Damned for Their Judgment: Tort Liability for Consensus Standard Setting

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I. Introduction

The National Spa and Pool Institute (NSPI) was a private, non-profit trade association and standards development organization for, among others, builders of swimming pools. Although NSPI primarily provided a forum and information clearinghouse, it also strove through consensus surveys of its members and through other methods to suggest minimum standards for pools. Beyond assuring that its suggested standards were developed following the procedures of the Canvass Method of the American National Standards Institute, NSPI did not follow up with any effort to check on compliance with its standards nor to sanction non-compliance.

In order to suggest a standard, the NSPI members inevitably confronted tradeoffs between desirable but conflicting features of pools. Consider, for instance, the tradeoffs inherent in the NSPI suggested standards for the depth and transition slope of what were known in the industry as Type II pools. These were commonplace residential pools which typically included a one meter diving board at the deep end. To select a standard for the depth and transition slope of such pools, NSPI needed to trade off such features as durability, maintenance, cost, and the appeal to, and safety of, pool users. Optimum safety itself required further tradeoffs. Too little depth and too abrupt a transition slope increased the collision risk to those using the diving board. Too much depth and too gradual a transition slope increased the drowning risk to all pool users.

The NSPI members derived no direct financial benefit from confronting these inevitable tradeoffs. NSPI dues were not fees creating a contract that called for NSPI to suggest standards. Although their participation in NSPI no doubt furthered the business interests of their employers, the NSPI members were volunteers, ostensibly serving out of a sense of responsibility rather than financial gain. Yet the standards that emerged from the NSPI judgment about the optimal tradeoffs provided product quality information in a

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1 NSPI assigned the initial draft of its standards to the relevant subcommittee, such as the Aboveground/Onground Residential Pool Subcommittee, which it thereafter referred to as the “Writing Committee.” That Committee then used the ANSI Canvass Method to develop consensus on an ultimate draft. The ANSI Canvass Method, sometimes named the ANSI Research Protocol, sought to assure openness, transparency, lack of dominance, balance, voluntariness, and due process. It called for public review and comment on successive drafts by a wide variety of interest groups including the American Red Cross, the National Safety Council, the American Public Health Association, the U.S.Consumer Product Safety Commission, plaintiffs’ lawyers, and experts active in swimming pool litigation. See AMERICAN NATIONAL STANDARDS INSTITUTE, ANSI PROCEDURES FOR THE DEVELOPMENT AND COORDINATION OF AMERICAN NATIONAL STANDARDS (____), available at ______. For more on the ANSI procedures for standard-setting, see infra note __.

2 The pools are typically built and installed on site by local construction companies, many of which specialize in pools and spas. When injuries occur in the pools, these local builders and sellers, along with other product suppliers, face potential products liability. But the modest liability insurance limits of these local businesses may lead pool users to sue the national standard development organization, like the NSPI.
capsulated form for pool builders and for the consuming public of enormous value. Like those of other standards development organizations (hereinafter standard-setters), the NSPI standards represent the distillation and encapsulation of invaluable engineering, technological and scientific learning gained from the members’ experience. Among other benefits, standards so developed lower the search costs and assist the entry of aspiring builders of pools, thereby reducing information asymmetries and fostering desirable competition, as well as greatly improving the odds that the occasional do-it-yourselfer will construct a pool that is reasonably safe. The development of product standards also typically allows the interchangeability of parts (especially replacement parts, thereby lowering production and maintenance costs), increases industrial innovation, identifies possible goals the products can serve, avoids the burdens of government regulation, supports common industry values, and facilitates benchmarking. Particularly in communications and information technology, which rely heavily on networking and interoperability, technical compatibility standards play a vital role in allowing innovators to commercialize new products. The information encapsulated in a standard is a public good; unless the legal environment provides appropriate incentives for private standard-setters to produce that information, not enough will be produced.


4Benchmarking is a process in which a company learns the practices and mimics the techniques of its superior-performing peers in order to enhance its own efficiency. See David J. Teece, Information Sharing, Innovation, and Antitrust, 62 ANTITRUST L.J. 465 (1994).

Because the advantages of complying with a suggested standard are often so great, a business may not experience compliance as voluntary. A business may feel especially coerced to comply when non-compliance threatens some form of accreditation. But coercion driven by the wish to take advantage of economies which may be available either at the firm or industry level cannot be equated with the coercion of government regulation without robbing the term coercion of too much of its value. In any event, the less compliance appears to be voluntary, the more quasi-governmental the standard-setter becomes, the better it can wrap itself in the government’s immunity, and the stronger the case for according it the qualified privilege from tort liability for which this Article contends.


6As Daniel Farber writes: “The presumption should be that the free dissemination of information generally makes individuals more knowledgeable and improves their welfare . . . Requiring producers [of information] to internalize costs fully . . . will not lead to a socially optimal level of information production because producers cannot also internalize all the benefits of their enterprise. Hence, information activities should not be subject to full tort liability.” Daniel A. Farber, Free Speech Without Romance: Public Choice and the First Amendment, 105 HARV. L. REV. 554, 558–61 (1991).
The government also sets standards when it regulates products. And unlike the suggested standards of private standard-setters, government standards are often mandatory. In setting its standards, the government regulators confront the same tradeoffs of conflicting considerations that private standard-setters confront. The Consumer Product Safety Commission (CPSC), for example, adopts standards for products after much investigation of the costs and benefits of proposed precautions and in so doing must ultimately confront such tradeoffs as: “how much certain risks should be tolerated to reduce others,” “how much other interests, such as the range of consumer choice, should be sacrificed in the interest of safety,” “how much weight should be given the possibility that drunks and children may use the product for other than its intended purposes,” and ultimately “how much safety is enough.” Like the decision of when to evacuate a city as a storm approaches, such policy-bound tradeoffs undertaken by the government represent an exercise of discretionary judgment universally deemed inappropriate for independent judicial review. When the CPSC uses its best judgment to undertake these tradeoffs and thereby develop a product standard, it need not fear that a judge and jury will second-guess its judgment, deem it negligent for adopting its standard, pronounce that negligence a cause of injuries suffered by those using a complying product, and hold it liable in tort for those injuries.

Because the NSPI membership includes competing builders, these members and the NSPI would face antitrust exposure were they to reach agreement on the actual characteristics of the products each member will offer. See National Macaroni v. FTC, 345 F.2d 421 (7th Cir. 1965) (agreement on product content violates section 1 of the Sherman Act); C-O—Two Fire Equip. Co. v. United States, 197 F.2d 489 (9th Cir. 1952) (same). The 2004 Act did not immunize from antitrust exposure standard-setters who participate in such agreements See 15 U.S.C.A. § 4301(a)(8).

This Article does not address the antitrust concerns that would arise from such agreements. Nor does it address the antitrust concerns that would arise if a standard-setter attempted to sanction non-compliance with its standards. The Article further assumes that the standard-setter’s agreement on suggested standards does not disguise a coordinated effort to reduce output. This last assumption can be indulged confidently because coordinated efforts to reduce output require agreement by senior management on variables not normally part of standard-setting.

The antitrust implications of standard-setting were exhaustively examined by the Federal Trade Commission from 1974 through 1985. The FTC considered a wide range of concerns about standard setting, not merely a concern about reduced output. One concern was that the standard-setter’s wish to further the business interests of its most influential members would lead to standards that are not congruent with consumer interests, either being too low out of wish to reduce the member’s costs, or too high out of wish to disadvantage lower cost rivals or entrants whose products do not comply. Other concerns included the lack of public accountability of standard-setters, and the possibility that small or innovative firms will lack sufficient input in the standard setting process. Various proposed rules were considered but none were adopted. See Federal Trade Commission, Standards and Certification: Proposed Rule and Staff Report, 43 Fed. Reg. 57,269 (Dec. 7 1978); Federal Trade Commission, Standards and Certification: Report of the Presiding Officer, 16 C.F.R. § 457 (1983). See also ftc.gov/os/annualreports/ar1985.pdf (terminating the investigation in 1985 without any action being taken).
Despite their standards being only suggestive,\(^8\) the NSPI and other private standard setters enjoy no such luxury. Pool users who collide with the bottom of pools meeting NSPI suggested standards have successfully obtained tort awards against NSPI in excess of eight figures.\(^9\) The ground for these awards is simply that the NSPI undertook the tradeoffs it faced negligently. For example, juries have found NSPI negligent on the ground that its suggested standards for a Type II pool allowed too little depth and too abrupt a transition slope.\(^10\) The Courts in these cases simply invited the juries to second-guess the NSPI tradeoffs that were incorporated in the NSPI suggested standards. Having deemed negligent the NSPI’s judgment about these tradeoffs, these juries went on to find that negligence the cause-in-fact and proximate cause of the collision injury of the plaintiff pool user. Naturally these juries, and the Courts upholding their decisions, were never required to confront nor defend the increased drowning risk that would accompany the greater depth or more gradual transition slope they implicitly required. Indeed, a future jury in the case of a plaintiff who drowned would be free to deem the NSPI negligent because its standards suggested a depth that was too great or a transition slope that was too gradual. To add insult to injury, the Final Draft of the 3rd Restatement of Torts, Liability for Physical and Emotional Harm, repeatedly cites with approval one of the Appellate Court opinions which subjects NSPI to a significant risk of tort liability whenever a person is injured in a pool which complies with NSPI standards.\(^11\)

Granted, U.S. product liability law for at least the past five decades has asked juries to second-guess similar tradeoffs made by companies that design products. When a jury applies the risk-utility test to a design defect claim against a product seller, for

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\(^8\) This Article does not deal with standards that are backed by the force of government, even though the standards may have emerged from a private standard-setter. Nor does it deal with standards that yield “audited regulation.” Audited regulation occurs when the government delegates the power to enforce and create standards to a nongovernmental body but retains the “power to review” through a federal agency. See Douglas C. Michael, Federal Agency Use of Audited Self-Regulation as a Regulatory Technique, 47 ADMIN. L. REV. 171 (1995).


\(^10\) Meneely, 5 P.3d at 59. The court in Meneely acknowledged that expert testimony indicated a Type II pool would need to be 32 feet deep in order to eliminate completely the risk that a person using the diving board would collide with the pool’s bottom. Such depth would significantly increase the risk to all pool users of drowning, and would also increase the cost of construction and maintenance. Moreover, the overwhelming majority of pool users do not need nearly that depth to slow their descent after diving, or to otherwise protecting themselves on contacting the pool’s bottom.

\(^11\) RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43 cmts. c, e, & f (___) (citing with approval King v. National Spa and Pool Institute, 570 So. 2d 612 (Ala. 1990)).
example, the jury is asked whether plaintiff’s proposed alternative design, which typically reduces the risk that materialized in plaintiff’s injury while increasing costs or other risks, is so superior to the defendant seller’s actual design that the defendant’s design should be deemed defective.\textsuperscript{12} In effect, then, the jury is asked whether defendant’s tradeoff unduly tolerated the risk that materialized in plaintiff’s injury in order to serve other interests or to reduce other risks. \textit{Dawson v. General Motors} is a classic example.\textsuperscript{13} The jury deemed the car that General Motors manufactured defective in its design because General Motors opted for a relatively light side bar which did not extend all the way through the front door panel. The jury deemed superior the plaintiff/driver’s alternative design which included a larger and longer side bar. The jury also found this alternative design would have probably reduced the injury to the driver when his car skidded sideways and then wrapped around a telephone pole. But although the larger and longer side bar would have reduced injuries in sideways collisions, the evidence showed that the side bar called for by the jury would have added rigidity to the car and therefore would have increased injuries in a frontal collision. In designing its car General Motors simply could not avoid trading off these risks, and also trading off other pros and cons of the longer and larger side bar, which included on the cons side all the disadvantages of the added weight and added costs. The Supreme Court upheld the verdict for the plaintiff driver, but expressed severe misgivings about asking juries to second guess the tradeoffs that underlay a manufacturer’s design decisions.\textsuperscript{14}

Many commentators, and an occasional court, have denounced this feature of our product liability law.\textsuperscript{15} These critics point out that juries undertake these tradeoffs with much less information than the product manufacturers (or than the government regulators), including, in particular, information about the wishes of consumers. The juries also undertake the tradeoffs with much less time to reflect. In addition, the juries undertake these tradeoffs with the often tragically injured plaintiff before them and in the conspicuous absence of the consumers whom defendant’s design saved. This setting invites the jury, erroneously, to view the product and its risks ex post (i.e., with the benefit of hindsight) and to assign undue weight to the risk that materialized in the plaintiff’s injury compared to the other risks that defendant’s design reduced.\textsuperscript{16} Such

\textsuperscript{12} \textit{Restatement (Third) of Torts: Prods. Liab.} §§ 1–2 (2005).
\textsuperscript{13} 630 F.2d 950 (3d Cir. 1980). \textit{See also} Gardner v. Chrysler Corp., 89 F.3d 729 (9th Cir. 1999) (court concerned that jury will ignore extent to which plaintiff’s proposed design, while avoiding injury to plaintiff, decreases overall safety.)
\textsuperscript{14} \textit{Id.} at 1002.
\textsuperscript{16} In \textit{Riegel v. Medtronic Inc.} the Supreme Court of the United States acknowledged the inferiority of the jury, compared to legislators or administrators, in undertaking the necessary tradeoffs:

A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury,
contradictory mandates—whereby defendant’s tradeoff is condemned by some juries for overweighing a certain risk and by other juries for underweighting that same risk—disgrace our jurisprudence much more than would mere conflicting verdicts. Telling a manufacturer that it is negligent if it adopts a certain design and also negligent if it rejects that design sends a more perverse signal than merely having juries disagree about whether a manufacturer’s design is defective. Two juries disagreeing on the Dawson facts about whether General Motor’s design was defective merely shows that our decision-making system is not fully predictable. Two juries both condemning General Motor’s design—one for overweighing a certain risk and the other for underweighting that same risk—shows that our decision-making system, although predictable, is an intellectual disgrace. The shortcomings of asking juries to second guess the tradeoffs of product designers argue against extending this aspect of our product liability law to standard-setters.

Asking the jury to second-guess the far more informed and carefully arrived at judgment of the standard-setter is not the only disturbing feature of imposing liability on “negligent” standard setters whenever a person is injured by a product conforming to their standards. The intervening behavior of the product’s builder or seller will often be more culpable than the standard-setter’s, raising the fear that the suit against the standard-setter represents the plaintiff’s opportunistic pursuit of a marginal contributor. While tort law has been notoriously willing to countenance the pursuit of marginal contributors, doing so risks creating an undesirable distance between tort law and popular views of moral culpability. Moreover, even when the product conforms with the standards of the standard-setter, the testimony of the builder or seller that he relied on those standards, rather than on his own judgment, in constructing the product is unreliable. Blaming the standard-setter is a costless option for the builder or seller. Deflecting blame to the standard-setter mitigates the builder’s or seller’s culpability. The plaintiff’s family or his attorney may have suggested such finger-pointing to the builder or seller. Nor is the testimony of the builder or seller that he relied on the standards the kind of evidence whose dependability can be adequately tested through cross-examination. Yet that

on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court. Riegel v. Medtronic Inc., 2008 US Lexus 2013, 2024 (class II medical devices that have undergone pre-market approval by the FDA cannot be deemed defective under state tort law).

17 Plaintiff’s option to sue the builder or seller of the product, service or activity that conformed with the standard also gives the injured plaintiff an alternative to suing the standard-setter. These product liability suits against the builder or seller present a more concrete product, service or activity to evaluate than the relatively abstract standard. Thanks to the rule of The T.J. Hooper, the builder’s or seller’s compliance with the industry standard gives them no defense in the suits against them. The T.J. Hooper v. N. Barge Corp., 60 F.2d 737 (2d Cir. 1932) (L. Hand, J.). A pattern of successful suits against these industry members should provide at least some deterrent against an industry standard-setter acting irresponsibly. A further deterrent is provided by the Federal Trade Commission’s ability to attack standards it deems “deceptive.”

18 Unless a juror is experienced in construction, there is little reason to think the juror’s own experience so prepares them to decide the cause-in-fact issue on their own that their experience will check the builder’s or
patently undependable testimony will often provide the only evidence establishing not one but two elements of the prima facie case against the standard-setter. This testimony will establish the reliance on which many courts will base the standard-setter’s tort duty. And that same testimony will supply critical evidence in showing the cause-in-fact connection between the standard and the plaintiff’s injury. After all, plaintiff’s cause-in-fact claim maintains that but for the negligent standard, the builder or seller would not have constructed the product in the particular way that led to plaintiff’s injury. Or to state that claim conversely, had the standard not been negligent, the builder or seller would have constructed the product differently, and plaintiff’s injury would probably have been avoided. Hence two of the three major issues—the other being the negligence (hereinafter the breach) issue—turn on little more than speculation.

Still more disturbing is the high percentage of cases against standard-setters like the NSPI in which the plaintiff’s injuries, being horrific, call for damages of seven or more figures. This is no coincidence because plaintiffs with lesser injuries will likely find the builder’s or seller’s liability insurance limits adequate for their purposes and feel less need to chase the national or international standard setter. Consequently the horrific nature of the plaintiff’s injuries combined with the status of the national or international standard setter exacerbates the usual threat that jury sympathy for the plaintiff will overthrow the requirement of causal negligence as the foundation for the standard-setter’s liability. In deciding the breach issue, for example, the jury will need to balance the brutally tangible tragedy plaintiff has suffered against the more abstract benefits of the standard-setter’s standard.

Another disturbing feature is that the standard the defendant organization suggests, while appearing to be a simple statement of how a product should be made (in the case of prescriptive standards) or how a product should perform (in the case of performance standards), may not only convey information. Some standards also constitute an opinion that a product so made or so performing is reasonably safe and effective net of all tradeoffs. Seeing that standards are often opinions carries two implications. First, it brings into relief the extent to which standards represent an exercise in discretionary judgment. Hence some of the same concerns that compel complete

seller’s self-serving assertion that he relied on the standards. This compounds the proof problems in determining cause-in-fact presented by this category of cases, viz., suits by one injured by a complying product, service or activity against the standard setter. A recognized reason for dismissing a category of cases on the ground of “no duty” is that the cases in that category will tend to present difficult problems of proof in determining cause-in-fact. The Third Restatement of Torts, Liability for Physical and Emotional Harm, provides this example:

In the educational-malpractice area, courts have concluded that educators have no duty of care to their students, often because of the administrative difficulties of adjudicating such claims. Problems exist both in sorting out conduct that is innovative or nontraditional as opposed to negligent and in determining the factual cause of a student’s educational deficiency. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. f (final draft, __). 

19 The duty of the standard-setter to the injured plaintiff is typically imposed by invoking Restatement 324A or the voluntary rescue doctrine. Both require reliance by a third party, here the builder or seller, on the standard-setter to the detriment of the plaintiff who used the product.

20 Ignoring globalization and the international character of modern standard-setting, this Article restricts itself to the liability of standard-setters under the tort law of the various jurisdictions of the United States.
immunity from tort liability for discretionary judgments of other decision-makers call for at least qualified immunity to those suggesting standards. Because the public rather than the standard-setter enjoy so many benefits of standard setting, for example, standard-setters might hesitate from adopting appropriate standards if its own benefit is less than the overall cost, even if the overall benefit exceeds that cost. Thus, liability for negligence threatens to distort the judgment of standard-setters just as such liability would distort the discretionary judgment of immunized decision-makers.\(^{21}\) Second, insofar as standards represent opinions, they are best forged through fearless and robust discussion among the members of the standard setting organization, unhampered by concerns of tort exposure. Liability then, perhaps to a surprising extent, also implicates First Amendment values.\(^{22}\) Finally, imposing liability on standard-setters whenever a person is injured by a product conforming to their standards and a jury deems the standard-setters negligent exposes standard-setters to an amount of liability that is unduly open-ended, insufficiently limited,\(^{23}\) and disproportionate to the modest benefits standard-setters receive.

The number and variety of standards development organizations underscore the social importance of this Article. The American National Standards Institute reports that more than 4000 organizations currently promulgate more than 35,000 standards.\(^{24}\) Juries have been allowed to second guess suggested standards ranging from the American Association of Blood Banks’ protocols for screening blood donors\(^{25}\) to the Oregon Schools Athletic Association’s schedules for starting football practice.\(^{26}\) Practice

\(^{21}\) For amplification of this point, see infra text accompanying notes 135–140.

\(^{22}\) Citing First Amendment values, courts have refused to impose a tort duty of care on the authors and sellers of “how to” books. E.g., Cardozo v. True, 342 So. 2d 1053(Fla. Dist. Ct. App. 1977) (no liability for recipe in cookbook that led to plaintiff’s poisoning); Alm v. Van Nostrand Reinhold Co., 480 N.E.2d 1263 (Ill. 1985) (no liability for author of “how to” book on making tools.); Walter v. Bauer, 439 N.Y.S.2d 821 (Sup. Ct. 1981) (no liability for author of a science book); MacKown v. Illinois Publ’g & Printing Co., 6 N.E.2d 526, 527–30 (Ill. App. Ct. 1937) (author of article recommending a procedure for reducing dandruff lacked any tort duty to an injured reader). Yet many standards also describe “how to” produce a product or perform a service or activity, and hence equally implicate First Amendment values.

\(^{23}\) More precisely, the judicial concern is with insufficiently limited liability for a single tortious act. This differs from “mass tort liability” situations, which raise different problems. For discussion of the many areas of torts affected expressly or implicitly by the judicial concern with insufficiently limited liability, see Robert Rabin, Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment, 37 STAN. L. REV. 1513 (1985).

If negligent standard setting were to lead to class actions against standard-setters, the insufficient limit on liability would present itself even more forcefully.

\(^{24}\) See *the ANSI web site at wwwansi.org (last visited Dec. 10, 2009)*. The Department of Defense refers to approximately 3300 private standards in its procurement documents. James C. Miller, *The FTC and Voluntary Standards: Maximizing the Net Benefits of Self-Regulation*, 4 CATO JOURNAL #3 page 897 (Winter 1985). The Internal Revenue Service reported in 2002 that about 71,000 organizations were registered under Section 501(c)(6) as non-profit business leagues, the category in which standard-setters typically fall. John Francis Reiley et al., *IRS 501(c)(6) Organizations*, available at http://www.irs.gov/pub/irs-tege/eotopick03.pdf(last visited April 12, 2009).


parameters routinely and laboriously issued for nearly every medical treatment expose the medical associations which issue them to significant tort liability. When this liability drives small standards-setters like NSPI into bankruptcy, the liability generates little public outcry. That may not be true when the same legal principles endanger more prominent organizations like the Joint Commission on Accreditation of Healthcare Organizations.

At least one possible effect of imposing liability on standard-setters has apparently not yet materialized—an attempt by a successful plaintiff to collect a judgment against the standard-setter from the individual or corporate members of the standard-setter. Principles of agency law arising from other contexts would offer disturbingly strong support to such an attempt. Yet such liability might well discourage individuals and corporations from volunteering for standard setting efforts.

This Article contends that when those injured by products, services or activities that conform with the standards of a private standard setting organization sue the organization for negligence in suggesting its standards, a court should dismiss the case on

463527 (D. Fla. Aug. 3, 1994) (by setting standards for the use of plywood the American Plywood Association subjected itself to liability to homeowners whose property was damaged by Hurricane Andrew).


28 In transplantation medicine the physicians responsible for the standards by which organs may be harvested could ultimately be held liable when a donated organ has been inadequately screened or a potential recipient has been denied an organ. In reproduction medicine the Council on Scientific Affairs of the American Medical Association has set standards for referring a patient to a specialist in genetic counseling and may face liability whenever doctors following their standards fail to refer a patient. See Mary Jo Wiley et al., Organ Donation and Transplantation, LEGAL MEDICINE 323, 333 (American College of Legal Medicine, 4th ed. 1998); Michael S. Cardwell & Thomas G. Kirkhope, Reproduction Patients, LEGAL MEDICINE 380 (American College of Legal Medicine, 4th ed. 1998).


the ground of “no duty” or should grant the organization a qualified privilege. A qualified privilege would enable standard setting organizations to prevail on a pre-answer motion to dismiss absent allegations in the injured plaintiff’s complaint that the organization set its standards in bad faith. Likewise, when bad faith is alleged, a standard setting organization should prevail on summary judgment when the paper record fails to show that the organization’s good faith in setting its standards is genuinely disputed. In particular, and whichever ground is chosen, a standard setter should not be pushed to trial merely on a showing that the plaintiff was injured by a product, service or activity that conformed to its standards combined with allegations that the standard-setter’s promulgation of those standards was negligent.

II. The Current Law on the Duty Issue

Two cases presenting similar facts illustrate the tort exposure facing standard-setters. In King v. National Spa and Pool Institute Inc., the plaintiff’s decedent broke his neck when he dove off his diving board into his Type II pool. Besides suing the local company which built the pool, the plaintiff also sued NSPI, despite the absence of any dealings between NSPI and the decedent, or between NSPI and the plaintiff, or even any dealings between NSPI and the pool’s builder, apart from the pool builder’s learning of the NSPI standards. Plaintiff’s sole theory of liability against NSPI was, in the words of the Alabama Supreme Court, “that the standards that allowed the placement of a diving board in this particular size pool created an unreasonable risk of harm.” That is, plaintiff’s sole theory was that the NSPI was negligent for suggesting the particular standards that permitted a diving board in plaintiff’s type of pool. In reversing a grant of summary judgment for the NSPI, the Court held that plaintiff should reach the jury and

31 Whether a tort duty of care exists is a question of law. The various tests for duty acknowledge that resolving the duty issue requires balancing policy reasons for limiting the responsibility of defendants who have committed a tortuous act against policy reasons for entitling a plaintiff to redress for injury caused by defendants’ tortious act. Tests for duty also acknowledge the wide latitude afforded the courts and cite as factors in determining duty the relationship of the parties and the wish to avoid potentially unlimited liability. The New York statement of the test for duty is typical: “It is the responsibility of courts, in fixing the orbit of duty, ‘to limit the legal consequences of wrongs to a controllable degree’ and to protect against crushing exposure to liability.” Strauss v. Belle Realty Co, 482 N.E.2d 34 (N.Y. 1980) (citing Tobin v. Grossman, 249 N.E.2d 419 (N.Y. 1968)).

In every case discussed here, this Article assumes that the elements other than duty have been resolved in plaintiff’s favor. In particular the Article refrains from discussing the merits of the particular standards suggested, for the merits of those standards constitute the heart of the breach issue. This Article aims to foster the sharp separation between the issues of duty and of breach that the Third Restatement, Liability for Physical and Emotional injury recommends. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 (final draft, 2005). For a discussion of proximate cause in these cases, see infra note 37.

32 Judicial recognition of a qualified privilege could be seen either as modifying the duty of care or as establishing a defense.

33 Nothing said here would affect the liability of the builders or sellers of the injurious product, service or activity.

prevail upon showing the NSPI was negligent “in promulgating standards for the design and construction of pools.”

To impose on the NSPI the legal duty of ordinary care, the Court likened NSPI to a stranger who passes by another in distress. The court acknowledged that NSPI “had no statutory or judicially imposed duty to formulate standards”. But having suggested standards, NSPI took on a legal duty to use ordinary care in doing so. The court seized on the Restatement (Second) of Torts section 324A. That section creates one of a number of exceptions to the usual rule (often called the “no duty to rescue rule”) that a stranger passing by another owes the other no legal duty to act, carefully or otherwise, to aid him. In general Restatement section 324A imposes a duty of care on a defendant toward a plaintiff when a defendant undertakes to perform services for another which defendant should recognize are necessary for the protection not of the other but of a third party who is the plaintiff. One of the most famous illustration of 324A is Marsailles v. Lasalle where liability was imposed upon a defendant volunteer who promised the parents of a child bitten by a cat to keep control of the cat until the passage of time eliminated the risk that the cat was rabid. Were the cat to escape before that time lapsed, the risk that the cat was rabid would cause the child to undergo painful medical treatment. When the cat escaped due to the volunteer’s negligence in confining it, and the child underwent the medical treatment as a result, Restatement section 324A enabled the child to recover from the volunteer for the damages from his medical treatment.

Of course the plaintiff must still show that the NSPI’s negligence in suggesting its standards was a cause in fact and a proximate or a legal cause of his injury. To show cause in fact the plaintiff must show that “but for” the NSPI’s negligent suggestion of standards, the injury to the plaintiff would have probably been avoided. The showing needed to establish proximate or legal cause, or what the Third Restatement refers to as the “scope of liability,” is less clear. But as long as the defendant’s standards are deemed negligent for ignoring or underestimating the same risk that materialized in plaintiff’s injury, proximate cause should exist. According to the Third Restatement, “an actor’s liability is limited to those physical harms that result from the risks that made the actor’s conduct tortuous.” See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29. This risk test, as the Restatement editors explain, is congruent with the foreseeability test when the foreseeability test is properly understood and framed. See id. cmt. e.

The overlap between the duty issue and the proximate or legal cause issue is well-known, and the policy reasons for holding “no duty” will constitute the ground for some courts holding “no proximate or legal cause.” For a case holding that a standard-setter was not a proximate cause of the plaintiff’s injury, see Sizemore v. Georgia-Pacific Corp., 1996 WL 498410 (D.S.C. 1996), aff’d 1997 WL 295644 (4th Cir. 1997). In calling for a holding of “no duty” and in ignoring the issue of proximate or legal cause, this Article follows the Third Restatement, Liability for Physical or Emotional Harm. Comment f to section 29 of the Third Restatement states:

Duty is a preferable means for addressing limits on liability when those limitations are clear, are based on relatively bright lines, are of general application, do not usually require resort to disputed facts in a case, implicate policy concerns that apply to a class of cases that may not be fully appreciated by a jury deciding a specific case, and are employed in cases in which early resolution of liability is particularly desirable.

Suits against standard-setters by those claiming injury from complying products or activities fit this criteria.

35 King, 570 So. 2d at 625. The opinion clarified that any negligence would arise from the deficiencies in the particular standard suggested rather than merely from the NSPI decision to suggest standards in the first place.


37 94 So. 2d 120 (La. App. 1957).
Without the principle Restatement section 324A reflects, the defendant volunteer would have been able to avoid liability by invoking the usual “no duty to rescue rule” which is perhaps more precisely stated as the rule that one has “no duty to act affirmatively to aid another.” Restatement section 324A states:

One who undertakes, gratuitously or for consideration to render services to another which he should recognize as necessary for the protection of a third person or his things is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care in protecting his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or
(b) he undertakes to perform a duty owed by the other to the third person, or
(c) the harm is suffered because of reliance of the other or the third person upon the undertaking

As the Court saw the facts of King, the NSPI, by suggesting standards for pool construction, became the counterpart of the volunteer in Marsailles. Suggesting its standards constituted an undertaking by NSPI to render services to the pool builder, the counterpart of the parents in Marsailles. In rendering those services to the builder, the NSPI should have recognized that the standards were necessary for the protection of all users of pools that conformed with NSPI standards, all such pool users, including the decedent, being the counterpart of the plaintiff child in Marsailles. Hence, when the NSPI suggested standards to the pool builder, NSPI undertook to perform a duty to use care which the pool builder plainly owed to his customer and to future pool users. On this reasoning 324A(b) applied and imposed a tort duty on NSPI to the decedent and to any such pool user without the need for any further evidence from plaintiff on remand. In addition, the harm to the pool user was allegedly suffered because of the reliance of the pool builder upon those NSPI standards in building the pool, so 324A(c) would also apply and would alternatively impose a tort duty on NSPI toward decedent and all pool users, at least once the plaintiff on remand adduced some evidence that the builder relied on the NSPI standards. And for this purpose, the testimony of the builder that he relied on NSPI standards in building the pool would presumably suffice.38

Some courts granting summary judgment to defendant standard-setters or defendant inspectors of products or activities that prove injurious have made much of the reliance requirement, finding no reliance when the pool builder or his counterpart continued its own safety efforts, or was insufficiently under the control of the defendant. E.g., Blessing v. United States, 447 F. Supp. 1160 (E.D. Pa. 1978) (trade association had no duty to consumer because it did not control what the manufacturer produced); Meyers v. Donnatiacci, 531 A.2d 398 (N.J. 1987) (refusing to impose a duty on NSPI toward a pool user because NSPI did not control the seller of pool); Bailey v. Edward Hines Lumber Co., 719 N.E.2d 178 (Penn. 1999) (Truss Plate Institute, a trade association, owed no duty to construction workers who relied on its installation instructions where the recommendations were only advisory and TPI had no power to enforce compliance); Beasock v. Deoguardi Enterprises, 130 Misc. 2d 25 (N.Y. 1985) (“no duty” because standard-setter did not control plaintiff’s employer).

These courts are certainly correct in pointing out the standard-setter’s lack of control. Suggested standards are often used merely as minimum guidelines that third parties may or may not choose to adopt, modify or reject. Nevertheless, the approach recommended here concedes that the standard-setter’s
There is no analytical difficulty in applying 324A to the promulgation of standards. Section 324A provides a legal niche into which the promulgation of standards conveniently fits. The court in King reasoned that promulgating standards likely satisfied (b) and (c) of 324A but it could also have invoked (a) on the ground that NSPI’s standard, by suggesting that a one-meter diving board could be used in a Type II pool, increased the risk of this collision injury. The purpose of (a), like that of 324A generally, is to identify when defendant’s behavior takes defendant out of the safe harbor of nonfeasance and precludes him from invoking the “no duty to rescue rule.” Behavior that cannot be said to leave the level of risk facing plaintiff unaffected but rather increases that risk is an example of such duty-triggering behavior. Arguably, as long as the standard was in place before the building of the pool, and influenced the builder to construct a pool presenting this collision risk, rather than a pool presenting less collision risk, the standard could be said to increase the risk of a collision injury like plaintiff’s. Again, the builder’s testimony that he was influenced by the suggested standard, if favorable to plaintiff, should suffice for this purpose.

But is Restatement section 324A an apt vehicle for carrying such baggage? Do the policies underlying Restatement section 324A call for imposing on standard-setters a tort duty of ordinary care to all users of products or activities which conform with the organization’s standards? As the editors of the 3rd Restatement emphasize, policy concerns may call for a holding of “no duty” no matter how tight the analytical fit between the facts of a category of cases and 324A. Past cases invoking 324A seem to envision a relationship between the defendant and the plaintiff that is much more specific, and, significantly, more limiting. The volunteer in Marsailles, for example, knew the parents and plaintiff child personally. The volunteer personally met and promised the individual parents to contain the cat and knew the one, specific individual that might be endangered by any negligence in his promised undertaking. Applying 324A to the volunteer in Marsailles imposed a duty on the volunteer to one person, the plaintiff child. Moreover the duty to that child would not last beyond a fortnight. And because the

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standard has invariably influenced the injurious product or activity. The approach recommended concedes further that such influence, while falling far short of control over the third party, for example, the pool builder or his counterpart, has been held sufficient to trigger a tort duty of care on the defendant exerting the influence, at least in other contexts. See Weirum v. RKO General Inc., 539 P.2d 36 (Cal. 1975) (radio station had duty to strangers on highway when radio station’s disk jockey merely encouraged listeners it did not control to arrive quickly at a particular location); Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. Ct. App. 1982) (publishing crime victim’s identity and address so assisted assailant in assaulting victim as to render newspaper liable for negligence.). Hence, the grounds advanced here for finding “no duty” differ. For a case where 324A (a) could not be invoked, see Patentas v. United States, 687 F.2d 707 (3d Cir. 1982). Because the Coast Guard merely came upon the scene of a tanker explosion and was negligent in providing aid, the Coast Guard did not increase the risk to the victims of the explosion, and hence had no tort duty to them.

In comment b to section 43, the Third Restatement’s counterpart to 324A, the editors state:

b. Court determination of no duty based on special problems of principle or policy. Even though an affirmative duty might exist pursuant to this Section, a court may decide, based on special problems of principle or policy, that no duty or a duty other than reasonable care exists. See Section 7(b).
situations to which 324A apply usually involve some exigency, the brief duration of the duty is another factor which limits the application of 324A.

When courts refuse to impose a tort duty, they often stress the fear of open-ended or insufficiently limited liability. Applying 324A to impose a duty on standard-setters whenever users of complying products are injured brings that fear into play. While knowing its standards would primarily be used by builders of pools, the NSPI, like other standard-setters, offered its standards generally to the world at large. The number of persons who might read and rely on its standards was unlimited. By suggesting its standards NSPI did not develop a deeper, closer or more specific relationship with any one of those persons than with any other. Unlike certifiers of previously produced products or models of products, NSPI did not express a judgment toward the particular specimen of the product that proved injurious. Compared to the standards of those who certify particular finished products, NSPI’s standards were general and forward-looking. When any organization suggests standards for products or models of products that are widely used and dangerous, the number of injuries resulting from the use of products that comply with the standards is potentially unlimited. Allowing all those injured to state a cause of action against the standard-setter merely by alleging the standard-setter was negligent in not opting for a different standard threatens to yield much more liability for ordinary negligence than courts should be willing to tolerate. At least one court has recognized the insufficiently limited liability now facing standard-setters:

Here policy considerations weigh against holding the NFPA, a voluntary membership association, liable . . . . Promoting public safety by developing safety standards is an important, imperfect, and evolving process. The imposition of liability on a nonprofit standards developer who exercises no control over the voluntary implementation of its standards . . . could expose the association to overwhelming tort liability to parties with whom its relationship is nonexistent and could hinder the advancement of public safety.42


42 Commerce Industry Insurance Co. v. Grinnell, 1999 WL 508357 (E.D. La. July 15, 1999) (Not reported in F. Supp) (refusing to impose a duty on the National Fire Protection Agency when complying product caused plaintiff’s injury). In refusing to impose on the standard-setter for accountants a duty of care to investors, the Connecticut Supreme Court also cited the fear of insufficiently limited liability:

It is not difficult to envisage the consequences . . . if the voluntary promulgation of professional accounting standards were held to impose on the [American Institute of Certified Public Accountant] a duty of care to a third party who neither is specifically identifiable nor has any relationship with the AICPA aside from reliance on . . . a certified public accountant who allegedly relied on published AICPA standards. In effect, the AICPA would be at risk of being called upon to defend its standards in any dispute challenging the propriety of the professional services of an AICPA member. In the face of such broad exposure, at least to the costs of litigation and possible to liability for damages, the AICPA and other similarly situated professional organizations might well curtail their laudable and salutary effort to . . . strengthen professional standards. We are persuaded that this chilling effect would benefit no one—not the members of professional organizations, not their clients and not the public at large.
In treating the duty issue, the 3rd Restatement endorsed this wish to avoid inviting unlimited liability. Yet when the Restatement editors created section 43 to update and replace section 324(a), they cited King favorably in the Reporter’s Note to three separate comments. First, they cited King in the Reporters’ Note to comment c to section 43 to illustrate Alabama’s acceptance of Restatement 2nd section 324A. Second, they cited King in the Reporters’ Note to comment e to illustrate that in a suit by a pool user, the reliance by the pool builder on the NSPI’s standards was the type of reliance that would satisfy the reliance requirement in section 43’s counterpart to section 324A(c). Third, the Restatement editors cited King to illustrate that section 43 would impose a duty of care toward third parties like pool users on a defendant like NSPI simply because of NSPI’s undertaking to promulgate safety standard for pool builders, and even though no contract existed between NSPI and any pool builder. Necessarily then, a third party like the pool user, plaintiff’s decedent in King, need not show it was a third party beneficiary of a possible NSPI contract with a builder or installer. These three favorable references to King send the message that the Restatement editors view the suggestion of standards by a standard-setter as a classic example of an undertaking that under section 43 ought to trigger a duty of care to those injured by complying products. To be sure, the Restatement editors’ favorable citation of an opinion does not necessarily express approval of the opinion’s ultimate ruling. The editors may use the citation merely to explain or to illustrate a principle they are embracing. Nevertheless, the Restatement editors’ treatment of King should suppress any impulse to dismiss King, and its threat to standard-setters, as an aberration.

In one incidental respect, the Restatement’s treatment of King limits the liability of standard-setters. For the Restatement editors made clear that any tort duty imposed on a standard-setter must arise under the “Affirmative Duties” laid out in sections 38 to 44 of the Restatement, rather than under the general duty provision in Restatement section 7. This means the Restatement editors do not view the promulgation of standards as itself posing a risk of physical harm to those injured by complying products. Apparently, they view other forces, such as the product, service or activity itself, as putting at risk the injured plaintiff. Hence the editors believe one of the exceptions to the usual “no duty to rescue rule” must apply before the suggestion of standards will give rise to a tort duty. Section 37, entitled “No Duty of Care with Respect to Risks Not Created by Actor,”


43 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 37, Reporters’ Notes to comment c (2005) (“Thus, Moch was decided not on the ground of no duty to rescue but on no duty so as to avoid excessive liability being imposed. In that respect, Moch is of a piece with other no-duty decisions . . . .”).

44 Section 43 of the Third Restatement, Liability for Physical and Emotional Harm, provides:

Duty to Third Persons Based on Undertaking to Another

An actor who undertakes to render services to another that the actor knows or should know to reduce the risk of physical harm to which a third person is exposed has a duty of reasonable care to the third person in conducting the undertaking if:

(a) the failure to exercise reasonable care increases the risk of harm beyond that which existed without the undertaking,

(b) the actor has undertaken to perform a duty owed by the other to the third person, or

(c) the person to whom the services are rendered, the third party, or another relies on the actor’s exercising reasonable care in the undertaking.
establishes the usual “no duty to rescue rule” and sections 38–44 lay out the exceptions to that rule.\textsuperscript{45} The result is that, at least in the eyes of the Restatement editors, a standard-setter in order to persuade the court to dismiss the suit on the ground of “no duty” need only satisfy the court that none of sections 38–44 apply.

\textit{Meneely v. S.R. Smith and Sons} is the second case illustrating the tort exposure of standard-setters like the NSPI.\textsuperscript{46} There the Washington Court of Appeals upheld a judgment entered on a jury verdict for an injured pool user who claimed the NSPI was negligent in promulgating its standards for Type II pools, that is, residential pools with a one-meter diving board. As in \textit{King}, the pool user struck the bottom of the pool in the transition slope after diving from the diving board. The jury set the plaintiff pool user’s damages at $11 million, and that determination of damages was also upheld on appeal.

The trial court relied on two alternative grounds for holding that NSPI owed the plaintiff a tort duty despite the absence of any contact between NSPI and either the plaintiff or the builder or owner of the pool.\textsuperscript{47} Indeed the only contact between NSPI and the pool in question was that the use of the particular type of diving board in this type of pool conformed with NSPI standards.\textsuperscript{48} The trial court’s first ground was Restatement 2\textsuperscript{nd} section 324A, the ground relied on in \textit{King}, and the second ground was Washington’s voluntary rescue doctrine. The appellate court agreed with the trial court that a duty should be imposed on NSPI under Washington’s voluntary rescue doctrine and therefore upheld the trial court’s judgment for the plaintiff without discussing whether Restatement 2nd section 324A also called for imposing a duty.

Washington’s voluntary rescue doctrine did not differ from that which exists throughout the country and which is reflected in Restatement 2\textsuperscript{nd} section 323 and in Restatement 3\textsuperscript{rd} Liability for Physical and Emotional Harm section 42. Qualifications aside, the doctrine imposes a tort duty of care upon an actor who undertakes, even gratuitously, to render services to another which the actor should recognize are necessary for the protection of the other. The \textit{Meneely} court deemed the NSPI promulgation of suggested standards as a sufficient undertaking to trigger Washington’s voluntary rescue doctrine and to impose a duty of care on NSPI toward all users of a pool which conforms to NSPI standards.\textsuperscript{49}

\textsuperscript{45} The exceptions are often referred to as the “Good Samaritan Rule” because they recognize a duty of care once an actor, like the Good Samaritan, attempts to aid.

\textsuperscript{46} \textit{Meneely v. Nat’l Spa and Pool Inst.}, 5 P.3d 49, 59 (Wash. Ct. App. 2000). The more specific theory of breach in \textit{Meneely} seemed to be that the NSPI standards negligently allowed the use of this particular type of diving board in a Type II pool.

\textsuperscript{47} The contractor who installed the pool and excavated the land for the pool was not sued. Defendant S.R. Smith Inc., apparently a member of NSPI, manufactured the allegedly inappropriate diving board and another defendant, Pool and Patio Supply sold the board to the defendant pool owner. The plaintiff stipulated to the dismissal of all defendants before trial other than NSPI.

\textsuperscript{48} \textit{In Meneely} the court admitted that the pool in question failed to conform with NSPI standards in many respects, but the court held that it sufficed that the transition slope where plaintiff’s collision occurred conformed with the NSPI standards. \textit{Meneely}, 5 P.3d at 60.

\textsuperscript{49} The \textit{Meneely} court also made much of the NSPI continuing its standard after a study it commissioned reported that indeed pool users in complying pools were colliding with the bottom. While this study confirmed the foreseeability to the NSPI of such a type of injury, that was never in dispute to begin with.
The *Meneely* court reasoned that two cases applying Washington’s voluntary rescue doctrine called for imposing a duty on the NSPI. In *Brown v. MacPherson’s Inc*\(^{50}\) a duty was imposed on the Washington Department of Motor Vehicles because its employee conferred with and then negligently misled plaintiff’s real estate broker into believing some cabins plaintiff later purchased were not subject to an avalanche risk.\(^{51}\) Quoting from that decision, the *Meneely* court fit those facts to the voluntary rescue doctrine: “the State’s agents undertook to prevent the avalanche damage by conferring with the real estate broker, in effect to rescue the plaintiffs from their danger but in the process negligently misled the broker . . . .”\(^{52}\) In the other application of the voluntary rescue doctrine, *Sheridan v. Aetna Cas. & Surety Co.*,\(^{53}\) the Washington court imposed a tort duty on the insurance company of the Stirrat building in Seattle toward an injured employee of one of the tenants in that building.\(^{54}\) The defendant insurance company had promised its insured, the owner of the Stirrat, to inspect the building’s elevators and to file with the city a copy of the report about the elevator as required by a city ordinance required. This “voluntary assumption, as the owner’s agent of the duty of proper inspection and reporting”\(^{55}\) subjected the insurance company to a tort duty toward the tenant and its employee. The insurance company breached that duty and caused the elevator’s malfunction by failing to inspect and report.

Neither *Brown* nor *Sheridan* involved standard setting. Moreover, in each of those cases—as in most voluntary rescue cases in other jurisdictions—the defendant “rescuer” had interacted specifically with the plaintiff, the plaintiff’s agents, or the owner of property on which the plaintiff was injured. Neither of these two cases required the

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\(^{50}\) 545 P.2d 13 (1975).

\(^{51}\) Id. at 21.

\(^{52}\) Id. at 24.

\(^{53}\) 100 P.2d 1024 (1940).

\(^{54}\) Id. at 1029.

\(^{55}\) Id. at 1030.
courts deciding them to confront the concern about open-ended or insufficiently limited liability that would arise from imposing a duty on the NSPI for promulgating its standards. The Department of Motor Vehicle employee in Brown met face to face with plaintiff’s broker, knew the broker was the agent of plaintiff, and knew the plaintiff was inquiring about a specific property with a view to purchasing it. Any possible liability was closely cabined. To impose a duty of care on the State based on the employee’s representations about the property, sound or not, created no concern of unlimited liability. Likewise, the defendant insurance company in Sheridan issued its promise to inspect identifiable, specific elevators to an identifiable, specific landlord. True, the duty imposed on the insurance company in Sheridan subjected the insurer to liability to anyone using one of the elevators in the building, rather than, as in Brown, to the one potential plaintiff and his associates who hoped to build in the avalanche area. Still the defendant insurer’s liability was limited to injuries caused by less than half a dozen elevators. The small number of product specimens to which defendant’s duty extended provided a natural limit on liability. Contrast the insurer’s potential exposure with that of a standard-setter whose standards fly around the country, often around the globe, offering themselves for use by anyone making a specimen or variation of the type of product to which the standards apply.

Although generalizations across the wide array of products affected by standards are treacherous, the potentially huge number of products that a standard might affect bears on the duty issue for two related reasons as well. In contrast to a standard-setter, a certifier who inspects, certifies, endorses, accredits, recommends, or otherwise publicly approves a number of finished, particular products or models of products will appear to have taken more responsibility for the product and will more likely lead builders of those particular products to forego their own efforts and judgment regarding the products’ safety. The builders know that the defendant certifier has looked at and approved the specimen of the product that they are looking at. In contrast when the NSPI merely suggests standards for all Type II pools, builders of the pools realize the NSPI experts will never come by to confirm the compliance of their particular pool to NSPI standards, nor to confirm whether the many variations the builders adopted for that particular pool have compromised product safety. When suggested standards apply so generally, builders of a particular specimen of the product seem more likely to view the standards merely as helpful guidance rather than as a reason for abandoning their own safety concerns about the particular specimen of the product they are building.57

56 The reference to “product specimens” rather than “products” aims to remind the reader that the defendant insurer in Sheridan did not promise to inspect all elevators of the type of those in the Stirrat building but only the specific, physical, individual elevators in that building. Standard-setters in contrast typically concern themselves with a type or model of product, rather than a single specimen of the product, and hence the number of specimens to which their duty might extend, and their corresponding liability, could be greater by several orders of magnitude.

57 Because the builders may attach labels of the standard-setter to the finished product which incorrectly suggest to a buyer or user that the standard-setter has indeed looked at and approved that specific specimen or type of model, the standard-setter’s limited relation to that specific specimen is not likely to affect the safety efforts of buyers and users. But the builder or seller will nevertheless know that the standard-setter has not looked at the particular specimen or type or model of the finished product and the builder or seller are therefore more likely to maintain its safety efforts.
The potentially huge number of products a standard might affect also bears on the
duty issue because it suggests that the likely relationship between the standard-setter and
the injured plaintiff will not be close.\(^\text{58}\) Granted, basing duty on the closeness of the
relationship between the parties invites vague and unfalsifiable assertions about that
relationship that rarely penetrate beyond the pronunciamento stage. Moreover, a judicial
finding of a “close relationship” may serve as merely a proxy for a finding that no
concerns about unlimited liability arise. But if the closeness of the relationship matters in
itself, the relationship between the NSPI and Meenely, for example, seems less close than
the relationship between the defendant and plaintiff in \textit{Brown} or between a product seller
and its buyer or user. In one of the NSPI cases in which the NSPI prevailed, the court, in
addressing the lack of relationship between NSPI and the plaintiff diver, described the
plaintiff “as a faceless member of an unresolved class of persons not marked by any
definable limits”.\(^\text{59}\) Had NSPI inspected the specific pool involved in \textit{Meneely}, it would
have more actively participated in the sale and arguably would have developed a closer
relationship with any pool user. But an organization that simply promulgates standards
for products bears an undifferentiated relationship to each product user. In this respect
the relationship between the standard-setter and the product user resembles the
undifferentiated relationship between a police force and a crime victim who sues the
police for negligently protecting him. While other policy concerns arise when
government employees are sued, courts unanimously refuse to impose a tort duty on the
police unless prior police behavior toward the individual plaintiff sufficiently
differentiates the plaintiff from the mass of others who might expect police protection.\(^\text{60}\)

These three policy reasons distinguish suits against standard-setters from the ever
lengthening line of successful suits against those who have certified or otherwise
inspected and approved the very specimen or model of the injurious product.\(^\text{61}\) Rightly or
wrongly, courts have usually imposed a duty on such product certifiers. This line of
authority extends back at least to \textit{Hansberry v. Hearst Corporation} in which a tort duty

\(^\text{58}\) One could term the concern for the closeness of the relationship as a concern for sufficient “nexus.” One
former but now defunct requirement for duty—privity—played a similar role.


\(^\text{60}\) See \textit{Riss v. City of New York}, 240 N.E.2d 860 (N.Y. 1968) (no tort duty imposed on police to protect
individuals from criminals); \textit{DeShaney v. Winnebago County Department of Social Services}, 489 U.S. 189
(1989) (state social service agency has no duty as a matter of constitutional law to protect specific
endangered children).

\(^\text{61}\) Some clarification is needed because often the certifier approves not the particular specimen of the
injurious product but instead the particular type or model or sample of that product. But the difference
between standard setting and such certification of a specified product or type, model or sample of that
product remains salient. Certification involves passing judgment on a specific already finished design,
model or product. Setting standards establishes goals for production (especially true of performance
standards) and aims to assist those planning to produce or in the process of producing a product (especially
true for prescriptive standards). While those actually producing a product may decide on their own to
attach the standard-setter’s label to it, labeling and listing by the certifier constitute the heart of the
certification enterprise. There is also a conceptual difference between standard-setting and certification as
well. Standard setting describes desired designs, materials, methods of productions or performance
characteristics of products. Standard-setters, as it were, resemble legislators in that they write the statutes.
Certification typically calls for the application of those standards to particular products or designs.
Certifiers, as it were, resemble courts in that they apply the legislator’s statutes to particular cases.
was imposed on Good Housekeeping Magazine and a jury verdict for misrepresentation upheld because the magazine claimed the shoes plaintiff bought were “safe.”

More recently courts have imposed a duty on the International Association of Plumbing Mechanical Officials (IAMPO) because IAMPO certified that certain piping, which injured the plaintiff, complied with the IAPMO Uniform Piping Code. The courts in these cases typically grounded the duty they imposed on Restatement section 324A. Certification certainly resembles standard setting in many respects, but the certifier’s approval of the particular completed specimen of the injurious product, or at least the completed model of that product, distinguishes standard-setting for the reasons stated above. That is, the certifiers approval of an existing product specimen reduces, at least somewhat, the fear of unlimited liability, more likely halts the builder’s own safety efforts, and establishes a closer relationship between the certifier and the product user. These three policy concerns blunt the precedential force of the many decisions that impose a duty on product certifiers and justify a court faced with a case against a standard-setter in refusing to impose a similar duty.

Having distinguished the cases against certifiers, a court wishing to adopt the approach recommended here must still confront the current law exemplified by King and Meenely that deals expressly with private standard-setters who do not attempt any certification or approval of the specific injurious product, service or activity. And questioning the underpinnings of King and Meenely in no way diminishes their threat to standard-setters. There is little reason to believe that future courts will dismiss King and Meenely as deviant applications of Restatement 2nd section 324A or of the state’s voluntary rescue doctrine, King’s and Meenely’s respective grounds for imposing a tort

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63While less open-ended than that of standard-setters, the potential liability of certifiers is still substantial. For example, the seal of Underwriters’ Laboratories, Inc. appears on over a million products manufactured by some 15,000 companies. NATIONAL COMM’N ON PRODUCT SAFETY, FINAL REPORT (1970). Other certifiers include Good Housekeeping Institute, Parents’ Magazine, Consumer Service Bureau, Consumers’ Research, Inc.(publisher of “Consumer Bulletin”), and Consumers Union (publisher of “Consumer Reports” magazine). Some certifiers like Good Housekeeping accept money in the form of advertising revenue from businesses whose products they certify; some like Consumer’s Union do not. Some are more likely to have 501(c)(3) status under the IRS Code than 501 (c)(6) status, the typical status of standards development organizations.
duty on standard-setters toward all users of complying products and activities.\textsuperscript{64} At best, predictability is nil. Indeed, the favorable reaction of the 3\textsuperscript{rd} Restatement editors to \textit{King} suggests these cases are harbingers of an era of increasing liability.

Further support for this prediction comes from the mixed results of suits against a much more quasi-governmental standard-setter than the purely private NSPI, the American Association of Blood Banks. The more closely a standard-setter is associated with the government, that is, the more quasi-governmental it is, the better it can wrap itself in the government’s immunity, the stronger the case for according it the same qualified privilege that a government agency suggesting standards would enjoy. Accordingly a court which refuses to accord a qualified privilege to a quasi-governmental standard-setter would refuse to accord such a privilege to a purely private standard-setter \textit{a fortiori}.

In these highly publicized suits the plaintiffs received blood transfusions of HIV contaminated blood. They then sued the American Association of Blood Banks (hereafter AABB) claiming that the AABB’s standards for screening blood donors was negligent and rendered the AABB liable for their HIV infection. Unable to point to any affirmative misfeasance by the AABB, plaintiffs claimed the AABB’s negligence lay in failing to adopt a standard calling on blood banks to surrogate test blood donors.\textsuperscript{65} Surrogate testing would have identified donors who were infected with Hepatitis B or with other conditions that put them at high risk of having HIV infected blood; those so identified would then be barred from donating blood.\textsuperscript{66} Had the blood bank responsible for the blood transfused into plaintiff surrogate tested and thereby excluded the particular high risk donors of the blood plaintiffs received, plaintiffs were able to show, the plaintiffs would not have been infected.

On appeal, the elements of breach, cause-in-fact and proximate cause were assumed to be resolved in plaintiff’s favor, and the primary issues became whether the court should impose a tort duty on the AABB toward plaintiff, and if so, whether the court should accord the AABB a qualified privilege that would save it from liability as long as it promulgated its standards in good faith. In most of these cases, the courts

\textsuperscript{64} Cases refusing to impose a tort duty on standard-setters for the policy reasons given here include Commerce and Indus. Ins. Co. v. Grinnell Corp., 1999 WL 508357 (E.D. La. 1999) (National Fire Protection Association which promulgates standards for construction companies has no duty to building owner); Friedman v. F.E. Myers Co, 706 F. Supp. 376 (E.D. Pa. 1989) (trade association for water pump manufacturers has no duty to homeowners).

\textsuperscript{65} Some of the cases against AABB included other theories of negligence in their standard setting such as negligence for failing to impose a standard that would call on blood banks to offer transfusion patients directed donations or negligence for failing to impose a standard that would call on blood banks to undertake direct questioning of donors. \textit{E.g.}, N.N.V. v. American Association of Blood Banks, 89 Cal. Rptr. 2d 885, 893 (2000).

\textsuperscript{66} The surrogate test for hepatitis-B was known as the core test. The AIDS Task Force of the Center for Disease Control viewed the core test as the most promising surrogate test, and the suits against the AABB focused on the failure of the AABB standards to call for this test. \textit{Snyder} v. American Association of Blood Banks, 676 A.2d 1036,1045 (1996) (known as \textit{Snyder II}). Other surrogate tests that the AABB standards might have called for were the T-cell ratio test and the absolute-lymphocyte test. \textit{Id.} at 1044.
imposed a duty on the AABB, rejected any claim of qualified privilege and affirmed the judgments against the AABB.\textsuperscript{67}

Unlike the certification or inspection cases, the negligence theory against the AABB—that their standards for blood banks should have called for surrogate testing—raised the specter of unlimited liability once a duty was imposed. AABB faced the prospect of liability to every person throughout the nation and beyond who acquired HIV from being transfused with HIV contaminated blood supplied by a blood bank which did not surrogate test during the time period that the AABB standard (or lack of standard) about surrogate testing was in effect.\textsuperscript{68} True, that time period itself provided a de facto limit on the number of suits. For the AABB’s negligent failure to call for surrogate testing lasted only from January 1983 until March 1985 when the Food and Drug Administration approved a blood test for AIDS now known as ELISA.\textsuperscript{69} Another de facto limit arose from the transmission rate for AIDS which at the time was estimated to be between 1 in 1000 and 1 in 20,000 transfusions.\textsuperscript{70} Nevertheless, these suits imposed a tort duty on the AABB toward all affected by a product, service or activity for doing no more than what every standard-setter does: promulgating standards which may influence the supplier of a product, service or activity and which therefore may affect the product, service or activity offered. The courts ruling for plaintiff in these cases imposed a duty on the AABB despite the absence of any relation between the AABB and the particular blood injurious to plaintiff other than that the AABB’s standards influenced the blood bank’s decision not to engage in surrogate testing of donors.

In \textit{Snyder II}, the leading decision for the plaintiffs, the New Jersey Supreme Court imposed a duty by relying heavily on factors increasingly deemed relevant not to the issue of duty but to the issue of breach. For instance, the court relied heavily on the foreseeability of injury to blood recipients from the AABB’s decision against a standard that would call for surrogate testing. At the time of that decision, the AABB knew of the


\textsuperscript{68} The AABB inspected and accredited blood banks, including the specific bank that supplied the blood to each plaintiff, and on that ground could be deemed a certifier or inspector even though it never approved the particular blood that injured the plaintiffs. But the opinions imposing a duty on the AABB make clear that AABB’s standard setting alone triggered a tort duty of care, regardless of any inspection, accreditation or follow-up. \textit{See Snyder II}, 676 A.2d at 1052.

\textsuperscript{69} The ELISA test is an acronym for the enzyme-linked immunoabsorbent-assay-screening test.

\textsuperscript{70} N.N.V., 89 Cal. Rptr. 2d at 897.
evidence showing that HIV infected blood could transmit AIDS. Indeed the issue under
discussion at the AABB was what to recommend in light of that knowledge. But the
court found that this knowledge of the evidence about how AIDS might be transmitted
sufficed to render the plaintiff’s infection a foreseeable result of the AABB’s standard
setting, and to satisfy fully whatever importance the factor of foreseeability played in
determining duty. That the evidence of transmission-related AIDS was inconclusive at
the time was irrelevant; as the court held “[t]he foreseeability, not conclusiveness, of
harm suffices to give rise to a duty of care.”

However important a role foreseeability has played on the duty issue as a
historical matter, many courts and the 3rd Restatement now reject foreseeability as a
factor in determining duty. Because foreseeability often determines whether a
defendant acted reasonably under the circumstances, it bears on the issue of breach. And
yet the issue of breach is reserved for the jury and necessarily involves an inquiry into the
specific facts of an individual case. The jury’s role is undermined if courts assess
foreseeability in determining the existence of duty as a threshold legal issue. Reliance of
courts on notions of foreseeability may also obscure the factors that actually guide, or in
the Restatement’s view should guide, courts in imposing tort duties. Rejecting
foreseeability as a factor then better respects the jury’s role and compels courts to
articulate more clearly the policy factors that support their duty or no duty
determinations.

The New Jersey Supreme Court also based their imposition of a duty on the
unquestioned severity of becoming infected with HIV. As with foreseeability courts have
historically found the severity of the injury risked by a defendant’s negligence to be a
factor in assessing duty. But again the 3rd Restatement conspicuously omits the severity
of injury as an appropriate factor in deciding duty and strongly suggests that the severity
of injury is better treated as part of the breach issue. Doing so effects no change in the
law pertaining to breach, as the Learned Hand calculus for breach has long incorporated

\[71\] Snyder II, 676 A.2d at 1049.
\[72\] E.g., Martinez v. Woodmar IV Condominiums Homeowners Ass’n Inc, 941 P2d 218, 223 (1997); Gipson
v. Kasey, 150 P.3d 228 (Ar. 2007). See W. Jonathan Cardi, Purging Forseeability: The New Version of
Duty and Judicial Power in the Proposed Restatement (Third) of Torts, 58 VAND. L. REV. 739 (2005);
RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 cmt. j (Proposed Final Draft no. 1
2005) (rejecting foreseeability as a factor in determining duty).

\[73\] See, e.g., Derrician v. Felix Contracting Corp, 414 N.E.2d 666, 679 (N.Y. 1990) (“Because questions
concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the
question of negligence itself, these issues generally are for the fact finder to resolve.”). Foreseeability, of
course, also plays a role in determining proximate or legal cause. See generally W. Jonathan Cardi, supra
note 77 at 758 (in the past foreseeability has made a dual appearance on duty and proximate cause).
Because the standard-setter certainly foresees that a builder or equipment supplier might comply with its
standard, and because the standard-setter has probably considered in setting the standard the risk that
materialized in plaintiff’s injury, plaintiff should have no difficulty showing foreseeability.

\[74\] The Third Restatement asserts that the duty issue should turn on such policy factors applicable to
categories of actors or patterns of conduct as the overall social impact of finding a duty, social norms about
responsibility, relational limitations, proof problems especially in ascertaining cause-in-fact, concerns of
institutional competence, the need to defer to the discretion of other branches of government and concerns
with unduly open-ended and insufficiently limited liability. See RESTATEMENT (THIRD) OF TORTS § 7
(____).
the severity of the injury as the “L” in its calculus. That well-known calculus calls for finding breach when B (the burden of precautions) < P (the chance of injury) times L (the severity of the injury). 75

The final factor the New Jersey Supreme Court emphasized in imposing a duty was the great influence of the AABB standards on the behavior of the member blood banks. About that influence, and the influence of standards-setters generally, there can be no doubt. 76 This Article concedes that plaintiffs can invariably show the product, service or activity in question was influenced by defendant standard-setter’s standards. What the court failed to mention or appreciate was that such influence is entirely appropriate, considering the AABB’s ex ante perspective, its experience, information, expertise, collective judgment, and its reputation for possessing these attributes among others in the industry. Indeed the wealth of know how that lies behind the standard-setter’s judgment is the very reason the government often incorporates their standards wholesale into regulation.

Yes, standards development organizations sometimes set standards in an environment of high stakes. The question remains the wisdom of exposing them to tort liability when the factfinder deems them guilty of ordinary negligence in doing so.

III The Social Value of Standards

Compared to the courts of other common law countries, U.S. courts view private standard-setters inhospitably. 77 In general U.S. courts react more unfavourably to private organizations engaged in what is loosely called industry self-regulation, using the term “regulation” not in the narrow sense of regulation backed by the force of law but in the broader sense which includes suggestions and other informal attempts to influence the behavior of the organization’s members. When the standards of those organizations directly or indirectly disadvantage or injure others, U.S. courts are far more likely than English courts, for example, to come to the aid of the disadvantaged and impose liability

75 United States v. Carroll Towing, 159 F. 2d 169 (2d Cir. 1947) (L. Hand, J.).
76 An inevitable result of standards being influential is that those who do not comply with the standard suffer some stigma, loss of trust, or other competitive disadvantage. For many decades U.S. courts in antitrust cases made much of the competitive disadvantage that non-compliers suffer. See, e.g., Radiant Burners v. Peoples Gas Light & Coke Co, 364 U.S. 656 (1961) (standard-setter, gas utility companies and rival burner makers liable for treble damages for adopting standard that excluded plaintiff’s burner). Recent antitrust cases, as well as the 2004 Act, focus more on the harm to output and to consumers generally than on the disadvantage to non-compliers. See Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co, 105 S. Ct. 2613 (1985). See generally Robert Heidt, Industry Self-Regulation and the Useless Concept: Group Boycott, 39 Vand. L. Rev. 1507 (1986) (reviewing the pre-1985 law).
on the organization, whether on the ground of tort or antitrust.\textsuperscript{78} The English courts, in contrast, label such purely private organizations “domestic tribunals” or “semi-public tribunals” and respond to them with deference, tolerance and gratitude for the important and necessary work these organizations perform.\textsuperscript{79} In general the English courts distinguish less sharply, and much less passionately, between mandatory regulation duly authorized by statute and performed by a public body, on the one hand, and regulation by a purely private organization acting merely under industry custom, on the other.\textsuperscript{80} Of course, if U.S. courts accorded private standard-setters the same treatment they accord government regulators, private standard-setters would enjoy full immunity against tort suits by persons injured by complying products or activities. In refusing to review a private sporting association’s adverse action against the plaintiff member, the English Court’s language suggests the deference shown such private organizations:

There are many bodies that, though not established or operating under the authority of statute, exercise control, often on a national scale, over many activities that are important to many people, both in providing a means of livelihood and for other reasons…I think that the courts must be slow to allow any implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over…activities which those bodies are far better fitted to judge than the courts… Bodies such as the [defendant]which promote public interest by seeking to maintain high standards…ought not be hampered in their work without good cause.\textsuperscript{81}

Congress too tends to appreciate standard-setting more than the U.S. courts. Congress most recently recognized the social value of standard-setting when it passed the

\textsuperscript{78} One tort concern is that the standard, by being set unduly low, will help complying industry members defend against negligence and product liability suits. Compliance with standards, like compliance with industry custom, may provide evidence helpful to defendants in such suits but is never a defense. T.J. Hooper, 60 F.2d 737 (2d Cir. 1932)(Learned. Hand, J.) (allowing jury to find negligent a defendant who complied with industry custom). U.S. courts thus deem industry standards unworthy to set the test for negligence and yet important enough, if negligent, to warrant liability.

In its decade-long investigation of standard setting, the Federal Trade Commission voiced a concern that courts have yet to appreciate—the potential delay in updating standards with a resulting freeze in innovation. Federal Trade Commission, Standards and Certification, Proposed Rule and Staff Report 54 et seq (Dec. 1978). Subjecting standard-setters to tort liability should a factfinder deem their standards negligent is likely to increase this delay.

\textsuperscript{79} E.g., Nagle v. Feilden, [1966] 2 Q.B. 633, [1966] 2 W.L.R. 1027, [1966] 1 All E.R. 689 (C.A.); Russell v. Duke of Norfolk, (1948) 65 T.L.R. 225, [1949] 1 All E.R. 109, 93 S.J. 132 (C.A.) No court has yet set forth the rationale for the more hostile treatment of standard setting at the hands of U.S. courts. Among the reasons suggested are the long tradition of judicial deference to guild rule in England compared to the judicial determination to suppress vigilante rule, especially as represented by the Ku Klux Klan, in the U.S. Heidt, supra note 82 at 49.

\textsuperscript{80} Although this usually means less liability for a private organization in England, occasionally this equivalent treatment means more liability. For example, a private trade association whose treatment of a plaintiff member arguably offends the plaintiff’s right to work is as likely as a public agency to be told by an English court that it must provide the plaintiff a hearing. R. v. Gaming Board for Great Britain, [1970] 2 Q.B. 417, [1070]2W.L.R. 1009, 114 S.J. 266 (C.A.) (private boards must provide right to a fair hearing); Faramus v. Film Artistes’ Ass’n, [1963] 2 Q.B. 527, [1963] 2 W.L.R. 504, [1963] 1 All E.R. 636 (A.C.), aff’d. [1964] A.C. 925, [1964] 2 W.L.R. 126, [1964] 1 All E.R. 25 (H.L.) (same).

Standards Development Organization Advancement Act of 2004.\textsuperscript{82} Although the Act addressed the antitrust rather than the tort exposure of standard-setters, the Act sought to “encourage the development and promulgation of voluntary consensus standards by providing relief under the antitrust laws for conduct engaged in for the purpose of developing voluntary consensus standards.”\textsuperscript{83} The Report of the House Judiciary Committee provided the relevant background:

Standard development organizations play a pivotal role in promoting market competition . . . . Beginning in the 1990’s, Congress concluded that government could no longer keep pace with rapid technological and market change, and that government-directed standard-setting activity was often cumbersome, duplicative, and inefficient. To address this concern, Congress passed the National Technology Transfer and Advancement Act of 1995 (“NTTAA”). NTTAA’s express goal was to . . . assist in the development of voluntary consensus standards and to adopt such standards in favor of often outmoded government standards whenever possible. While the NTTAA succeeded by almost every measure, standard development organizations continue to be vulnerable to litigation even after its passage.\textsuperscript{84}

When the possible tort liability of standard-setters has been brought to Congress’ attention, Congress has invariably opted against liability and provided the standard-setter some immunity. The treatment recently accorded the facility security standards of the ASIS, a standard-setter for security professionals, offers an example. In the SAFETY Act of 2002 Congress authorized the Department of Homeland Security to “designate” the ASIS standards.\textsuperscript{85} That designation:


\textsuperscript{83} House Report No. 108-125 (May 22, 2003). The Act required that standards development organizations be accorded rule of reason analysis under the antitrust laws, rather than the more severe per se analysis. The Act also eliminated the threat of treble damages for specified standard development activity and provided for the recovery of attorney fees by defendant standard-setting bodies when they prevail. The Act also encouraged disclosure and discussion of intellectual property rights and licensing terms during standard-setting proceedings. See H.R. Rep. No. 108-125, pt. 2 (2003). Despite the Act, the mere possibility of an antitrust challenge, even under the rule of reason, inhibits many standard-setters from allowing pre-adoption discussions among rivals about license terms or royalty rates. Yet these discussions would serve the salutary purpose of avoiding later, strategic claims of infringement from patentees whose patents are incorporated in the standards. Patrick D. Currant, Comment, Standard-Setting Organizations: Patents, Price Fixing, and Per Se Legality, 70 U. CHI. L. REV. 983 (2003).


(2) . . . limits ASIS’ liability for acts arising out of the use of the [ASIS] standards and guidelines in connection with an act of terrorism, and [further]
(3) . . . precludes claims of third party damages against organizations using the standards and guidelines as a means to prevent or limit the scope of terrorist acts.

Congress has also acknowledged the elaborate procedures through which private standard-setters normally develop their standards. The model set of procedures was first adopted by the private American National Standards Institute,86 and is referred to either as the ANSI Canvas Method or as the ANSI Research Protocol.87 The goal of these procedures is to assure that the process of developing standards adheres to principles of openness, voluntariness, balance, cooperation, transparency, and lack of dominance. The goal of “lack of dominance,” for example, is described as follows:
“The standards development process shall not be dominated by any single interest category, individual or organization. Dominance means a position or exercise of dominant authority, leadership, or influence by reason of superior leverage, strength, or representation to the exclusion of fair and equitable consideration of other viewpoints.”88

In the 2004 Act Congress required that to enjoy the protections of the Act, standard-setters must follow procedures that closely track the ANSI Canvas Method.89 These elaborate procedures contradict the populist image of industry leaders manipulating the standard-setters into suggesting standards that will entrench the leaders at the expense of more efficient innovators or of the public.

86 The American National Standards Institute is the central, private body responsible for the identification of a single, consistent set of voluntary standards in the U.S. It aims to identify the need for standards and to then provide a set of standards that are without conflict or unnecessary duplication in their requirements. ANSI is the U.S. member of non-treaty international standards organizations such as the International Organization for Standardization. As such, ANSI coordinates the activities involved in U.S. participation in these groups. Most but not all standard development organizations support ANSI and seek ANSI approval of their standards. Among those seeking and obtaining ANSI approval was the National Spa and Pool Institute.

87 See ANSI PROCEDURES FOR DEVELOPMENT AND COORDINATION OF AMERICAN NATIONAL STANDARDS available at www.ansi.org [hereinafter ANSI PROCEDURES]. See generally ANSI ESSENTIAL REQUIREMENTS; DUE PROCESS REQUIREMENTS FOR AMERICAN NATIONAL STANDARDS 3.1 (2006), WWW.ANSI.ORG (follow “Library; ANSI Public Documents” hyperlink; then follow American National Standards’ hyperlink; then follow “Procedures, Guides, and Forms’ hyperlink; then follow “ER0106” hyperlink).

88 See ANSI PROCEDURES, 1.23-6.0 in passim.

The ANSI procedures call for eliciting the views of all interested parties before any standard is proposed, forbid any single interest group from constituting a majority of any body dealing with standards, require wide distribution of a proposed standard followed by a lengthy period for public comment, insist that a record be made of any objections, and further insist that a single such objection automatically reach the eyes of the ANSI Board of Standards Review. All standard development organizations who wish their standards to be acknowledged as an ANSI standard must follow these procedures. To be sure, saying the standards are arrived at by “consensus” may mislead. Consensus does not mean that everyone agrees on the standard. It merely means that the standard was agreed upon by something more than a simple majority of the voting group, whose members were selected by the standard-setter itself. Moreover, while outside entities are encouraged to comment on proposed standards, they are only allowed to vote if the standard-setter appoints them to the voting group.

Of all the types of industry self-regulation, standard-setting may provide the greatest social value. Standards supply the technical foundation for transactions involving complex goods, services and activities. Standards facilitate communication between sellers and buyers, transfer technology, achieve efficiencies in design, production and inventory and promote interchangeability of products and components. Standards usually represent the distillation of great deal of technical facts and judgment about the characteristics of goods, services and activities. They tell what is important about them, how they must be produced or carried on, how to test them, and how to evaluate the test results. The particular utility of a standard arises from providing this complex information in a form useful to those who are not experts in the goods, services or activities.

To illustrate the information efficiencies of standards, a buyer who is not informed about a product’s safety or performance characteristics, and who cannot evaluate them by casual inspection, might be able to make a satisfactory choice by referring to a product standard. Consumers buy motor oil simply by asking for their “standard” grade. A manufacturer using standards could produce a quality product without being an expert at the underlying chemical, metallurgical, or other properties of the materials used. This is possible because the technology or activity in question has already been evaluated by persons who participated in development of the standard. The standard codifies their judgments as to “acceptable” attributes of the good, service or activity. Builders, buyers and others who use the standard to evaluate product acceptability are able to adopt these judgments without repeating the evaluation process.

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90 See supra note 91.
91 The National Aerospace Standard identified 52 areas of potential benefit from standards, including reducing technical time in processing product design, reusing known items of established reliability, reducing break-in time for new personnel, developing cost estimates more economically, providing a common language between buyers and sellers and reducing the time required for negotiations. NATIONAL BUREAU OF STANDARDS, REPORT OF THE VOLUNTARY STANDARDIZATION POLICY STUDY GROUP, REPORT #10 391 at 9 (Dec. 1, 1970); Tama Soldesi, Economic Effects of Standardization, International Standards Organization, Geneva (1975). Leaving each individual business to devise stands on its own would not serve consumers. With unpoled resources the individual business would often be unable to devote the resources necessary to investigate health and safety issues. 851 F.2d at 487.
Standard-setting is especially valuable as the level of technology rises and the government entities become less able to keep up with industry change: “For a mass society in an era of accelerating scientific and technical change, standards are the stabilizing, the protecting factor. Without standards there would be technological chaos; without standards the user would be unprotected.”

As the social value assigned to information flow within an industry is better appreciated generally, the social value of standard-setters as facilitators of that information flow should become better appreciated as well. Michal Porter in *The Competitive Advantage of Nations* suggests how standard-setting may contribute to innovation. He emphasizes the importance of “industry clusters” for whom “groups of domestic rivals” are integral to the rapid interfirm diffusion of product and process innovations. Porter identifies professional and trade associations encompassing clusters as key facilitators of this information flow partly because of their provision of complementary standards:

These standards are essential if products and their complements are to be used in a system. Computers, for example, need complementary software, compact disc players need complementary discs. Compatibility standards define the format for the interface between the core and the complementary goods, so that, for example, compact disc players from any manufacturer may use compact discs from any music company.

David Teece identifies a closely related advantage of standards:

The advantage of a standard is that the greater the installed base of the core product, the more complementary goods are likely to be produced by independent vendors, in turn increasing demand for the core good. In the compact disc example, the more households that have disc players, the more titles record companies are likely to publish on compact discs. The same mechanism applies when the complement is a service such as a maintenance network for aircraft, or when the complement is other users of the same product…. In each case the demand for the core product increases the larger the base of products using the same standard. The standard increases the total market for the product because it enables network externalities to be enjoyed. The advantages to society associated with the widespread adoption of common standards can be very large, as network externalities are often considerable.

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94 The information exchange must not dull competition. As Porter says, “[w]hen the exchange and flow of information about the needs techniques and technology among buyer, suppliers and related industries . . . occurs at the same time that active rivalry is maintained in each separate industry, the condition for [national]competitive advantage are most fertile.” PORTER, *supra* note 104, at 152.
95 Teece, *supra* note 104, at 481.
Establishing common standards requires a great deal of communication and coordination. Private standard development organizations serve as forums for providers and for users to educate each other and to discuss and plan the development of systems of compatible components. The standards that emerge can also serve as a focal point for designers who must choose among many technical solutions when embedding a standard in a component design.

96 One must distinguish between the effect of promulgating standards and the effect of the standard development organization serving as a mere clearinghouse of information, thereby providing the benefits of rivals sharing information about their products or services. For the benefits of sharing information, see Note, Antitrust and Sharing Information about Product Quality, 73 U. CHI. L. REV. 995 (2007). The author contends that such sharing may minimize over and under investment and better tune operations to supply and demand than might otherwise be the case. The author offers this example:

“Suppose a firm has the task of estimating some parameter of great importance, such as future demand [or] the weather. The statistic of interest is quite uncertain. Each firm in the industry has some separate foundation for estimating its value. By sharing such imperfect knowledge, firms in an industry are likely to increase the accuracy of their judgment. . . . With better estimates of uncertain common values, operations and investments can be scheduled more confidently and efficiently, thereby lowering long term costs.” Id. at 1009.

97 The effect of standard development organizations on output is of course an antitrust concern not a tort concern. But that effect is ambiguous even when actual standardization occurs. Teece, supra note 104, at 479. After all, product standardization facilitates achieving economies of scale in production. Whether standardization increases or decreases output depends on whether competition is primarily quality based to begin with. That is, whether standardization on balance increases output depends on a tradeoff between economies of scale in production (or the cost of producing design variants) and the level of market demand for improvements (or the benefit of producing design variants). As Professor Lancaster has stated:

If there are no economies of scale associated with individual product variance . . . then it is optional to custom produce to everyone’s chosen specifications. If there is no gain from variety and there are scale economies, then it is clearly optimal to produce only a single variant if those economies are unlimited, or only such variety as uses scale economies to the limit. Most cases involve a balance of some variety against some scale economies.

Kevin Lancaster, The Economics of Product Variety: A Survey, 9 MARKETING SCI. 189, 192 (2000). See also E. H. Chamberlin, Product Heterogeneity and Public Policy, 40 AMER. ECON. REV. 85, 89-90 (May 1950) (the loss of satisfaction from a more standardized product will often be less than the gain through producing more units).

Markets for physical products with dominant designs by definition possess high scale economies and low market demand for improvements. With such products, standardization is typically procompetitive. Taking advantage of scale economies increases output by lowering the cost of production. At the same time, standardization does not reduce output because the market does not demand much “improvement”. Standardization in these markets increases price competition without reducing quality competition. Jean Tirole, The Theory of Industrial Organization 286 (MIT 1988) (optimal degree of product design variety is low for markets in which there are economies of scale in production and a dominant design). See Tag Manufacturers v. FTC, 174 F.2d 452 (2d Cir. 1937) (finding procompetitive the standardization of bottle caps). Standardization can also make previously differentiated products more comparable, thereby reducing buyer search costs.

In addition standardization can take advantage of a dominant design that accounts for most of a market’s demand and of positive externalities between firms. Information advertising and public research conducted by one firm benefits other firms that produce according to the same standard. But advertising has an ambiguous effect on competition. It can either increase demand elasticity by showing buyers similarities between products or decrease demand elasticity by particularizing buyer preferences. Thomas
Because a standard can provide a benchmark, standard-setting also facilitates and supports the benefits of benchmarking. Benchmarking is the process in which a company learns and then mimics the techniques of its superior-performing peers to enhance its own efficiency. Benchmarking galvanizes companies to compete once they recognize what rivals are doing, how far behind they are and what they can do to improve. It helps underperforming peers to catch up. And realizing that the promulgation of the standard will now tend to close the gap with their inferior rivals, the superior firm gains more incentive to refine its processes further, whether in management, manufacturing, research or development. This will affect the next round of standard-setting and then the process begins again.

The social value of suggesting standards far exceeds the social value of merely providing a forum for discussion for experts in defendant’s field. The need to decide upon a standard leads the members of the standard development organization, each of whom may have relevant information about some aspect of the matter at hand, to focus on the implications of their learning instead of merely sharing their learning back and forth. By coordinating the learning of the members and bringing that learning to resolution, if only in the form of suggested standards, the standard setting process imposes a certain discipline. The standard setting process provides for the industry what the restatement process provides for the common law. It represents an attempt to summarize, translate and resolve different points of information, like different case outcomes, into the directions and generalizations that will be most helpful to experts and non-experts alike. Subjecting trade associations to potential liability when they go beyond information sharing and attempt to resolve upon a suggested standard would deprive members, consumers and the community at large of a valuable resource.

Part of the social value of standard-setting lies in the standard-setter’s ex ante perspective. That is, the standard-setter, much like the product designer in selecting between alternative designs, is in position to take into account all the reasonably foreseeable pros and cons of alternative standards. Compared to other decision-makers the standard-setter sits on higher ground and enjoys better vision. In regard to risks, for example, the standard-setter, at least when free from the threat of liability, can accord appropriate weight to the entire panoply of risks presented by the product or activity, measuring those risks by their probability and severity. Unlike a judge or jury, the standard-setter is not tempted to put undue weight on the risks that materialized in the

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As the National Marrow Donor Program explained in its amicus brief in the tort challenge to the standard setting of the American Association of Blood Banks:

A standard setting body, such as the AABB, provides an arena in which researchers can and do come together to focus on the state scientific knowledge. The standard setting process thus imposes a certain discipline and coordination to what would otherwise be independent research going on in many places at the same time. Without this arena or this discipline, there are only scholarly articles going back and forth in various journals that are then individually analyzed and responded to months later by other researchers.

injury to the particular plaintiff before the court. Assuming the standard-setter possesses at least as much information as a subsequent court, the standards emerging from the standard-setting process are hence more likely to reflect an accurate assessment of all the risks, and an informed tradeoff between them, than any standards suggested by a decision-maker deprived of the benefits of an ex ante perspective. Insofar as the threat of liability leads the standard-setters to place undue weight on some risks, namely, the risks most likely to result in liability, that threat may destroy societies’ best chance of obtaining its most informed assessment of the costs and benefits of alternative standards.

Compare the standard-setter’s ex ante perspective in suggesting a standard with the ex post perspective of a jury which is asked whether the suggestion of that standard constitutes negligence on the part of the standard-setter. Calling the jury’s perspective “ex post” means the jury knows what has happened. That perspective subjects the jury to what one court called the “hydraulic force” of the hindsight bias. For instance, the jury knows that only one of the several risks the standard-setter took into account has materialized in the gruesome injury to the plaintiff before them. Does such knowledge affect the jury’s evaluation of the magnitude and severity of that risk compared to the risks that did not materialize? Of course, the jury is told that their knowledge of that risk materializing, like their knowledge of what happened generally, should not affect their evaluation of the standard-setter’s judgment. They are told to adopt the ex ante perspective and impartially assess the magnitude and severity of all risks. But an ample literature establishes that most people succumb to the hindsight bias. Knowledge of the outcome significantly increases their perception of the foreseeability and the probability of that outcome, regardless of how carefully they are instructed to ignore that knowledge. In cases against standard-setters as in cases against product designers, this bias likely manifests in jurors overestimating the risk that materialized in plaintiff’s injury compared to other equal risks. The jurors then tend to condemn as negligent the standard-setter’s more accurate estimate of that risk, an estimate which is implicit in its suggested standard.

While juries retain a hallowed place in tort law, even the Supreme Court of the United States has recently acknowledged that juries, as a practical matter and however instructed to the contrary, do not conduct the careful cost-benefit calculus called for by the risk-utility test for design defect and by the Learned Hand test for negligence. In comparing regulations imposed by juries to those imposed by state legislatures, the Court deemed the jury’s “less deserving” and recognized that the jury is likely to accord the risk that materialized in plaintiff’s injury disproportionate weight:

A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the

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100 See Baruch Fischhoff’s experiments in the 1970s, described in Science of Fear. DANIEL GARDINER, SCIENCE OF FEAR 298 (2009). Potential outcomes given a probability of 33.8% before subjects knew the outcome were given a 57.2% probability by subjects who knew the outcome had in fact materialized. And after events occurred, subjects remembered assigning a higher probability to that event occurring than they actually had before. When events did not occur, subjects remembered assigning a lower probability to that event occurring than they actually had before.
FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.\(^\text{101}\)

The Court’s candor is as refreshing as its implications are dramatic. For if the Court correctly depicts the juries’ perspective when presented with a design defect claim, then the Court has taken the side of the severest critics of asking the jury to second-guess a manufacturer’s design decisions. The Court’s frank admission that juries do not apply the risk-utility test for design defect or the Learned Hand test for negligence mocks the formal law that supposedly governs and accuses that law of allowing virtually untrammeled scope for jury sympathy. In effect the Supreme Court is saying that, however well-defined our law may be up to that point, once negligence and design defect claims reach the jury, lawlessness reigns. Lower courts too willing to defer crucial elements to the jury’s judgment, therefore, threaten due process norms.\(^\text{102}\) Such constitutional issues need not be reached if a court—citing the standard-setter’s ex ante perspective and the jury’s shortcomings—refuses, under the rubric of “no duty,” to let the jury condemn as negligent the standard-setter’s judgment.

The customary practice rule applied in malpractice actions against professionals may reflect a similar distrust of the jury properly determining the breach issue. This rule requires the plaintiff to produce expert evidence, and requires the jury to find, that the allegedly negligent defendant failed to comply with the standard of care of the profession. Hence the jury is not free to deem the defendant negligent merely on finding that in their opinion the defendant failed to exercise ordinary care. The customary practice rule stems in part from the same concern voiced throughout this Article—the reluctance to let the jury second-guess the judgment of the more informed. Less obviously, the customary practice rule also stems in part, some have suggested, from fear that the jury will infer negligence merely from defendant making what has turned out in hindsight to be a mistake. In many malpractice actions, naturally, it is clear that defendant in some respect turned out to be mistaken. The customary practice rule comes to the aid of the mistaken but non-negligent defendant by protecting him from the jury as long as he has complied with the standard of care of the profession.

The fear that the jury will infer negligence merely from finding a mistake presents itself just as forcefully in actions against standard-setters. In the blood transfusion cases against the American Association of Blood Banks, one court based its refusal to impose a duty on the AABB on its conviction that the jury would find the AABB negligent simply because the AABB’s failure to call for surrogate testing turned out in hindsight to be tragically mistaken. Yet the current law provides “mistaken” standard-setters no counterpart to the protection from wrongly being found negligent that is provided to mistaken individual professionals by the customary practice rule.

\(^{101}\) Riegel v. Medtronic Inc., 2008 US Lexus 2013, 2024 (Class II medical devices that have undergone pre-market approval by the FDA preempt stat tort claims).

This part has emphasized the benefit to society of the information standards provide. The benefit to society from standard setting resembles the benefit to shareholders of the entrepreneurial and managerial efforts of their company’s executives. Just as the shareholders’ benefit helps to justify the “business judgment” rule which protects the executive from liability to the shareholders for losses caused by his ordinary negligence, the benefit to society from standard setting argues for the equally hospitable treatment of standard-setters. Courts which appreciate the informational benefit of standards and which realize how ill positioned the jury is to evaluate standards should also question the current exposure of standard-setters on that ground alone. But the realization that standards are often opinions, albeit highly informed opinions, about best practices or optimal tradeoffs brings into play First Amendment values and strengthens further the case against imposing liability for negligent standard setting.

IV. Liability’s Threat to First Amendment Values

Even the most devoted first amendment fan may question the sincerity of a standard-setter who claims that imposing a tort duty of care upon it when its standards cause physical injury would pose a significant threat to First Amendment values. Whether they are suggesting standards for rating the prurient content of motion pictures, suggesting procedures for blood banks or suggesting practice parameters for brain surgery, standard-setters operate in the commercial world. They function to facilitate commerce. They deal primarily with information, not expression, with know-how, not ideas. If anything, the effect of resolving on a suggested standard tends to overrule more than to support deviant voices. And, of course, tort liability neither imposes a prior restraint nor “abridges” first amendment rights through fines or imprisonment.

All the same, those who would dismiss First Amendment concerns out of hand in deciding whether to impose a tort duty on standard-setters should rebuke themselves. Courts have often found that imposing a tort duty on communicators to those physically injured by


104 Modern cases, however, have expanded the notion of abridgment. See Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) (“Our cases teach that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes ‘state action’ under the Fourteenth Amendment.”); cf. Board of County Comm’rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 674 (1996) (“constitutional violations may arise from the deterrent, or ‘chilling,’ effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights”) (quoting Laird v. Tatum, 408 U.S. 1, 11). See generally Susan Elizabeth Brant Hamilton, The First Amendment as a Trade Association Shield from Negligence Liability and Strategies for Plaintiffs Seeking to Penetrate that Shield, 2 U. PA. J. CONST. L. 466 (2000).
their communication implicates First Amendment values. Indeed the range of tort cases arising from communications in which First Amendment concerns can be dismissed is surprisingly narrow. Professor Schauer has attempted to describe that narrow range of cases:

[When] an act of communication is directed at a private transaction and not at social change, when it is delivered face to face or individually rather than to the world at large, when it seeks to convey information and not argument, and when it pertains only to topics well beyond the range of topics perceived to involve the values of the first amendment, then with the convergence of all four of these factors there does not seem to be any reason to convert what would otherwise be a pure tort action into anything else.

If nothing else, his requirement that the communication be face-to-face excludes standard-setting from this narrow range of cases in which First Amendment concerns can be dismissed. Hence the extent to which imposing a tort duty on standard-setters sacrifices First Amendment values warrants examination.

Such an examination quickly reveals that while many standards merely convey information, many others represent a greater than majority opinion among experts about the optimum tradeoff between several conflicting goals. A standard may announce, for instance, “here is our opinion about the best way of making a product or performing an activity, net of all tradeoffs between conflicting goals.” Overall safety is typically one of these goals but hardly the only one. However impressive the body of data about risks and benefits from which the experts draw, these standards turn ultimately on value judgments. These standards then amount to informed and agreed-upon judgment calls. Like other opinions but unlike say, the price of cucumbers, these standards are not susceptible to verification. Of course, one can disagree with the standard-setter’s opinion. One can think their standard should have called for more precautions or placed less weight on the cost of precautions. Just so, one can disagree with the laws that emerge from the legislative process, or from the provisions of the Restatement of Torts. One may likewise condemn the actual effects of those standards, laws or provisions. But allowing the jury

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107 If some standards amounted to a guarantee against being injured while using a complying product, perhaps those standards could be judged true or false. But virtually no standards purport to give such a guarantee.
to characterize the standards, laws or provisions themselves, or their actual effects, as “negligent” is something else again.

Imposing tort liability whenever a jury deems the standard-setter’s opinion negligent collides head-on with the protection against tort liability that courts accord to statements of opinion generally. When those stating an opinion are sued for defamation, for example, courts accord the statement of opinion virtually absolute protection, citing both the impairment of First Amendment values if voicing an opinion triggered tort liability and the difficulty of judging an opinion true or false. Yet judging an opinion negligent or non-negligent, at least when standard-setters follow their usual procedures, seems equally difficult.

Of all the types of speech “How to” books resemble standard-setting most closely, at least in their usual goals. When authors are sued for the physical injuries caused by the faulty instructions in such books, courts have refused to impose a tort duty. As one court explained “were we tempted to create this duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs.”

The tort exposure of standard-setters need not threaten their existence, nor their continuing willingness to promulgate standards, to raise alarm. The tort exposure can undermine the benefits of standard-setting merely by distorting the discussion leading to

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108 Gertz v. Robert Welch, Inc. 418 U.S. 323, 339–40 (1974) (“Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. . . . But there is no constitutional value in false statements of fact.”). But see Milkovich v. Lorain Journal Co., 497 U.S. 1, 19–21 (1990) (cautioning against “the creation of an artificial dichotomy between opinion and fact, “ but using verifiability as the touchstone for distinguishing opinions and ideas from facts”). While the fact/opinion distinction may break down in close cases, it has nearly created a safe harbor for critics.

109 See supra for the procedures of ANSI.

110 Admittedly, certifiers likewise offer opinions. Yet doing so has not prevented courts from deeming them negligent and imposing liability.

111 E.g., Gorran v. Atkins Nutritional, Inc., 464 F. Supp. 2d 315 (SDNY 2006) (because publisher has no duty of care to readers to verify the information in their publications, summary judgment granted on plaintiff’s negligent misrepresentation claim); Cardozo v. True, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977) (neither author nor publisher has a duty of care to check on the recipes in their cookbook); Alm v. Van Nostrand Reinhold Co., 480 N.E.2d 1263 (Ill. 1985) (author of “how to” book on making tools has no duty of care to avoid injuries from a tool shattering); Walter v. Bauer, 439 N.Y.S.2d 821 (Sup. Ct. 1981) (no liability for author of a science book); MacKown v. Illinois Publ’g & Printing Co., 6 N.E.2d 526, 527–30 (Ill. App. Ct. 1937) (author of article recommending a procedure for reducing dandruff lacked any tort duty to an injured reader). Publishing a “do-it-yourself” installation guide for above-ground swimming pools resembles closely the behavior of the NSPI in suggesting standards for pools. Yet when sued by an injured pool user, the publisher of the guide prevailed on the ground of “no duty”, with the court insisting that a duty of care should only be imposed on the seller of the pool . Spaulding v. Lesco Int’l Corp., 451 N.W.2d 603, 605–06 (Mich Ct. App. 1990) (court held that the defendant publisher “had no duty to warn of the alleged dangers of another’s product”). Travel guides also resemble standards. Courts have not hesitated to dismiss on the ground of “no duty”, publishers of travel guides sued for injuries suffered in reliance on the guides. Birmingham v. Fodor’s Travel Publications Inc., 833 P.2d 70 (Haw. 1992) (publisher’s negligent failure to warn of the dangers at a recommended beach was not actionable).

112 Winter v. G.P/ Putnam’s Sons, 938 F.2d 1033, 1036 (9th Cir. 1991).
the standards. Perhaps the best illustration of how standard setting may benefit from a wide open, fearless and vigorous discussion was the supposedly negligent standard-setting by the AABB which led to liability in *Snyder II*. There the trial court sent to the jury the claim of the plaintiff recipient of HIV infected blood that the AABB was negligent because its standards for blood banks, adopted in July, 1984, did not call for surrogate testing of blood donors for Hepatitis B. And the Supreme Court of New Jersey upheld on appeal the jury’s finding of negligence and liability.

Implicitly then, the jury found that the AABB was unduly and unjustifiably influenced at that time by the considerations, introduced through the testimony of the AABB’s experts, that argued against surrogate testing. Yet a brief review of those considerations suggests their obvious relevance and the social value of a wide-open discussion that will put such considerations before the standard-setters. In deciding whether to adopt a standard that called for surrogate testing of blood donors for hepatitis B, and the consequent exclusion of those donors, the AABB needed to consider the effect of such testing on the supply of blood. Many individuals need blood regularly and others require it as a life-saving measure in emergency situations. Instituting surrogate testing would produce false positives in 5 percent of the normal population who did not have AIDS and would thereby wrongly exclude a half-million blood donors. Being told they were rejected lest they contaminate the blood supply with HIV might inflict upon these false positives emotional distress, and even panic, at the fear that they had contracted AIDS. Members of high-risk groups might be drawn to blood banks under the impression that they could then find out whether they had AIDS. Since the test for Hepatitis B was not completely reliable—only 80 percent of male homosexuals with AIDS would test positive—the net effect might be to contaminate more blood. Moreover there was only one manufacturer of commercial kits to test for Hepatitis B, that test had not yet been approved by the Food and Drug Administration, and it was unclear whether this test, even if approved, could be rapidly and efficiently made available. Also arguing against surrogate testing was a study that showed a high rate of Hepatitis B in areas with a high proportion of Chinese residents even though the incidence of AIDS in those areas was low. Surrogate testing was also costly in part because it would have required notifying people who had tested positive and doing repeated testing. Estimates of the probability of acquiring AIDS through blood transfusions at that time ranged from 1 in 1000 to 1 in 20000. By the time of trial, evidence had been developed to suggest that surrogate testing would have avoided 21 percent of the blood-transmitted AIDS cases. But up to the relevant time period, medical studies on the efficacy of surrogate testing had yielded conflicting results. Other organizations studying the evidence such as the Food and Drug Administration, the Center for Disease Control, the American Red Cross, the National Institutes of Health and the Public Health Service adopted the same position as the AABB in not recommending the surrogate testing of blood donors until December 1984. Rather all these organizations, from December 1982 when evidence first arose that AIDS could be transmitted through the transfusion of blood, through 1984 when the ELISA test for AIDS became available, called for further study, and instituted measures to protect patients from AIDS, including recommendations about AIDS education, self-deferral, directed donations, and screening through medical history. As the majority could hardly dispute, AABB’s decision to adopt educational efforts and indirect donor
screening instead of surrogate testing was "the exercise of judgment or discretion in making basic policy."\textsuperscript{113}

This background is recited not to defend the AABB’s decision but to illustrate the many matters that standard-setters may legitimately consider. To provide that consideration, a wide-open discussion untrammeled by the fear of tort liability is as appropriate for standard-setters, as it is, say, for the voting public during an election campaign.\textsuperscript{114} There is a First Amendment interest in affording the standard-setter and its members engaged in that discussion, and in the ultimate vote on a proposed standard, the “breathing space” that immunity from tort liability would provide.\textsuperscript{115} Here again the great number of possible claimants against standard-setters should a duty be imposed heightens the likely chilling effect of liability on the standard-setter’s discussion.\textsuperscript{116} The harm to First Amendment values must therefore be added to the other concerns that argue against imposing a duty, and the sum of those concerns then laid against the gain from liability, primarily the deterrence of negligent standard-setting.

V. Liability’s Threat to the Integrity of Standards

Imposing liability on standard-setters to those injured by products or activities complying with the standard not only inhibits the discussion of possible standards, it also tends to distort the standards themselves by putting disproportionate pressure on the standard-setters to sacrifice other interests in striving to avoid tort liability. That is, interests that for whatever reason the standard-setter can sacrifice without fear of triggering tort liability will tend to be sacrificed far too readily. These include, for example, diffuse or abstract interests. In contrast, interests that if sacrificed threaten to trigger a viable tort suit will receive disproportionate weight and deference from

\textsuperscript{113} Costa v. Josey, 415 A. 2d 337, 348 (1980) (granting defendant a privilege under the State counterpart of the discretionary function doctrine).

\textsuperscript{114} The New Jersey Supreme Court, in contrast, suggested the AABB had considered too many concerns. After reviewing the concerns that argued against surrogate testing, the Court held:

“These concerns, however, should not have diverted the AABB from its paramount responsibility to protect the safety of the blood supply. Recognition of that responsibility should have led the AABB to consider more carefully the risks to recipients from the transfusion of infected blood”


\textsuperscript{116} The Supreme Court has recognized that imposing tort liability may distort discussion. In Sullivan v. New York Times Co. 376 U.S. 254 (1964), the Court held that the common law of defamation, if left unqualified, could so distort discussion about public figures as to be unconstitutional. Such liability would deter uttering a certain assertion “even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proven in court or fear of the expense of having to do so.” Id. at 277.
standard-setters. Hence standard-setters will unduly avoid standards that might inflict a well-defined and substantial injury on an identifiable person or group. The more clearly the standard, or more precisely the product, service or activity conforming with the standard, inflicts an injury, the more easily the injured can prove cause-in-fact. The more well-defined and substantial the injury and the more identifiable the victims, the more easily the injured can attract an attorney who will work on a contingency fee. For example, the AABB in the future will more readily sacrifice interests such as its interest in maintaining the supply of blood. Whatever the harms of an insufficient supply of blood, they are less likely to fall on an identified person or group who can show cause-in-fact and who have enough at stake to sue. Instead the AABB will feel undue pressure to opt for a standard such as requiring surrogate testing, however foolish on balance, because failure to embrace that standard will inflict a substantial injury, in this case HIV infection, on identifiable persons with enough at stake to sue. Indeed a tort duty pressures the AABB to rush to adopt whatever standards will best avoid liability lest they be deemed negligent for failure to respond quickly enough to new information.

In this respect the effect of liability on standard-setters resembles the effect of tort liability on members of medical peer review groups. Medical peer review group are typically charged with deciding whether the performance of the doctor being reviewed warrants the continuation of the doctor’s staff privileges at a hospital. Continuing the doctor’s privileges, however poor the doctor’s record and however many patients suffered from his future performance, created no risk of suit against the members. Only denying privileges created a risk of litigation. Such a denial, after all, inflicted a well-defined and substantial injury on an identified person with enough at stake and the wherewithal and patience to sue. Congress decided this undesirable imbalance of pressures resulting from the threat of liability called for granting the members of such peer review groups immunity against suit by those denied privileges. The result was the Health Care Quality Improvement Act of 1986.

Tort liability’s tendency to imbalance the incentives facing decision-makers also calls for granting public employees a privilege when they are engaged in discretionary functions. Professor Epstein’s identification of the policy underpinnings of that rule has been widely cited:

The nub of the issue lies in the implicit imbalance in the incentives imposed on public officials if left wholly unprotected by any immunity

117 Courts have recognized that liability for negligence can distort decision-making by leading to the undue sacrifice of abstract or diffuse interests. E.g., Smith v. Luman, 538 A.2d 157 (Vt. 1987) (imposing a duty of care on university to protect students from gunmen “would inevitably lead to repressive regulations and a loss of student freedoms, thus contravening a goal of higher education: the maturation of the students”).

118 Imposing a tort duty will also hinder the adoption of a new standard because plaintiffs can then argue the adoption admits the prior standard was inadequate.

doctrine. Let them make an incorrect decision and they will have to shoulder the enormous costs of liability. Let their decisions be correct and there will be enormous gains, which will be captured not by them, but by the public at large. Why, therefore, should a public official take all the risks for none of the gain? . . . One way to restore the [proper] balance would be to pay public officials enormous sums to compensate them for the great liability risks. . . . The other way to restore the needed symmetry between official rewards and official burdens is to release the public official from liability, in whole or in part. In this way the system is brought into balance, since the official in question escapes capturing the full gain or bearing the full loss, albeit at the cost of individual redress for government wrongs. 120

Just as a privilege for public employees aims to encourage acceptance of public employment, a privilege for standard-setters would encourage private actors to continue participating in standard setting activities.

Unlike public employees, however, standard-setters face no government oversight, nor risk of electoral removal, nor do they operate under a formal commitment to serve the public interest. Moreover, despite following ANSI protocols and procedures, standard-setters face an abiding incentive to let business and cost considerations influence unduly the standards they suggest. Most standard-setters also act as lobbyists for their industry—further indication that they may be motivated by their industry’s interests as well as by the public good, and that unlike government employees, they may enjoy some benefit from their suggested standards. And no doubt exists about the great influence of standard-setters generally over the products, services and activities they address. Eliminating tort liability altogether, then, may strike some as too sweeping an abdication of traditional judicial oversight over influential private behavior.

VI. The Alternative to “No Duty”--A Qualified Privilege

These concerns of selfish incentives, power and lack of oversight may call for a less sweeping approach than a rule of “no duty” or a grant of absolute immunity. An alternative approach—judicial recognition of a qualified privilege for suggesting standards—may strike a better balance between the contending concerns. This approach would retain a significant role for the jury and provide some check against wholly abusive standard-setting. It would require those injured by a product, service or activity that conformed to the standard-setter’s standard to show that the standard-setter acted in bad faith in suggesting its standard. Courts would identify the contours of bad faith, and the evidence needed to reach the jury on the issue, case by case. While attempts to identify “bad faith” behavior would be premature, a standard-setter’s unexplained failure to follow the well-accepted ANSI procedures in adopting a standard would certainly provide evidence against it. 121 Evidence of good faith, on the other hand, would include a

121 In her dissent in Snyder II, Judge Garibaldi also called for a qualified privilege for standard-setters that would free them from liability for ordinary negligence but impose liability when the standards were
standard-setter establishing that, when “faced with alternative approaches, [it] weighed the competing policy considerations and made a conscious choice.”

While no statutes provide a qualified privilege to private standard-setters generally or to other private volunteers, the “statutory privileges are reflective of public policy and may serve as a guide to the evolution of related common law privileges.” The beneficiaries of these statutory privileges are not merely judges and prosecutors but many wholly private actors who can point to some government authorization for their decision-making. Many courts have recognized that recognition of the privilege does not depend upon the source of the decision-making power but rather upon the nature of the decision-making process. The decision to grant a privilege is based on a desire to protect and to encourage certain types of decision-making processes. That is, a privilege should depend upon the functional comparability of the standard-setter’s duties to those for whom the federal and state governments have granted a statutory

promulgated in bad faith. Judge Garibaldi proposed a broad, pro-plaintiff test for bad faith but one that may be too open-ended and difficult to apply: “[A] qualified [privilege] . . . imposes a sufficient check against decisions [by standard-setters] that are clearly wrong and motivated by profit.” 

Moreover, the Restatement of Torts (Second) also offers some guidance about what “bad faith” might entail when it identifies how a person who enjoys a qualified privilege to publish defamatory matter about another may “abuse” and thus lose that qualified privilege. Such a person “abuses the privilege if he does not act for the purpose of protecting the interest for the protection of which the privilege is given.” For example, a qualified privilege to defame may be created because “an interest of the public is actually or apparently involved, and the knowledge . . . of the defamatory matter, if it is true, is likely to be of service in the protection of that interest.” Restatement (Second) of Torts § 603 (1977). The interests of the public that warrant giving a qualified privilege to defamers closely resemble the interest that would be served by extending a similar privilege to standard-setters.


Crawn v. Campo, 643 A 2d 600, 616 (1994). When the attention of Congress has been drawn to the possible tort liability of standard-setters, Congress has expressly provided for a privilege. See supra text accompanying note 90; Support Anti-Terrorism by Fostering Effective Technology Act of 2002, 27 U.S.C.A. § 223 (2002).


The term functional comparability was first used in Imbler v. Pachtman, 424 US. 409, 423 n.20 (1976). The term was affirmed and expanded upon a year later in Butz v. Economou, 438 US.478 (1977).
privilege. Consistent with Supreme Court guidance, a court rightly “looks to the nature of
the function performed . . . and evaluates the effect that exposure to particular forms of
liability would likely have on the appropriate exercise of that function.” This view
mirrors the functional approach embraced by the Supreme Court in looking both to the
defendant’s act as well as the capacity in which that act was performed.

The most prominent statutory privilege is that provided to public officials by the
Federal Tort Claims Act and its state equivalents. These acts prohibit state tort suits
against the government and its officials based on “the exercise or performance or the
failure to exercise or perform a discretionary function.” This discretional function
exception prohibits predicating tort liability upon policy bound decisions which require
the exercise of judgment or discretion. Standard-setting entails the same “type of policy-
bound decision” that discretionary function exception insulates from judicial scrutiny.
As it does for public officials, a privilege would allow the members of standard-setters to
avoid the fear and expense of litigation and its diversion of personal energy from their
standard setting responsibilities. Qualified persons who could enrich the standard setting
process would no longer be deterred from serving.

Admittedly, when private standard-setters are not acting pursuant to any express
or implied grant of government authority, there is little precedent for extending the
discretionary function exception, and the resulting privilege, to them. Courts have,
however, invoked the discretionary function exception by analogy in extending a
privilege for the good faith performance of their discretionary tasks to wholly private
arbitrators. In stressing the similarity between the function of arbitrators and judges, and
the need for both for some privilege for their decision-making, courts have overlooked the
absence of governmental authorization for arbitrators. These courts have
acknowledged that judicial review is inappropriate for some policy-bound decisions,
however private the decision-makers. As the function of arbitrators resembles the
function of judges, the function of standard-setters resembles the function of legislators
and administrators, both of whom, no less than judges, enjoy at least a qualified privilege
for their decision-making under the discretionary function exception.

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130 C.R.S. by D.B.S. v. United States, 11____ .3d at 797.
131 See Corey v. New York Stock Exch., 691 F.2d 1205, 1211 (6th Cir.1982); cf. Harlow v. Fitzgerald, 457
U.S. 800, 814 (1982).
132 Austern v. Chicago Bd. Options Exch., Inc., 898 F.2d 882 (2d Cir. 2003) (granting absolute immunity
for all quasi-judicial actions to arbitrators who heard case pursuant to contractual arbitration clause); Corey,
691 F.2d at 1208–11 (confering immunity on private arbitrators performing quasi-judicial duties);
Lundgren v. Freeman, 307 F.2d 104, 118 (9th Cir.1962) (confering immunity on architect acting as
arbiter pursuant to contract because policy of judicial immunity “extends to private persons acting [as
arbitrators]in a quasi-judicial capacity within jurisdiction established by private agreement.”); Craviolini v.
Scholer & Fuller Assoc. Architects, 357 P.2d 611 (Ariz. 1961) (recognizing tort immunity for private
arbitrators); Rubenstein v. Otterbourg, 357 N.Y.S.2d 62, 63–64 (N.Y.Civ.Ct.1973) (confering immunity
on arbitrator association because “[t]hey perform with respect to arbitrator's functions similar to those
performed by the Judicial Conference, the Administrative Board and the Appellate Division with respect to
judges.”).
Of course, courts need not base recognition of a qualified privilege for standard-setters upon an interpretation of the discretionary function exception and its state equivalents. The common law has long provided qualified privileges for private behavior that, while it may injure particular plaintiffs, benefits the public. The most well known is the qualified privilege for those who publish false and defamatory matter in the public interest.\textsuperscript{133} The Restatement Editors explain the balancing of interests that warrant this privilege, and the qualification to that privilege, in language that also seems apt for standard-setters sued for personal injury:

A qualified privilege is one of the methods utilized by the common law for balancing the interest of the defamed person in the protection of his reputation against the interests of the publisher . . . and of the public in having the publication take place. The latter interests are not strong enough under the circumstances to create an absolute privilege but they are of sufficient significance to relax the usual standard for liability.\textsuperscript{134}

In modern defamation law the effect of granting a qualified privilege is closely analogous to the required showing of bad faith that would be the effect of granting standard-setters a qualified privilege in personal injury suits:

One consequence . . . is that mere negligence as to falsity, being required for all actions of defamation, is no longer treated as sufficient to constitute abuse of a qualified privilege. Instead, knowledge or reckless disregard as to falsity is necessary for this purpose.\textsuperscript{135}

Granting standard-setters a qualified privilege under the common law, while certainly not compelled by precedent, would then fall well within the traditional bounds of judicial authority.

\textsuperscript{133} \textit{Restatement (Second) of Torts} § 598, “Communication to One Who May Act in the Public Interest” (American Law Institute 1977). As comment d to section 598 explains, “the rule stated in this Section is applicable when any recognized interest of the public is in danger.” For the public interest in standard setting, see supra text accompanying notes 92–111.

\textsuperscript{134} \textit{Id.} at 281

\textsuperscript{135} \textit{Id.} at 282. By modern defamation law, I mean the defamation law that has developed in the wake of the Gertz decision in 1972. Gertz v. Robert Welch, Inc. 418 U.S. 323 (1972).
VII. Conclusion

Evidence scholars posit that a legal system’s choice among rules is often an exercise in trading off the harms that flow from different types of error. The two contending rules discussed here are 1) the current rule which allows juries to find standard-setters negligent for promulgating their standards and thus liable in tort when complying products, services or activities cause injuries, and 2) the proposed rule which would immunize standard-setters, at least unless the jury found the standards were promulgated in bad faith. Erroneous application of the first rule means that standard-setters who have used ordinary care in promulgating their standards are wrongly liable to those injured by complying products, services and activities. Erroneous application of the second rule means that standard-setters who have promulgated their standards in good faith but nevertheless negligently avoid liability. To compare the harms from these errors, one must consider the likelihood and severity of the errors.

To take first the severity of the errors: Decision to recognize a privilege may reflect the judgment that the social loss from over deterrence exceeds the benefit of under deterrence. True this is for standards development. The loss from liability that inhibiting standards development is greater than the likely gain from letting juries second guess those developing standards.

In comparing the likelihood of the errors, . . .
Standard development organizations seem unlikely candidates for the sympathy of any readers, even legal scholars and judges. Their members toil in relative obscurity, content to use their know-how and judgment to guide the less experienced and to lubricate the engines of production and service.

Granting immunity to these private, non-profit standard-setters will ensure that, undaunted by the prospect of litigation expense and potential damage awards, they will continue to perform the essential public service that they are best positioned to perform: the good-faith development of industry standards.