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Congratulations It's a Tort: Expanding the Scope of Duty in the Surrogacy Setting

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Congratulations!

It's a Tort:

Expanding the Scope of Duty in the Surrogacy Setting

*Huddleston v. Infertility Center of America*¹

I. INTRODUCTION

As technological and scientific breakthroughs continue to change the world, the laws of the land have to scramble to keep up. With each scientific innovation comes new and complex legal issues—especially when the innovations involve the creation of new life. Modern fertilization capabilities raise interesting and complex legal issues that demand precise and well-founded legal decisions.

In the evolving science and business of surrogacy,² an important issue arises as to what duty, if any, a surrogacy business owes to its participants and the child created through the surrogacy process. In *Huddleston v. Infertility Center of America*,³ the Superior Court of Pennsylvania held that a surrogacy business had the duty to take steps to protect a child created by surrogacy from abuse at the hands of his biological father, and, if it was negligent in not doing so, its negligence could be found to be the proximate cause of the child's injuries.⁴ This Note evaluates why and how the court arrived at this surprising conclusion and examines the dangerous policy implications the court may have created in the process.

II. FACTS AND HOLDING

In 1993, Phyllis A. Huddleston contacted the Infertility Center of America (“ICA”) to express an interest in becoming a “surrogate mother.”⁵ At approximately the same time, James A. Austin contacted ICA for help in

1. 700 A.2d 453 (Pa. Super. Ct. 1997).

2. Surrogacy is “the state of being . . . a surrogate mother.” RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1297 (2d ed. 1997). A surrogate mother is a woman who is inseminated with a man's semen and who carries the child to term, and, after birth, assigns her parental rights to the birth father. BLACK'S LAW DICTIONARY 1008 (6th ed. 1991). A surrogacy business is a business that facilitates the process of a woman becoming a surrogate mother and oversees the entirety of the surrogacy process.

3. 700 A.2d 453 (Pa. Super. Ct. 1997).

4. *Id.* at 460.

5. *See id.* at 455. For a definition of “surrogate mother,” see *supra* note 2.

becoming a father.⁶ Austin paid ICA for its services, and ICA brought Huddleston and Austin together to create a child.⁷

On November 24, 1993, Huddleston agreed, in writing, to be artificially inseminated with Austin's sperm and to give Austin sole custody of any child produced as a result of the insemination.⁸ In return, Austin agreed to pay all of Huddleston's medical expenses that were related to the pregnancy and not covered by her own medical insurance.⁹ Austin also agreed to pay Huddleston a "surrogate fee" of \$13,000 at the time of birth.¹⁰

As a result of this agreement, Huddleston was impregnated with Austin's sperm.¹¹ On December 8, 1994, Huddleston gave birth to a baby boy named Jonathan.¹² One day later, Austin and an ICA representative arrived at Huddleston's hospital room to take custody of the child.¹³ At this time, Huddleston gave Jonathan to his father, Austin.¹⁴

After taking custody of his newborn son, Austin returned to his residence in Bethlehem, Pennsylvania.¹⁵ It was there that Austin repeatedly abused his newborn, causing Jonathan to suffer head and brain injuries, including "shaken baby syndrome."¹⁶ As a result of these injuries, Jonathan was hospitalized at the age of one month.¹⁷ Shortly thereafter, on January 17, 1995, Jonathan died.¹⁸

On April 10, 1995, Huddleston filed wrongful death and survival actions against ICA.¹⁹ Huddleston based her actions on theories of negligence, breach

6. *Huddleston*, 700 A.2d at 455.

7. *Id.*

8. *Id.* The court noted that this written agreement, titled the "Surrogate Parenting Agreement," was drafted by Infertility Center of America ("ICA"). *Id.*

9. *Id.*

10. *Id.* The agreement provided that the fee would be prorated according to the number of days of pregnancy in the event of a miscarriage or a stillbirth. *Id.*

11. *Id.*

12. *Id.* at 455-56.

13. *Id.* at 456.

14. *Id.*

15. *Id.*

16. *Id.* Shaken baby syndrome, a condition in infants, is "caused by a violent shaking of the arms and shoulders that makes the brain whip back and forth in the skull, causing subdural hematomas and bleeding in the eyes." RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1187 (2d ed. 1997).

17. *Huddleston*, 700 A.2d at 456.

18. *Id.* "On August 7, 1995, Austin pled guilty to murder in the third degree, and to endangering the welfare of a child." *Id.* at 456 n.1.

19. *Id.* at 456. Huddleston originally filed the suit in the United States District Court for the Eastern District of Pennsylvania, but, upon agreement of the parties, the case was removed to state court. *Id.*

of fiduciary duty, negligent infliction of emotional distress, and fraud.²⁰ On October 2, 1995, ICA filed a demurrer, claiming that Huddleston failed to set forth a cause of action because no causal connection existed between the facts Huddleston alleged in her complaint and her alleged damages.²¹

In ruling on ICA's demurrer, the trial court determined, on its own initiative, that Huddleston did not have standing to bring the wrongful death action under Pennsylvania Consolidated Statutes Annotated Section 8301²² because she did not have a "family relation" with Jonathan.²³ Furthermore, the court held that Huddleston failed to state a cause of action because the risk that a child would be murdered by his biological father was not legally foreseeable.²⁴ Therefore, the court granted ICA's demurrer and dismissed all counts of Huddleston's complaint.²⁵

Huddleston appealed the trial court's decision to the Superior Court of Pennsylvania.²⁶ In her appeal, Huddleston claimed that the trial court erred in concluding it was not foreseeable that a father would abuse his biological child so badly that death would result.²⁷ ICA responded with three distinct arguments.²⁸ First, ICA argued it could not be liable for Jonathan's death because it had no affirmative duty to protect the participants in its surrogacy program.²⁹ Second, ICA argued, even if it did have a general duty to protect its participants from foreseeable harm, the risk that a sperm-donor father would abuse his child is not legally foreseeable.³⁰ Third, and finally, ICA argued that

20. *Id.*

21. *Id.* ICA did not challenge Huddleston's standing to bring the action. *Id.*

22. 42 PA. CONS. STAT. ANN. § 8301 (West 1998). Pennsylvania Consolidated Statutes Annotated Section 8301(b) provides, in pertinent part: "Except as provided in subsection (d), the right of action . . . shall exist only for the benefit of the spouse, children or parents of the deceased . . ." 42 PA. CONS. STAT. ANN. § 8301(b) (West 1998). Further, Pennsylvania Consolidated Statutes Annotated Section 8301(d) states that: "[i]f no person is eligible to recover damages under subsection (b), the personal representative of the deceased may bring an action to recover damages for reasonable hospital, nursing, medical, funeral expenses and expenses of administration necessitated by reason of injuries causing death." PA. CONS. STAT. ANN. § 8301(d) (West 1998).

23. *Huddleston*, 700 A.2d at 456.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 457.

28. *Id.*

29. *Id.*

30. *Id.*

it could not be liable because Austin's criminal act of murder was a superseding cause of Jonathan's death.³¹

After ruling that ICA had waived its right to object to Huddleston's standing to bring the action,³² the Superior Court of Pennsylvania addressed ICA's arguments.³³ First, the court looked at recent case law concerning the existence of an affirmative duty to protect participants in the surrogacy setting, and other special circumstances, and concluded that the "special relationship" between a surrogacy business and each of its participants and the child the surrogacy creates places an affirmative duty on the surrogacy business to protect the participants and the child from foreseeable risks.³⁴ Second, the court analyzed the meaning of "foreseeable" in the context of this affirmative duty and ruled that child abuse is a foreseeable risk of the surrogacy process.³⁵ Finally, because child abuse was foreseeable as a matter of law, the court ruled that a reasonable jury could find that Austin's criminal act was not a superseding cause of Jonathan's death.³⁶

After reaching these three conclusions, the court held that, because a "special relationship" existed between ICA and its client-participants, and because child abuse "is not completely unforeseeable in the surrogacy context," Huddleston had a prima facie case of negligence against ICA.³⁷ The court, therefore, reversed the trial court's dismissal of Huddleston's wrongful death and survival actions that were based on a theory of negligence.³⁸

31. *Id.*

32. *Id.* The court went on to hold that, even if ICA had not waived its right to object to Huddleston's standing to bring the action, the objection would fail because Huddleston had proper standing under Pennsylvania Consolidated Statutes Annotated Section 8301(d) because the evidence showed that she was Jonathan's "personal representative." *Id.* at 457 n.2.

33. *Id.* at 457-61.

34. *Id.* at 460 (noting that the surrogacy business operates "for the sole purpose of organizing and supervising the very delicate process of creating a child" and "reaps handsome profits from such endeavor").

35. *Id.*

36. *Id.* at 460-61.

37. *Id.* at 461.

38. *Id.* at 462. The court affirmed the trial court's dismissal of Huddleston's claims for negligent infliction of emotional distress, breach of fiduciary duty, and fraud. *Id.*

III. LEGAL BACKGROUND

A. *The Creation of an Affirmative Duty to Protect Others*

To sustain a negligence action, a plaintiff must prove that a defendant had a legal duty to act for the benefit of or protect the safety of the plaintiff.³⁹ Whether such a duty exists is usually a question of law to be decided by the court.⁴⁰ Courts across the country have attempted to reduce the question whether a duty exists to a standard that can be applied to the facts of any case.⁴¹ According to Pennsylvania courts, the existence of a duty “‘is predicated on the relationship existing between the parties at the relevant time,’”⁴² so it can be said that, based on the relationship, the defendant’s actions “‘are unreasonable or expose the plaintiff to an elevated risk of foreseeable harm.’”⁴³ Similarly, in Missouri, the courts have stated that the existence of a duty depends on whether “‘the parties stood in such a relationship to one another that the law imposes an obligation on the defendant to act reasonably for the protection of the plaintiff.’”⁴⁴ In other words, a court will determine that a defendant had a duty

39. See *Griggs v. Bic Corp.*, 981 F.2d 1429, 1434 (3d Cir. 1992); *Johnson v. State*, 553 N.W.2d 40, 49 (Minn. 1996); *Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151, 155 (Mo. 2000); *Estate of Strever v. Cline*, 924 P.2d 666, 669 (Mont. 1996); *J.S. v. R.T.H.*, 693 A.2d 1191, 1193 (N.J. Super. Ct. App. Div. 1997), *aff'd*, 714 A.2d 924 (N.J. 1998); *Clayton v. McCullough*, 670 A.2d 710, 712 (Pa. Super. Ct. 1996).

40. *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1366 (3d Cir. 1993); *Markovich v. Bell Helicopter Textron, Inc.*, 805 F. Supp. 1231, 1236 (E.D. Pa. 1992), *aff'd*, 977 F.2d 568 (3d Cir. 1992); *Hosein v. Checker Taxi Co.*, 419 N.E.2d 568, 571 (Ill. App. Ct. 1981); *Tenney v. Atl. Assocs.*, 594 N.W.2d 11, 15 (Iowa 1999); *Williams v. Cunningham Drug Stores, Inc.*, 418 N.W.2d 381, 382 (Mich. 1988); *Johnson*, 553 N.W.2d at 49; *Stitt v. Raytown Sports Ass'n*, 961 S.W.2d 927, 930 (Mo. Ct. App. 1998).

41. See *Kleinknecht*, 989 F.2d at 1366; *Bullock v. Tamiami Trail Tours, Inc.*, 266 F.2d 326, 331 (5th Cir. 1959); *Miller v. Group Voyagers, Inc.*, 912 F. Supp. 164, 166-67 (E.D. Pa. 1996); *Hosein*, 419 N.E.2d at 571; *Gill v. Chicago Park Dist.*, 407 N.E.2d 671, 673 (Ill. App. Ct. 1980); *Tenney*, 594 N.W.2d at 17; *Williams*, 418 N.W.2d at 384; *Rothwell v. W. Cent. Elec. Coop., Inc.*, 845 S.W.2d 42, 43 (Mo. Ct. App. 1992); *Estate of Strever*, 924 P.2d at 670; *J.S.*, 693 A.2d at 1193.

42. *Kleinknecht*, 989 F.2d at 1366 (quoting *Morena v. S. Hills Health Sys.*, 462 A.2d 680, 684 (Pa. 1983)).

43. *Miller*, 912 F. Supp. at 167 (quoting *Bratner v. Black & Decker Mfg. Co.*, 831 F. Supp. 460, 462 (W.D. Pa. 1993)); see also *Kleinknecht*, 989 F.2d at 1366-70.

44. *Rothwell*, 845 S.W.2d at 43 (quoting *Gouge v. Cent. Ill. Pub. Serv. Co.*, 582 N.E.2d 108, 112 (Ill. 1991)); see *Parra v. Bldg. Erection Servs.*, 982 S.W.2d 278, 283 (Mo. Ct. App. 1998).

toward a plaintiff when “the interest of the plaintiff which has suffered invasion is entitled to legal protection at the hands of the defendant.”⁴⁵

In any case, a court’s decision to impose a duty is essentially “a question of fairness and policy.”⁴⁶ This public policy question has been boiled down to a weighing of “a calculus of factors,”⁴⁷ including the “relationship of the parties, the nature of the risk, and the public interest in the proposed solution.”⁴⁸ Still, duty is “only a word with which [a court states its] conclusion that there is or is not to be liability.”⁴⁹ The concept of duty is not “sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.”⁵⁰

As a general rule, a court will not consider it to be in the best interest of public policy to impose a duty on a defendant to take affirmative action to protect another person from the actions of a third person.⁵¹ Simply having

45. *Hyde v. City of Columbia*, 637 S.W.2d 251, 257 (Mo. Ct. App. 1982) (quoting WILLIAM L. PROSSER, LAW OF TORTS §§ 37, 53 (4th ed. 1971)), *cert. denied*, *Tribune Publ’g Co. v. Hyde*, 459 U.S. 1226 (1983).

46. *J.S.*, 693 A.2d at 1193 (quoting *Snyder v. Am. Ass’n of Blood Banks*, 676 A.2d 1036, 1048 (N.J. 1996)); *see In re TMI*, 67 F.3d 1103, 1117 (3d Cir. 1995), *aff’d*, 67 F.3d 1119 (3d Cir. 1995), *cert. denied*, *Metro. Edison Co. v. Dodson*, 517 U.S. 1163 (1996); *Stitt v. Raytown Sports Ass’n*, 961 S.W.2d 927, 930 (Mo. Ct. App. 1998); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 358 (5th ed. 1984).

47. *Hoover’s Dairy, Inc. v. Mid-Am. Dairymen, Inc.*, 700 S.W.2d 426, 432 (Mo. Ct. App. 1985).

48. *Clayton v. McCullough*, 670 A.2d 710, 712 (Pa. Super. Ct. 1996) (quoting *Cruet v. Certain-Teed Corp.*, 639 A.2d 478, 479 (Pa. Super. Ct. 1994)); *see Hoover’s Dairy, Inc.*, 700 S.W.2d at 432.

49. *Troxel v. A.I. DuPont Inst.*, 675 A.2d 314, 319 (Pa. Super. Ct. 1996) (quoting *Gardner v. Consol. Rail Corp.*, 573 A.2d 1016, 1020 (Pa. 1990)). The court went on to state:

In the decision whether or not there is a duty, many factors interplay: The hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, always keeping in mind that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.

Id. (internal quotations omitted).

50. *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3d Cir. 1979) (quoting WILLIAM L. PROSSER, LAW OF TORTS 333 (West Publ’g Co. 3d ed. 1964)); KEETON ET AL., *supra* note 46, § 53, at 358.

51. *See Gill v. Chicago Park Dist.*, 407 N.E.2d 671, 673 (Ill. App. Ct. 1980); *Tenney v. Atl. Assocs.*, 594 N.W.2d 11, 15 (Iowa 1999); *Williams v. Cunningham Drug Stores, Inc.*, 418 N.W.2d 381, 383 (Mich. 1988); *Ford v. Monroe*, 559 S.W.2d 759, 762 (<https://scholarship.law.missouri.edu/mlr/vol67/iss2/10>)

knowledge of a dangerous situation will not give rise to a duty to act or warn—even if a defendant had the ability to intervene and prevent the injury.⁵²

There are a few exceptions to this general rule, and courts will impose an affirmative duty on a defendant to protect another person in a few special circumstances.⁵³ One such circumstance is the “special relationship” exception.⁵⁴ According to this exception, a defendant has a duty to protect a person from injury at the hands of a third person when the defendant has a “special relationship” with the injured person.⁵⁵ These special relationships typically involve a particularly vulnerable plaintiff who entrusts himself or herself to the protection of a defendant, and, because the plaintiff has given up his or her ability to protect himself or herself, he or she relies on the defendant to provide safety.⁵⁶ These relationships also “often involve an existing or potential economic advantage to the defendant.”⁵⁷

Prior to *Huddleston*,⁵⁸ the “special relationship” exception was applied by only one court in the context of a surrogacy business.⁵⁹ In *Stiver v. Parker*,⁶⁰ the United States Court of Appeals for the Sixth Circuit ruled that the “special relationship” between a surrogacy business and its participants gave the surrogacy business an affirmative duty to protect the participants.⁶¹ The plaintiff-surrogate mother in *Stiver* claimed that she contracted a disease from a sperm donor’s semen.⁶² As a result, the disease infected the child during the pregnancy, and the child was born with severe birth defects.⁶³ In imposing an

(Mo. Ct. App. 1977); *Clayton*, 670 A.2d at 712; KEETON ET AL., *supra* note 46, § 56, at 385.

52. *Snyder v. ISC Alloys, Ltd.*, 772 F. Supp. 244, 253 (W.D. Pa. 1991); *see Tenney*, 594 N.W.2d at 15; *Johnson v. State*, 553 N.W.2d 40, 49 (Minn. 1996); *Clayton*, 670 A.2d at 712.

53. *See* KEETON ET AL., *supra* note 46, § 56, at 373-75, 383, 385.

54. *See Williams*, 418 N.W.2d at 383; *Keenan v. Miriam Found.*, 784 S.W.2d 298, 302 (Mo. Ct. App. 1990); *Reed v. Hercules Constr. Co.*, 693 S.W.2d 280, 282 (Mo. Ct. App. 1985); *T.A. v. Allen*, 669 A.2d 360, 362-63 (Pa. Super. Ct. 1995); RESTATEMENT (SECOND) OF TORTS § 314A (1965); KEETON ET AL., *supra* note 46, § 56, at 374.

55. *See, e.g.*, KEETON ET AL., *supra* note 46, § 56, at 374.

56. *See Keenan*, 784 S.W.2d at 302; *Reed*, 693 S.W.2d at 282; KEETON ET AL., *supra* note 46, § 56, at 374. Examples of these relationships include common carrier-passenger, innkeeper-guest, business invitor-invitee, and custodian-ward relationships. *See* RESTATEMENT (SECOND) OF TORTS § 314A (1965).

57. KEETON ET AL., *supra* note 46, § 56, at 374.

58. *Huddleston v. Infertility Ctr. of Am.*, 700 A.2d 453 (Pa. Super. Ct. 1997).

59. *See Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992).

60. 975 F.2d 261 (6th Cir. 1992).

61. *Id.* at 268.

62. *Id.* at 264.

63. *Id.* at 263.

affirmative duty on the surrogacy business, the court found that: (1) the surrogacy business expected to profit from its relationship with participants in the program; (2) the participants in the program had given up some control over their safety; and (3) the surrogacy business had undertaken a special task that required great care to prevent harm to the participants.⁶⁴ For these reasons, the court held that the surrogacy business had a “special relationship” with its participants, and, because of this relationship, the business “owed a duty to design and administer a program to protect” the surrogate mother, the child, and the contracting father⁶⁵ “from foreseeable harm caused by the surrogacy undertaking.”⁶⁶

B. *The Scope of an Affirmative Duty*

The determination that a defendant owes an affirmative duty to a plaintiff defines the class of persons to whom the duty extends, but this is only half of the duty question.⁶⁷ The other half is defining the nature or scope of the duty required of the defendant.⁶⁸ This question—the general standard of care, or scope of duty, required of a defendant—is also a matter of law for the court to decide.⁶⁹

As a general rule, the scope of a defendant’s duty is limited to the foreseeable consequences of his or her actions or omissions.⁷⁰ A defendant does not have a duty to prevent “consequences which no reasonable man would expect to follow from his conduct.”⁷¹ If a defendant “could not reasonably

64. *Id.* at 268, 270-71. The court also stated its policy concern that “surrogate arrangements for the transfer of babies present significant dangers for society and therefore require careful regulation and control through the development of the common law of negligence.” *Id.* at 269.

65. *Id.* at 268.

66. *Id.* at 272.

67. *See* Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1369 (3d Cir. 1993).

68. *Id.*

69. *See* Williams v. Cunningham Drug Stores, Inc., 418 N.W.2d 381, 383 (Mich. 1988); Dudley v. Offender Aid & Restoration of Richmond, Inc., 401 S.E.2d 878, 883 (Va. 1991).

70. *See* Miller v. Group Voyagers, Inc., 912 F. Supp. 164, 167 (E.D. Pa. 1996); Rothwell v. W. Cent. Elec. Coop., Inc., 845 S.W.2d 42, 44 (Mo. Ct. App. 1992); Troxel v. A.I. DuPont Inst., 675 A.2d 314, 321 (Pa. Super. Ct. 1996); KEETON ET AL., *supra* note 46, § 43, at 281.

71. Parsons v. Smithey, 504 P.2d 1272, 1277 (Ariz. 1973); *see* Tenney v. Atl. Assocs., 594 N.W.2d 11, 17 (Iowa 1999); Rothwell, 845 S.W.2d at 44; Danielenko v. Kinney Rent A Car, Inc., 441 N.E.2d 1073, 1075 (N.Y. 1982); Brennen v. City of Eugene, 591 P.2d 719, 722 (Or. 1979); KEETON ET AL., *supra* note 46, § 56, at 385.

foresee any injury as the result of his act, or if his conduct was reasonable in the light of what he could anticipate,” the defendant does not have a legal duty to prevent the harm that occurs as a result of his acts or omissions.⁷² Even if hindsight makes it clear that greater precaution could have been used to protect a plaintiff from harm, a defendant is not required to use the increased care if the injury was not foreseeable at the time the defendant acted or failed to act.⁷³ Simply put, the scope of a defendant’s duty, even if he or she has an affirmative duty to protect a plaintiff from harm, does not extend to protecting against dangers he or she “neither knows of or has reason to foresee.”⁷⁴

The concept of foreseeability has special importance in defining the scope of a defendant’s duty when the harm is a result of criminal or intentional acts by a third person. Generally, the scope of a defendant’s duty does not extend to protecting a plaintiff from an intervening criminal or intentional act.⁷⁵ This rule exists because there are usually fewer reasons to anticipate criminal or intentional acts by a third person than there are to anticipate negligent acts by a third person.⁷⁶ However, if the criminal or intentional intervening act “is one which in ordinary human experience is reasonably to be anticipated, or one which the defendant has reason to anticipate under the particular circumstances,” the scope of a defendant’s duty extends to protecting a plaintiff from such criminal or intentional acts.⁷⁷ Therefore, if a defendant has an affirmative duty to protect a plaintiff from harm, the scope of that duty includes protecting the plaintiff from foreseeable intervening criminal or intentional acts but does not include protecting the plaintiff from criminal or intentional acts that are not foreseeable.⁷⁸

The standard used to define what is foreseeable in the context of determining the scope of a defendant’s duty to prevent intervening criminal or intentional acts varies slightly from state to state. In Pennsylvania, the degree of foreseeability required to define a defendant’s scope of duty is “not dependant

72. *Danielenko*, 441 N.E.2d at 1075 (quoting PROSSER, *supra* note 45, § 43, at 250).

73. *Id.*

74. See KEETON ET AL., *supra* note 46, § 56, at 385.

75. See *Gill v. Chicago Park Dist.*, 407 N.E.2d 671, 673 (Ill. App. Ct. 1980); *Brogan Cadillac-Oldsmobile Corp. v. Cent. Jersey Bank & Trust Co.*, 443 A.2d 1108, 1110 (N.J. Super. Ct. Law Div. 1981), *aff’d*, 464 A.2d 1141 (N.J. Super. Ct. App. Div. 1983); KEETON ET AL., *supra* note 46, § 44, at 313.

76. See *Estate of Strever v. Cline*, 924 P.2d 666, 672-73 (Mont. 1996); KEETON ET AL., *supra* note 46, § 33, at 201.

77. KEETON ET AL., *supra* note 46, § 44, at 303; see *Gill*, 407 N.E.2d at 673; *Brogan Cadillac-Oldsmobile Corp.*, 443 A.2d at 1110.

78. See KEETON ET AL., *supra* note 46, § 44, at 303; see *Gill*, 407 N.E.2d at 673; *Brogan Cadillac-Oldsmobile Corp.*, 443 A.2d at 1110.

on the foreseeability of a specific event.”⁷⁹ Rather, in the context of defining a defendant’s scope of duty, foreseeability means the “likelihood of the occurrence of a general type of risk.”⁸⁰ Under this approach, a court only can declare as a matter of law that a defendant’s scope of duty does not extend to protecting a plaintiff from the harm that occurred “when even the general likelihood of some broadly definable class of events, of which the . . . plaintiff’s injury is a subclass, is unforeseeable.”⁸¹ So, in Pennsylvania, the scope of a defendant’s affirmative duty to protect a plaintiff includes a duty to protect the plaintiff from harm caused by criminal or intentional acts of a third party, even if the kind of harm the third party causes is only generally foreseeable.⁸²

In Missouri, the courts require a slightly higher level of foreseeability.⁸³ According to Missouri law, the test for foreseeable harm, and the standard for defining the scope of a defendant’s duty to take action to prevent the harm, is whether the facts of the situation show “some probability or likelihood of harm sufficiently serious that ordinary persons would take precautions to avoid it.”⁸⁴ Therefore, in defining the scope of a defendant’s duty to prevent criminal or intentional acts by a third party, the focus is on the defendant’s actual or constructive knowledge of the danger of the situation.⁸⁵ The scope of a defendant’s duty in Missouri extends to prevent harm caused by criminal or intentional conduct of a third party if the defendant “should realize through

79. *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1360 (3d Cir. 1993).

80. *Id.* (quoting *Suchomajcz v. Hummel Chem. Co.*, 524 F.2d 19, 28 n.8 (3d Cir. 1975)); see *Miller v. Group Voyagers, Inc.*, 912 F. Supp. 164, 167 (E.D. Pa. 1996); *Troxel v. A.I. DuPont Inst.*, 675 A.2d 314, 321-22 (Pa. Super. Ct. 1996).

81. *Kleinknecht*, 989 F.2d at 1369; see *Miller*, 912 F. Supp. at 167; *Troxel*, 675 A.2d at 321-22.

82. See *Miller*, 912 F. Supp. at 167. In addition to this test of foreseeability for determining a defendant’s scope of duty, Pennsylvania courts will not impose liability on a defendant if a jury finds his or her actions to be a reasonable response to his or her duty in light of the foreseeable risk, even though the action might not have prevented the harm to the plaintiff. See *Kleinknecht*, 989 F.2d at 1369-70. This determination is made through the classic risk-utility analysis of negligence law. See *id.*

83. See *Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151, 156 (Mo. 2000); *Scheibel v. Hillis*, 531 S.W.2d 285, 288 (Mo. 1976); *Berga v. Archway Kitchen & Bath, Inc.*, 926 S.W.2d 476, 479 (Mo. Ct. App. 1996); *Smith v. Archbishop of St. Louis*, 632 S.W.2d 516, 521 (Mo. Ct. App. 1982); *Irby v. St. Louis County Cab Co.*, 560 S.W.2d 392, 394-95 (Mo. Ct. App. 1977).

84. *Lopez*, 26 S.W.3d at 156; see *Scheibel*, 531 S.W.2d at 288; *Berga*, 926 S.W.2d at 479; *Smith*, 632 S.W.2d at 521; *Irby*, 560 S.W.2d at 394-95.

85. See *Pierce v. Platte-Clay Elec. Coop., Inc.*, 769 S.W.2d 769, 776 (Mo. 1989); *Hoover’s Dairy, Inc. v. Mid-Am. Dairymen, Inc.*, 700 S.W.2d 426, 433 (Mo. 1985).
<https://scholarship.law.missouri.edu/mlr/vol67/iss2/10>

special facts within his knowledge . . . that an act or omission exposes someone to an unreasonable risk of harm through the conduct of another.”⁸⁶

Even though the courts in Pennsylvania and Missouri follow their own distinct standards for determining a defendant’s scope of duty toward a plaintiff, this determination, just as the determination whether a defendant owes any duty at all to a plaintiff, is largely based on principles of policy and fairness.⁸⁷ The courts weigh a variety of factors in making this policy decision, including “the relationship involved, the nature of the risk, and the public interest in the proposed solution.”⁸⁸ However, because social conditions and what is deemed to be in the interest of public policy are always evolving, a court may weigh these factors differently at different times.⁸⁹ In the end, a court will define the scope of a defendant’s duty to a plaintiff in accordance with the “mores of the community” at the time.⁹⁰

Because the definition of what duty, if any, a defendant owes a plaintiff is so reliant on policy decisions, it can be difficult to predict a court’s determination of duty on a case-by-case basis.⁹¹ Predictions are made a little easier, however, by looking at cases “involving fact situations as similar as one can find” to the facts in the instant case.⁹² As previously mentioned, the United States Court of Appeals for the Sixth Circuit held that a surrogacy business has an affirmative duty to protect its participants.⁹³ The court defined the scope of this duty as a duty to protect the surrogate mother, the child, and the contracting father “from foreseeable harm caused by the surrogacy undertaking.”⁹⁴ Under the facts of the case, the court ruled that one of these foreseeable harms was the risk that a surrogate mother and her child would contract a sexually transmitted disease

86. *Irby*, 560 S.W.2d at 395; *see Hyde v. City of Columbia*, 637 S.W.2d 251, 257 (Mo. Ct. App. 1982).

87. *Meadows v. Friedman R.R. Salvage Warehouse*, 655 S.W.2d 718, 721 (Mo. Ct. App. 1983); *see Bradshaw v. Rawlings*, 612 F.2d 135, 140 (3d Cir. 1979); *Poskus v. Lombardo’s of Randolph, Inc.*, 670 N.E.2d 383, 385-86 (Mass. 1996); *Keenan v. Miriam Found.*, 784 S.W.2d 298, 302 (Mo. Ct. App. 1990); KEETON ET AL., *supra* note 46, § 54, at 359.

88. *Meadows*, 655 S.W.2d at 721; KEETON ET AL., *supra* note 46, § 44, at 303.

89. *See* KEETON ET AL., *supra* note 46, § 44, at 303.

90. *See Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1372 (3d Cir. 1993); KEETON ET AL., *supra* note 46, § 44, at 303.

91. *See* KEETON ET AL., *supra* note 46, § 42, at 274.

92. *See* KEETON ET AL., *supra* note 46, § 42, at 274.

93. *Stiver v. Parker*, 975 F.2d 261, 268 (6th Cir. 1992).

94. *See id.* at 268, 272.

from the sperm donor.⁹⁵ As a result, the surrogacy business had a duty to protect the mother and child from this risk.⁹⁶

C. *An Intervening Criminal Act's Effect on Causation*

In addition to proving that a defendant had the legal duty to prevent an injury that occurred, a plaintiff in a negligence action also must show that the defendant's negligence was the "proximate cause" of the harm to the plaintiff.⁹⁷ Although courts use slightly different terminology in formulating the test for proximate cause, generally, in Pennsylvania and Missouri, a negligent act is the proximate cause of an injury if the injury was the "natural and probable consequence"⁹⁸ of the negligent act or if the negligent act was a "substantial factor"⁹⁹ in bringing about the injury.¹⁰⁰ Under these standards, when a criminal act by a third party injures a plaintiff, a prior negligent act is usually not considered to be the proximate cause of the injuries.¹⁰¹ This is not the case, however, if the criminal act was a reasonably foreseeable result of the original negligent act.¹⁰² If the person who performed the original negligent act "should have reasonably foreseen and anticipated the intervening [criminal] act," his or her negligent act remains the proximate cause of the injury.¹⁰³ Therefore, just as in the determination of duty, foreseeability of the injury is key to determining proximate cause.¹⁰⁴

Even though the determination of duty and proximate cause both involve the issue of foreseeability, a few major distinctions exist. First, whether a defendant's negligent act is the proximate cause of a plaintiff's injury is a

95. *Id.*

96. *Id.*

97. See *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1366 (3d Cir. 1993); *Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151, 155 (Mo. 2000); *Buck v. Union Elec. Co.*, 887 S.W.2d 430, 433 (Mo. Ct. App. 1994); *Dix v. Motor Mkt. Inc.*, 540 S.W.2d 927, 932 (Mo. Ct. App. 1976).

98. *Krause v. U.S. Truck Co.*, 787 S.W.2d 708, 710 (Mo. 1990).

99. *Powell v. Drummheller*, 653 A.2d 619, 622 (Pa. 1995).

100. See *Krause*, 787 S.W.2d at 710; *Buck*, 887 S.W.2d at 434; *St. John Bank & Trust Co. v. City of St. John*, 679 S.W.2d 399, 401 (Mo. Ct. App. 1984); *Powell*, 653 A.2d at 622.

101. See *Ford v. Monroe*, 559 S.W.2d 759, 762 (Mo. Ct. App. 1977); *Powell*, 653 A.2d at 624.

102. See *Scheibel v. Hillis*, 531 S.W.2d 285, 288 (Mo. 1976); *Ford*, 559 S.W.2d at 762; *Dix*, 540 S.W.2d at 933; *Powell*, 653 A.2d at 624.

103. *Dix*, 540 S.W.2d at 933; see *Scheibel*, 531 S.W.2d at 288; *Ford*, 559 S.W.2d at 762; *Powell*, 653 A.2d at 624.

104. See *Krause*, 787 S.W.2d at 710; *Powell*, 653 A.2d at 624.

question based specifically on the facts of each case, and, therefore, it is usually decided by the jury.¹⁰⁵ Second, in the context of determining duty, foreseeability is determined by whether the injury was foreseeable at the time of the negligent act, but, in deciding whether a negligent act was the proximate cause of a plaintiff's injury, the judge instructs the jury to use hindsight.¹⁰⁶ In using hindsight, the jury views the negligent act from the time of the injury and, looking back, determines if the injury was a foreseeable result of the negligent act.¹⁰⁷ Finally, in Pennsylvania, the level of foreseeability required to show proximate cause is much more specific than the general foreseeability required to define the scope of a defendant's duty.¹⁰⁸

IV. INSTANT DECISION

In *Huddleston*, the Superior Court of Pennsylvania addressed whether a surrogacy business has an affirmative duty to protect the participants of its program, and, if it does, whether the scope of that duty extends to a duty to take steps to prevent the child created in the surrogacy process from abuse at the hands of his or her biological father.¹⁰⁹ The court began by stating that the question whether a defendant owes a duty to a plaintiff is a question of law and public policy.¹¹⁰ Then, because of the lack of binding precedent regarding the question of duty in the surrogacy setting, the court examined the Sixth Circuit's opinion in *Stiver v. Parker*.¹¹¹ *Stiver* held that, based on the "special relationship" between a surrogacy business and its participants, a surrogacy business has an affirmative duty to protect its participants from foreseeable risks and "infection from a sexually transmitted disease was a foreseeable risk of the surrogacy process."¹¹²

105. See *Krause*, 787 S.W.2d at 710; *Powell*, 653 A.2d at 624.

106. See *Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151, 156 (Mo. 2000); *St. John Bank & Trust Co. v. City of St. John*, 679 S.W.2d 399, 401 (Mo. Ct. App. 1984).

107. See *Lopez*, 26 S.W.3d at 156; *St. John Bank & Trust Co.*, 679 S.W.2d at 401.

108. See *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1369 (3d Cir. 1993). The court noted that the "type of foreseeability that determines a duty of care, as opposed to proximate cause, is not dependant on the foreseeability of a specific event." *Id.* (emphasis added).

109. *Huddleston v. Infertility Ctr. of Am.*, 700 A.2d 453, 457 (Pa. Super. Ct. 1997).

110. *Id.* at 457-58.

111. *Id.* at 457.

112. *Id.*; see *Stiver v. Parker*, 975 F.2d 261, 268 (6th Cir. 1992).

The court then considered *Kleinknecht v. Gettysburg College*, a Third Circuit case, applying Pennsylvania law.¹¹³ In *Kleinknecht*, the United States Court of Appeals for the Third Circuit held that a college owed an affirmative duty to protect an intercollegiate athlete from foreseeable risks “due to the ‘special relationship’ that was created when the college recruited [the athlete] to participate in an [sic] sport which it organized and supervised, and from which it reaped many benefits.”¹¹⁴ The *Kleinknecht* court went on to hold that a medical emergency occurring on a lacrosse field was a reasonably foreseeable risk.¹¹⁵

Using *Kleinknecht* and *Stiver* as guidance,¹¹⁶ the *Huddleston* court held that, because a surrogacy business organizes and supervises “the very delicate process of creating a child,” and because the business “reaps handsome profits” from doing so, a “special relationship” exists between a surrogacy business and each of its participants, and—“most especially”—between a surrogacy business and the child the surrogacy undertaking creates.¹¹⁷ Due to this special relationship, the court found that the surrogacy business had an affirmative duty to protect the participants in its program and to protect the child the surrogacy process creates from the foreseeable risks of the surrogacy process.¹¹⁸

Next, the court turned to whether a biological father abusing his child was a foreseeable risk of the surrogacy process.¹¹⁹ First, the court explained that, in the context of duty, a risk need only be “generally foreseeable,” rather than specifically foreseeable, for a duty to protect against that risk to come into existence.¹²⁰ The court noted that the *Stiver* court specifically stated that child abuse is “arguably foreseeable in a surrogacy undertaking.”¹²¹ The court also pointed out that many other states have statutes requiring participants in a surrogacy agreement to undergo psychological testing to ensure that a child

113. *Huddleston*, 700 A.2d at 459; see *Kleinknecht*, 989 F.2d at 1360.

114. *Huddleston*, 700 A.2d at 459 (citing *Kleinknecht*, 989 F.2d at 1369).

115. *Id.* (citing *Kleinknecht*, 989 F.2d at 1370).

116. Although the court considered the reasoning and holdings of *Stiver* and *Kleinknecht* persuasive, the court did not explain how it used these cases to reach its decision in the instant case. *Id.* at 460. The court merely recited the facts and findings of *Stiver* and *Kleinknecht*, and then announced its holding on the existence of an affirmative duty. *Id.* at 458-60.

117. *Id.* at 460.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* In a long list of possible negative results of surrogacy, the *Stiver* court stated that child abuse may occur. See *Stiver v. Parker*, 975 F.2d 261, 269 (6th Cir. 1992).

created through surrogacy will be placed with a competent parent.¹²² For these reasons, the court found that child abuse is a foreseeable risk of the surrogacy process.¹²³

After ruling on the duty issues, the Superior Court of Pennsylvania addressed whether the father's criminal acts of child abuse and murder were a "superseding cause" of the child's death, and, therefore, whether the alleged negligence of the surrogacy business could be found to be the proximate cause of the child's death.¹²⁴ In determining this issue, the court stated that the question of proximate cause should be decided by a jury, unless the negligent act is clearly not the proximate cause of the injury.¹²⁵ The court also found that criminal conduct does not automatically sever causation from an original negligent act and that an intervening force only severs causation if the intervening conduct was "so extraordinary as not to have been reasonably foreseeable."¹²⁶ The court then stated that it already had found that the child abuse was "not unforeseeable" in the surrogacy context.¹²⁷ Therefore, the court held that a jury should determine whether it was foreseeable that the contracting father would abuse his child so severely as to cause the child's death.¹²⁸

V. COMMENT

In *Huddleston*, the Superior Court of Pennsylvania made a questionable policy decision that sets a dangerous precedent and, in at least one instance, the court ignored the law. The first holding the court made was that ICA, a surrogacy business, had an affirmative duty to protect its participants—here the surrogate mother Huddleston, biological father Austin, and the newly created child Jonathan—from foreseeable harm.¹²⁹ This was the right decision. An

122. *Huddleston*, 700 A.2d at 460 (citing, as examples, N.H. REV. STAT. ANN. § 168-B:18(II)(a) (1990 & Supp. 1994) and VA. CODE ANN. § 20-160(B)(7) (Michie 1991)).

123. *Id.* In making this decision, the court actually stated that a jury could conclude that child abuse was a foreseeable risk of the surrogacy undertaking. *Id.* By doing this, however, the practical legal effect was to extend the defendant's scope of duty to include protecting against child abuse as a matter of law, and the jury was left to consider whether the defendant took reasonable steps to prevent the risk based on the probability and gravity of the risk. *But see supra* notes 71-74 and accompanying text.

124. *Huddleston*, 700 A.2d at 460.

125. *Id.*

126. *Id.* (quoting *Powell v. Drumheller*, 653 A.2d 619, 623 (Pa. 1995)).

127. *Id.*

128. *Id.*

129. *Id.*

affirmative duty to protect others arises when a defendant has a “special relationship” with a plaintiff.¹³⁰ The classic “special relationship” involves a plaintiff who has given up his or her ability to protect himself or herself from certain risks because he or she has entrusted some aspect of his or her safety to a defendant who expects to benefit from the plaintiff doing so.¹³¹

The relationship a surrogacy business has with its participants and the relationship a surrogacy business has with the child it creates both fit the “special relationship” definition perfectly. Outside of the surrogacy context, when a woman and a man make the decision to create a child, both participants usually make a personal decision to enter the relationship based on their knowledge of the other person. Because of this, they assume the responsibility of and have the ability to protect themselves, as well as the child they create, from risks associated with the child-bearing process. When a woman and man enter into a surrogacy agreement with the help of a surrogacy business, they no longer have the same level of control over their decision. Each party relies on the surrogacy business to use its medical expertise and its knowledge of the participants to ensure that the surrogacy process will be as safe as possible for everyone involved. In the present case, ICA welcomed this trust and, indeed, profited from it. Because of this, ICA had a “special relationship” with its participants and with the child created as a result of ICA’s surrogacy service. The *Huddleston* court was correct, therefore, in holding that ICA had an affirmative duty to protect Huddleston, Austin, and Jonathan from foreseeable risks associated with the surrogacy process.¹³²

The court erred, however, in determining that the scope of ICA’s affirmative duty should extend to protecting the child created by the surrogacy process from criminal abuse and murder at the hands of his biological father.¹³³ Under the negligence laws of both Pennsylvania and Missouri, if a defendant has an affirmative duty, the duty only extends to protect another person from the “foreseeable” consequences of his or her acts or omissions.¹³⁴ Therefore, if a defendant has a “special relationship” with a plaintiff, the scope of his or her affirmative duty only extends to protecting the plaintiff from foreseeable criminal acts.¹³⁵

130. See *supra* note 55 and accompanying text.

131. See *supra* notes 56-57 and accompanying text.

132. See *Huddleston*, 700 A.2d at 460.

133. See *id.*

134. See *Miller v. Group Voyagers, Inc.*, 912 F. Supp. 164, 167 (E.D. Pa. 1996); *Rothwell v. W. Cent. Elec. Coop., Inc.*, 845 S.W.2d 42, 44 (Mo. Ct. App. 1992); *Troxel v. A.I. DuPont Inst.*, 675 A.2d 314, 321 (Pa. Super. Ct. 1996); *KEETON ET AL.*, *supra* note 46, § 43, at 281; see also *supra* notes 70-74 and accompanying text.

135. See *supra* notes 74-75 and accompanying text.

Under Pennsylvania law, whether Austin's criminal acts were "foreseeable," as the term is used in the context of defining the scope of a defendant's duty, is a closer question than it is in Missouri. In Pennsylvania, foreseeability, in the context of defining the scope of duty, means the "likelihood of the occurrence of a general type of risk."¹³⁶ Under this approach, if a defendant has an affirmative duty, the scope of that duty extends to taking steps to protect against every "broadly definable class" of risks that are generally likely in the circumstances.¹³⁷ Under the facts of the present case, because child abuse is an unfortunate reality in today's society,¹³⁸ it is possible that intentional injury or harm to a child placed in the care of his biological father, is a general risk of the surrogacy process. Following a literal reading of the Pennsylvania standard, Austin's abuse of Jonathan could be deemed "foreseeable," and, therefore, it is arguable that the scope of ICA's affirmative duty extended to taking steps to protect Jonathan from Austin's abuse.¹³⁹

Under Missouri law, it is much less likely that Austin's criminal abuse and murder of Jonathan would be considered "foreseeable." In Missouri, a criminal act is only foreseeable if a defendant "should realize through special facts within his knowledge"¹⁴⁰ that there is "some probability or likelihood of harm sufficiently serious that ordinary persons would take precautions to avoid it."¹⁴¹ Under the facts of *Huddleston*, an ordinary person in ICA's position probably would not have taken precautions to prevent Austin from abusing Jonathan. Even though biological parents occasionally do abuse their children and, even though child abuse is an extremely serious risk, American law, except in rare circumstances, still gives biological parents the supreme responsibility and control over their children's welfare.¹⁴² The fact that American law usually gives

136. *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1369 (3d Cir. 1993) (quoting *Suchomajcz v. Hummel Chem. Co.*, 524 F.2d 19, 28 n.8 (3d Cir. 1975)); see *supra* text accompanying note 79.

137. *Kleinknecht*, 989 F.2d at 1369; see *supra* text accompanying notes 76-77.

138. *Huddleston*, 700 A.2d at 460.

139. As discussed below, however, when public policy considerations are included in the evaluation, even under the Pennsylvania law of negligence, ICA's duty should not extend to protect Jonathan from Austin's abuse.

140. *Irby v. St. Louis County Cab Co.*, 560 S.W.2d 392, 394-95 (Mo. Ct. App. 1977); see *Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151, 156 (Mo. 2000).

141. *Lopez*, 26 S.W.3d at 156; see *Irby*, 560 S.W.2d at 394-95; see also *supra* text accompanying notes 83-85.

142. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (stating, as a cardinal rule, that the "custody, care, and nurture of the child reside first in the parents"); see also *Lopez v. Martinez*, 102 Cal. Rptr. 2d 71, 76 (Ct. App. 2000); *Santi v. Santi*, 633 N.W.2d 312, 318 (Iowa 2001) (stating that "the parenting right is a fundamental liberty interest that is protected against unwarranted state

biological parents so much independence in providing for the safety and welfare of their children is clear proof that the risk of a biological parent abusing his or her child is not sufficiently likely, without special knowledge of the parent's violent propensities, that an ordinary person would take precautions before entrusting a child to the care of his or her biological father. In this case, the court did not suggest that ICA had any special knowledge of Austin's propensities for abuse, and it failed to give any other reason ICA should have been aware of the dangers of placing Jonathan in Austin's care.¹⁴³ So, under Missouri's standard of foreseeability, because ICA lacked knowledge of Austin's propensities for abuse and because an ordinary person would not take precautions before entrusting a child to the care of his or her biological father, Austin's criminal abuse was not "foreseeable." Therefore, under Missouri law, the scope of ICA's affirmative duty probably would not extend to taking steps to protect Jonathan from Austin's abuse.

Whether using the Pennsylvania or Missouri standards, however, considerations of public policy dictate that the scope of ICA's duty should not include protecting a child created through surrogacy from abuse at the hands of his or her biological father. Despite any standards of foreseeability that may be used in Pennsylvania, Missouri, or any other state, the determination that a defendant owes a duty to a plaintiff and the scope of that duty are determined by public policy.¹⁴⁴ The scope of duty in any situation is a court's determination, based on public policy and the "mores of the community," that there "is or is not to be liability."¹⁴⁵

In *Huddleston*, the court plainly had public policy concerns in mind when it determined that ICA's duty included protecting Jonathan from Austin's abuse.¹⁴⁶ Although the court never explicitly detailed its policy considerations, it began its evaluation of ICA's duty by stating that the determination of a duty "amounts to no more than the sum total of . . . considerations of policy."¹⁴⁷ Also, in evaluating the duty ICA owed to Jonathan, the court referred to the fact that ICA "reaps handsome profits" from its surrogacy business and that it is engaged in "the very delicate process of creating a child."¹⁴⁸ These phrases and the overall tone of the opinion suggest that the court viewed surrogacy businesses

intrusion" (emphasis omitted)).

143. See *Huddleston*, 700 A.2d at 460.

144. See *supra* notes 46-50, 86-89, and accompanying text.

145. *Troxel v. A.I. DuPont Inst.*, 675 A.2d 314, 319-20 (Pa. Super. Ct. 1996); see *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1372 (3d Cir. 1993); *KEETON ET AL.*, *supra* note 46, § 44, at 303; see also *supra* notes 46-50, 86-89, and accompanying text.

146. See *Huddleston*, 700 A.2d at 460.

147. *Id.* at 457-58 (quoting *Troxel*, 675 A.2d at 319-20).

148. *Id.* at 460.

as out of step with public policy.¹⁴⁹ Although the court did not explain why a surrogacy business is contrary to public policy, several other courts have held that surrogacy agreements are disfavored as against public policy because they are dangerously close to illegal contracts in which money is paid for adopting a child or because they dehumanize the woman involved.¹⁵⁰ With these concerns in mind, the *Huddleston* court was prepared to stretch the scope of ICA's duty—and, therefore, liability—to include protecting a child created through surrogacy from injuries as distant as abuse by his biological father. It appears that the court was looking for a way to discourage ICA and other surrogacy programs from continuing to do business in Pennsylvania. The court accomplished its goal through its definition of the scope of ICA's duty.

The court's determination of public policy is questionable at best. While it might be true that the "mores of the community" suggest that surrogacy businesses are less than desirable, the broader impact of the court's ruling runs completely contrary to public policy. As previously stated, it is the long-standing position of American courts to allow parents to care for their children as they see fit so long as they raise their children with a minimum level of care.¹⁵¹ Child abuse certainly falls below this minimum level, but it is the general policy of American law that the parents are to blame for failing to take proper care of their children. By imposing a duty on ICA and other surrogacy businesses to take steps to prevent child abuse at the hands of a biological parent, the court allows a third party, who no longer has control over the care of the child, to be held liable for the parent's failure. This opens the door to a dangerous array of third-party liability for parental failures. Should a hospital who entrusts a newborn to his or her biological parents be liable for the parents' child abuse? Should a surrogacy clinic or a hospital be liable for a biological parent's failure to properly feed, clothe, or educate a child? Should a surrogacy clinic be liable if a biological parent abandons a child created through surrogacy? Does a surrogacy business's potential liability last until the child reaches majority? These questions loom large in light of *Huddleston*.

149. See *id.* at 457-58, 460; see also *Stiver v. Parker*, 975 F.2d 261, 269 (6th Cir. 1992). Although the *Huddleston* court never explicitly stated this as the policy concern that shaped its opinion, the *Stiver* court, which the *Huddleston* court quoted extensively in its opinion, stated, "surrogate arrangements for the transfer of babies present significant dangers for society and therefore require careful regulation and control through the development of the common law of negligence." *Stiver*, 975 F.2d at 269.

150. See *R.R. v. M.H.*, 689 N.E.2d 790, 796-97 (Mass. 1998); *In re Baby M*, 537 A.2d 1227, 1240 (N.J. 1988); *Kass v. Kass*, 696 N.E.2d 174, 179 n.4 (N.Y. 1998); see also *Litowitz v. Litowitz*, 10 P.3d 1086, 1088 n.3 (Wash. Ct. App. 2000). *But cf.* *Johnson v. Calvert*, 851 P.2d 776, 782-85 (Cal. 1993), *cert. denied*, 510 U.S. 874 (1993).

151. See *supra* note 138 and accompanying text.

Obviously, a court likely would limit a surrogacy business's liability for a biological parent's failures in several of the above circumstances, but just how and where it would draw that line is unclear. In effect, the *Huddleston* court, through its holding, has chosen a flexible, imprecise case-by-case approach over a bright-line rule that a third party cannot be liable for harm caused to a child at the hands of his or her biological parent while the child is in his or her biological parent's care and control. The only apparent reason for choosing the latter seems to be that surrogacy businesses are disfavored by public policy, and, therefore, should be heavily regulated and given incentives to cease their operations.¹⁵² This public policy concern is outweighed by the policy problems created by allowing a surrogacy clinic to be liable for the criminal abuse of a biological father and, thereby, the expansion of third-party liability for parental wrongdoing or failure. For this reason, public policy dictates that the court should not have expanded the scope of ICA's affirmative duty to include protecting Jonathan from Austin's criminal abuse, and the court erred when it did so.

In making its duty determination, the *Huddleston* court placed great emphasis on the Sixth Circuit's decision in *Stiver*.¹⁵³ In *Stiver*, however, the court merely held that a surrogacy business's duty extended to protect a surrogate mother and a child created through the surrogacy process from being infected with a sexually transmitted disease.¹⁵⁴ This holding does not go nearly as far as the one in *Huddleston*, and the two cases, taken together, provide an excellent example of what dangers a surrogacy business should and should not be expected to take steps to prevent. The issue is essentially one of control.¹⁵⁵ From a policy viewpoint, it makes sense to hold a surrogacy business responsible for protecting its participants from being infected with sexually transmitted diseases. The semen transferred into the surrogate mother, and how, is precisely within the surrogacy business's control, and beyond the control of the participants. Also, due to its control over the situation, a surrogacy business can prevent the introduction of disease into the surrogacy process by performing a few relatively easy and accurate tests. Alternatively, the surrogacy clinic does not exercise any control over how a biological father treats a child after he takes custody, and no matter what screening or background checks a surrogacy business performs, it cannot guarantee the child will be safe from some form of mistreatment at the hands of the biological father. Due to these differences in control, a surrogacy clinic's duty should include taking steps to protect its

152. See *Stiver*, 975 F.2d at 269; see also *supra* notes 145-46 and accompanying text.

153. See *Huddleston*, 700 A.2d at 458-59.

154. See *Stiver*, 975 F.2d at 272.

155. See *supra* note 56 and accompanying text (discussing that one of the major reasons an affirmative duty is imposed at all is due to a defendant's ability to control a dangerous situation that a plaintiff cannot protect himself or herself against).

participants from sexually transmitted diseases, but it should not include taking steps to protect a child created through surrogacy from child abuse at the hands of his or her biological father.

Even if the court made the correct policy decisions in determining that ICA had a duty to protect Jonathan from Austin's abuse, the court inappropriately applied Pennsylvania law when it determined that a jury could find that ICA's negligence was the proximate cause of Jonathan's injuries. Under Pennsylvania law, as well as under the laws of Missouri, when an intervening criminal act injures a plaintiff, the original negligent act is the proximate cause of the plaintiff's injury only if the criminal act was a reasonably foreseeable result of the original act.¹⁵⁶

In the context of proximate cause, the determination of foreseeability rests on the specific facts of each case, and a negligent act is not the proximate cause of an injury unless, using hindsight, the specific injury that occurred was the "natural and probable consequence" of the negligent act.¹⁵⁷ In Pennsylvania, the level of foreseeability required to show proximate cause is much more specific than the level of foreseeability required to define the scope of a defendant's duty.¹⁵⁸ Nevertheless, in *Huddleston*, the court summarily ruled that, because it already had found, when determining the scope of ICA's duty, that child abuse was "not unforeseeable" as a matter of law in the surrogacy context, a jury could decide that ICA's alleged negligence was the proximate cause of Jonathan's injuries.¹⁵⁹ This reasoning is incorrect. Because foreseeability must be specific in the context of proximate cause, the court should have engaged in a fact-specific determination whether a reasonable jury, using hindsight, could have found that Austin's severe abuse of Jonathan was the "natural and probable consequence" of ICA's alleged negligence. Due to the extreme nature of Austin's abuse,¹⁶⁰ it is unlikely that a reasonable jury could have come to this conclusion.¹⁶¹ The court, therefore, inappropriately applied the standard of general foreseeability from the duty context to the proximate cause issue. In

156. See *Scheibel v. Hillis*, 531 S.W.2d 285, 288 (Mo. 1976); *Ford v. Monroe*, 559 S.W.2d 759, 762 (Mo. Ct. App. 1977); *Dix v. Motor Mkt. Inc.*, 540 S.W.2d 927, 933 (Mo. Ct. App. 1976); *Powell v. Drumheller*, 653 A.2d 619, 624 (Pa. 1995); see also *supra* notes 98-101 and accompanying text.

157. See *supra* notes 103-05 and accompanying text.

158. See *supra* note 105 and accompanying text.

159. *Huddleston v. Infertility Ctr. of Am.*, 700 A.2d 453, 460 (Pa. Super. Ct. 1997).

160. *Id.* at 456.

161. Because the court glossed over this issue, the facts presented in the opinion are not specific enough to make this conclusion definite. See *id.* (discussing briefly the facts of the case).

doing so, at the very least, it used improper reasoning in sending the case back to the jury and, more than likely, erred in sending it back to the jury at all.

VI. CONCLUSION

The *Huddleston* decision was a misguided policy determination that inappropriately expanded negligence liability. The Pennsylvania Superior Court was blinded by its goal of discouraging ICA and others from engaging in the surrogacy business. In so doing, the court may have overlooked several even more important policy concerns, and, if the decision is followed by other courts, it will establish a precedent under which anyone involved in the organization or supervision of the creation of human life could be held liable for a criminal act that injures that new life at a distant point in the future.

STEVE JASPER