra* notes 130–57 and accompanying text (discussing confusion regarding duty among many elements of the legal community and placing the *Glenn* court's decision within that general confusion).

[110] *See infra* notes 158–72 and accompanying text (discussing the importance of reaffirming the *Gates* test as Wyoming's measure of duty).

[111] *See* Rabin, *supra* note 38, at 790–91.

interpretations of duty, including a generalized duty and specialized duties.[112] However, the court's ultimate holding remains an ad hoc decision, lacking clarification because it discusses generalized and specialized duties while applying neither.[113] The court's ruling clearly ignores the importance of providing rationale for this new duty.[114]

Why the Glenn *Court's Confusion is Relevant to Wyoming Practitioners*

The *Glenn* court's confusion regarding duty may seem like an unimportant matter.[115] However, the Wyoming Supreme Court's confusion regarding duty in *Glenn* becomes problematic because it creates the potential for incorrectly understood precedents, leading to error in future cases.[116] This kind of confusion strikes at the very foundations of negligence law.[117] Negligence law gauges decisions to engage in harmful behavior as proper or improper.[118] Behavior becomes improper only if it breaches a preexisting obligation to refrain from harm carelessly inflicted on others.[119] Thus, duty provides reason to a negligence inquiry.[120] As the foundational element of a negligence claim, duty acts as a portal through which every negligence claim must pass.[121]

This "duty portal" sets the boundary of the scope of recovery for negligently-inflicted harm.[122] Even more importantly, how strongly a court frames duty rules controls which negligence suits pass to full adjudication or suffer summary judgment.[123] When courts rely on categories of generalized duty, more suits which lack foundation in negligence law make their way into local courtrooms.[124] Conversely, when courts rely on categories of specialized duty, such as traditional

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[112] *See Glenn*, 176 P.3d at 642–43.

[113] *See id.* at 643.

[114] *See, id.*; *see also* Rabin, *supra* note 38, at 791. When courts fail to provide rationalization for their findings of duty, practitioners cannot effectively support future arguments. *Id.*

[115] Owen, *supra* note 91, at 1673 ("Normally, most courts and commentators have other (arguably more important) fish to fry and little interest in trifling with how one element or another should be conceived or phrased.").

[116] *See* Honorable Theodore R. Boehm, *A Tangled* Webb—*Reexamining the Role of Duty in Indiana Negligence Actions*, 37 IND. L. REV. 1, 14–15 (2003).

[117] *Id.* at 15.

[118] Owen, *supra* note 91, at 1675.

[119] *Id.*

[120] *See* Goldberg & Zipursky, *supra* note 31, at 672.

[121] Owen, *supra* note 91, at 1675.

[122] *See* Twerski, *supra* note 43, at 21–22.

[123] Owen, *supra* note 91, at 1675; *see* Joseph W. Little, *Palsgraf Revisited (Again)*, 6 PIERCE L. REV. 75, 106–07 (2007).

[124] Owen, *supra* note 91, at 1675.

premises liability, injured plaintiffs are forced to fend for themselves or seek relief from insurance providers and other entities outside the courts.[125]

The Court's Decision is Clear Evidence of a Greater Confusion Regarding Duty

The *Glenn* court's confusion regarding duty reflects the turmoil in tort law surrounding the concept of duty present among practitioners, courts, and the ALI.[126] Disputes regarding the elements of negligence, particularly duty, arise every time the ALI issues its Restatement on the Law of Torts.[127] The importance of one element of a claim may not appear self-evident.[128] However, the outline of torts, including the place of duty, structures how lawyers frame specific issues.[129] In turn, lawyers' analyses of duty affect how judges apply this element to cases.[130] Thus, the formulation of negligence's elements remains important to a fundamental understanding of the essence of negligence and how to properly apply it.[131]

The *Glenn* court's discussion of generalized duty reflects one side of this controversy.[132] While the *Glenn* court did not openly adopt a generalized duty in *Glenn*, the court must recognize what confusion such a declaration would cause for practitioners and the court alike.[133] The draft Restatement (Third) of Torts, which eliminates duty as an element for ordinary negligence claims, and the controversy surrounding this change, demonstrates a general uncertainty regarding the role of duty.[134] By eliminating duty as an element for an ordinary negligence claim, the Third Restatement relegates duty to a background principle.[135] Alternatively, some commentators find the prospect of rewriting duty an invitation for chaos.[136]

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[125] *See id*.

[126] W. Johnathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 673–82 (2008).

[127] *See* Little, *supra* note 127, at 82–83.

[128] *See* Owen, *supra* note 91, at 1672–73.

[129] *Id.*

[130] *See* Goldberg & Zipursky, *supra* note 31, at 661–62 (discussing the impact of such arguments on the California Supreme Court).

[131] Owen, *supra* note 91, at 1673.

[132] *See Glenn*, 176 P.3d at 643. The *Glenn* court mirrors the language of the Third Restatement by stating railroads have a duty to act reasonably. *Id.*

[133] Little, *supra* note 127, at 96–100.

[134] RESTATEMENT (THIRD) OF TORTS: DUTY § 7 (2005).

[135] Goldberg & Zipursky, *supra* note 31, at 658–64.

[136] *See id.*

Unfortunately, some states have accepted the invitation to eliminate duty as an element of a negligence claim, resulting in inconsistent verdicts.[137]

The Wyoming Supreme Court need only look to the Wisconsin courts to see the absurd outcomes resulting from such a generalized duty.[138] Sincere hope that plaintiffs recover more often under a general duty regime fade into the mist upon examination of an illustrative case: *Smaxwell v. Bayard*.[139] The defendant owned two adjoining parcels of land, L1 and L2.[140] L1 contained several residential buildings, occupied by the defendant's tenants, T1 and T2.[141] L2 remained vacant.[142] In this case, the defendant allowed T1 to build a dog kennel on L2 to house wolf-dog hybrids.[143] Surrounding inhabitants complained about this use of L2, noting a wolf-hybrid had recently bitten a deputy sheriff.[144] The defendant knew of this incident.[145] As feared, one of the hybrids escaped, came upon L1, and attacked T2.[146] T2 then sued the defendant.[147] The lower courts granted the defendant's motion for summary judgment on public policy grounds.[148] The Wisconsin Supreme Court affirmed this finding, citing fear of opening a floodgate of litigation against landlords and landowners for dog attacks when they do not own the offending dog.[149]

The frustration attending this decision rests in the recognition that many, if not most, courts would have held the defendant owed the foreseeable plaintiffs a duty of care to restrain the animals.[150] The Wyoming Supreme Court must not embrace the generalized duty advocated by the Third Restatement and Wisconsin because of the confusion and absurd verdicts it engenders.[151] Instead, it must

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[137] Little, *supra* note 127, at 98–106. Wisconsin remains the only state to adopt officially a generalized duty to all to act reasonably. *Id.* However, California may soon follow suit. Cardi & Green, *supra* note 46, at 726–32.

[138] *See* Little, *supra* note 127, at 96–107.

[139] Smaxwell v. Bayard, 682 N.W.2d 923, 925 (Wis. 2004).

[140] *Id.* at 925–26.

[141] *Id.*

[142] *Id.* at 927–28.

[143] *Id.*

[144] *Smaxwell*, 682 N.W. at 927.

[145] *Id.* at 927.

[146] *Id.* at 928.

[147] *Id.*

[148] *Id.*

[149] *Smaxwell*, 628 N.W. at 928.

[150] Little, *supra* note 127, at 105–06.

[151] *See* Owen, *supra* note 91, at 1673-75; *see generally* Goldberg & Zipursky, *supra* note 31, at 661–75.

return to its own precedent.[152] The Wyoming Supreme Court can avoid all this bewilderment by using the *Gates* eight-factor test, which established the correct precedent for determining duty.[153]

The Wyoming Supreme Court Must Reaffirm the Gates *Eight-Factor Test for Finding Duty*

The Wyoming Supreme Court mistakenly ignored the *Gates* factor test in its discussion of duty.[154] By not using the *Gates* test to provide rationale for its finding, the court confuses practitioners.[155] The Wyoming Supreme Court must recognize that when analyzing a new duty, it must not think categorically by restricting itself to either a generalized duty or specialized duty.[156] Instead, it must weigh the facts presented with the *Gates* factor test to provide a rationalized holding.[157] As the element of duty draws upon such concepts as fairness, justice, and social policy, the *Gates* factor test provides a means for the court to balance conflicting values and policies while avoiding the pitfalls of categorizing duty too openly or restrictively.[158]

Other states found the solution to problematic questions of duty by applying factor tests to the specific facts of various cases.[159] Indiana stands out as a potent example of a state adopting a factor test to determine duty in all situations.[160] Indiana courts routinely found, or did not find, duty in a haphazard manner, lacking any thought given to factual contexts, such as relationships or other tort obligations.[161] To combat this confusion, the Indiana Supreme Court adopted a factor test as a formula to identify duty in *Webb v. Jarvis*.[162] The Indiana Supreme Court announced a three-part test to identify duty: (1) the relationship between the parties, (2) the foreseeability of harm, and (3) public policy concerns.[163]

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[152] *Gates*, 719 P.2d at 196.

[153] *See id.*

[154] *See Glenn*, 176 P.3d at 642–43.

[155] *See* Goldberg & Zipursky, *supra* note 31, at 657. Duty lacking foundation remains useless to the practitioner and courts. *Id.*

[156] Twerski, *supra* note 43, at 21–22.

[157] *See* Boehm, *supra* note 120, at 5.

[158] *See* Owen, *supra* note 91, at 1676.

[159] *See* Boehm, *supra* note 120, at 5.

[160] *See id.*

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

[162] Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991). *Webb* involved a patient who shot his brother-in-law in a fit of rage caused by an over-prescription of steroids. *Id.* at 994. The brother-in-law sued the prescribing doctor, claiming the doctor breached his duty to administer medical treatment so as to account for possible harm to others. *Id.* at 995. Holding the doctor owed no duty, the Indiana Supreme Court adopted a three factor test to determine duty. *Id.*

[163] *Id.*

Indiana has inconsistently applied the *Webb* test, leading to confusion about whether the test supersedes existing formulations of duty, complements them, or applies only when new duty arises.[164] Additionally, some Indiana courts have ignored the *Webb* test, or misapplied it.[165] The solution cannot rest in copying Indiana's approach of adopting policy considerations in lieu of an actual inquiry into duty.[166] Instead, the Wyoming Supreme Court must clarify when and how the *Gates* factor test applies, rather than ignoring it or overly simplifying the factors.[167] To do otherwise confuses practitioners and lower courts, and has the potential to create ill-considered legal precedent.[168]

CONCLUSION

Glenn reaffirms the foundations of basic tort law: provide compensation in order to make the plaintiff "whole" again.[169] However, to provide the plaintiff relief in this situation, the court needed to find Union Pacific owed Glenn a duty.[170] Though the court ultimately reached this conclusion, it fails to explain its holding.[171]

The new duty invoked by the court does not seem useful to future claims because of the confusion engendered by its lack of rationalization.[172] The *Glenn* court should have used the *Gates* factor test to better serve lower courts and

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[164] *See* Boehm, *supra* note 120, at 5 (discussing Indiana's application of factor tests).

[165] *Id.*

[166] *Id.* at 18.

[167] *See Glenn*, 176 P.3d at 643–45 (analyzing duty regarding Union Pacific and Glenn). Glenn used the *Gates* test in the Brief of Appellant, including going through a step-by-step analysis applying the factors and determining a duty existed. Brief of Appellant, *supra* note 5, at 10. The court ignored the *Gates* factors in its *Glenn* opinion. *See Glenn*, 176 P.3d at 643–45. *See also Hendricks*, 184 P.3d at 686. In *Hendricks*, an eight-year-old boy died from electrocution after touching an ungrounded well-head at his grandparents' house. *Id.* at 681. Hendricks, the boy's mother, sued the grandparents, the Hurleys, to recover for emotional injuries from their failure to use reasonable care to inspect the well and in supervising the child. *Id.* The Wyoming Supreme Court affirmed the district court's summary judgment in favor of the Hurleys. *Id.* In coming to its conclusion, the court only mentions *Gates* when discussing proximate cause. *Id.* at 686. The absence of the *Gates* factor test in this context seems particularly shocking because the test arose to address claims for emotional injuries. *Id.*; *Gates,* 719 P.2d at 196–98.

[168] *See* Goldberg & Zipursky, *supra* note 31, at 658.

[169] Esper & Keating, *supra* note 46, at 273.

[170] *See supra* note 84 and accompanying text.

[171] *See supra* notes 85–109 and accompanying text.

[172] *See Glenn*, 176 P.3d at 642–43.

practitioners because it would have articulated a rationale for its finding.[173] Instead, the court delivers a new duty without supporting rationale.[174]

An opinion lacking necessary rationale concerning an essential element lacks true usefulness for practitioners and lower courts.[175] Though the court correctly overturned the district court's finding of no duty, only once this new duty is explained and rationalized can it truly become a part of Wyoming case law to serve as a tool for injured plaintiffs.[176]

[173] *See supra* notes 159–73 and accompanying text (discussing the importance of the *Gates* factor test in supporting findings of duty).

[174] *See supra* notes 100–12 and accompanying text (discussing the court's finding of duty).

[175] *See* Goldberg & Zipursky, *supra* note 31, at 657.

[176] Brief of Appellant, *supra* note 5, at 6–7; *see also Glenn*, 176 P.3d at 643.