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Supreme Court No. 948984
C/A No. 341976-III

WASHINGTON SUPREME COURT

HEIDI JO HENDRICKSON, a single person,

Plaintiff-Petitioner,

vs.

MOSES LAKE SCHOOL DISTRICT, a municipal corporation,

Defendant-Respondent.

ANSWER TO PETITION FOR REVIEW AND CROSS PETITION

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I. INTRODUCTION AND IDENTITY OF PETITIONER

Heidi Jo Hendrickson (Hendrickson), a former student at Moses Lake High School, had a significant portion of the thumb on her dominant hand cut off, while learning to use a power saw that she would normally be legally prohibited from using. Hendrickson brought suit against Moses Lake School District No. 1 (MLSD or the school), alleging that the school and her shop teacher had failed to train and supervise her properly, and that the saw was unsafe because safety equipment had been removed.

The superior court declined to instruct the jury regarding the school's affirmative duty to use reasonable care to protect Hendrickson, which follows from the special relationship that exists between the school and its students. School attendance is mandatory and the protective custody of the school is substituted for that of the parents. Schools are therefore required to anticipate dangers and take precautions to protect students in their custody, including protection from a student's own negligence.

Instead, the superior court instructed the jury regarding the duty of care that applies outside the school context, including instructions regarding contributory negligence. Based on the unduly narrow view of the school's duty that resulted from these

instructions, the jury returned a special verdict finding that the school had breached its duty in one or more of the ways alleged by Hendrickson, but that its negligence was not a proximate cause of her injury and damage.

The Court of Appeals reversed in part, holding that the superior court's failure to instruct the jury regarding the school's duty to protect is prejudicial error requiring retrial. However, the Court of Appeals affirmed the superior court decision to instruct the jury regarding the alleged contributory negligence of Hendrickson.

MLSD filed a petition for review of the Court of Appeals decision regarding the nature of its duty and the prejudicial effect of the incorrect instructions. Although it does not explicitly argue for the Court's prior case law to be overruled, MLSD appears to be asking the Court to retreat from schools' long-recognized and well-established duty to protect students, even if the risk of harm from which the student must be protected is not created by the school itself. Because the Court of Appeals simply followed controlling precedent, MLSD's petition should be denied. The fact-specific determination of prejudice is not worthy of review.

However, the Court should grant Hendrickson's cross petition for review of the Court of Appeals' decision regarding

contributory negligence in the context of a school's duty to protect its students. While some cases appear to recognize students' contributory negligence as a defense to schools' liability, these cases are not controlling and appear to be at odds with the nature of the duty to protect, as expressed in the Restatement provisions on which the duty is based, as well as this Court's recent decisions in *Christensen v. Royal Sch. Dist. No. 160,* 156 Wn. 2d 62, 124 P.3d 283 (2005), and the lead opinion in *Gregoire v. City of Oak Harbor,* 170 Wn. 2d 628, 244 P.3d 924 (2010). At a general level, the duty to protect is conceptually incompatible with contributory negligence of the person who is supposed to be protected. The incongruity is especially apparent in the context of a case such as this, where a student is in the process of learning how to use a dangerous piece of equipment that she would normally be legally prohibited from using, *see* WAC 296-125-030(13), and the grounds for liability include negligent failure to train and supervise the student. This is an issue of substantial public interest that should be determined by this Court under RAP 13.4(b)(4).

II. COURT OF APPEALS DECISION

Hendrickson asks this Court to accept review of that portion of the Court of Appeals' decision finding a defense of contributory negligence compatible with a school's duty to protect its students. *See Hendrickson v. Moses Lake School District,* 199 Wn. App. 244, 252-54, 398 P.3d 1199 (2017), *rev. pending*. A copy of the Court of Appeals' decision is reproduced in the Appendix at pages A-1 through A-7. A copy of the order denying the motion for reconsideration filed by MLSD is reproduced in the Appendix at page A-8.

III. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW BY MLSD'S PETITION

Is it presumptively prejudicial error not to instruct the jury regarding a school's duty to protect its students based on the special relationship that exists between them? And if so, can MLSD meet its burden to prove the absence of prejudice resulting from the superior court's erroneous duty instructions?

IV. ISSUE PRESENTED FOR REVIEW BY HENDRICKSON'S CROSS PETITION

Does a school's duty to protect its students include a duty to protect students from their own negligence and preclude a defense of contributory negligence?

V. STATEMENT OF THE CASE

A. The superior court declined Hendrickson's request to instruct the jury regarding MLSD's duty to protect Hendrickson arising from the special relationship between a school and its students.

Before the case was submitted to the jury on the issue of MLSD's negligence, Hendrickson proposed a jury instruction based upon the duty of care arising from the special relationship between a school and its students. CP 1308.[1] The superior court declined to give the instruction, and instead instructed the jury regarding the general duty of care that applies outside the school context. CP 1528-30 (Instructions 12-14).[2]

B. The superior court instructed the jury regarding MLSD's defense of contributory negligence over Hendrickson's objection.

The superior court instructed the jury on MLSD's affirmative defense based on Hendrickson's alleged contributory negligence. CP 1523, 1525 & 1531-32 (Instructions 7, 9 & 15-16); CP 1539-40 (special verdict form); *see* Appendix. The court further instructed the jury that the school had a right to assume that Hendrickson

[1] Hendrickson's Proposed Instruction 7 regarding the duty of a school (CP 1308) is reproduced in the Appendix to this brief.
[2] Cited jury instructions are reproduced in the Appendix. The jury instruction conference was not reported, RP 981:20-982:11 & 983:21-23; so Hendrickson filed a written exception to the court's refusal to give the special relationship instruction, CP 1500-03. Excerpts of Hendrickson's written exceptions to the jury instructions are reproduced in the Appendix.

would exercise ordinary care. CP 1534 (Instruction 18); *see* Appendix. Hendrickson filed a written exception to these instructions on grounds that they are incompatible with the school's duty of care toward its students. CP 1501, 1507-08; *see* Appendix.

C. In closing argument, counsel for MLSD focused on the issue of Hendrickson's alleged contributory negligence.

Counsel for MLSD began closing argument by focusing on Hendrickson's alleged contributory negligence, and repeatedly emphasized the issue throughout the argument. *See, e.g.,* RP 1036:16-22, 1037:20-22, 1038:15-24, 1039:3-1040:4, 1043:12-24, 1045:11-19, 1046:19-24, 1059:1-5 & 1061:24-25. Counsel highlighted that, under the court's instructions to the jury, Hendrickson and the school each had the exact same duty of care. RP 1059:1-5 & 1061:24-25. Counsel specifically linked Hendrickson's alleged contributory negligence to the issue of proximate cause:

> Now, if we flip to the next slide, here's what it says about causation in your jury instructions. The term proximate cause means a cause which in a direct sequence produces the injury complained of and without which such injury would not have happened.
>
> Well, you can answer this question right now. Had Heidi not put her thumb inside the guard like she was repeatedly instructed not to do, she wouldn't have had an injury. *That's the cause question.* The act was Heidi's act that caused her injury.

RP 1038:15-24 (emphasis added); *accord id.* at 1039:6-10 (arguing Hendrickson's injury could have been avoided if she had not been negligent).

D. The jury returned a special verdict finding the school negligent but not a proximate cause of Hendrickson's injury and damage.

The jury returned a special verdict finding the school negligent but not a proximate cause of Hendrickson's injury and damage. CP 1539-40. The superior court entered judgment on the verdict. CP 1543-45. Hendrickson timely appealed. CP 1546-53.

E. The Court of Appeals held that the superior court prejudicially erred in failing to instruct the jury regarding MLSD's duty to protect its students, but affirmed the decision to instruct the jury regarding the school's contributory negligence defense.

The Court of Appeals reversed in part, holding that the superior court's failure to instruct the jury regarding the school's duty to protect is prejudicial error requiring remand for a new trial. *See Hendrickson,* 199 Wn. App. At 249-52. However, the Court of Appeals affirmed the superior court decision to instruct the jury regarding the alleged contributory negligence of Hendrickson. *See id.* at 252-54. From this decision, MLSD seeks review and Hendrickson seeks cross review.

VI. OVERVIEW OF A SCHOOL'S DUTY TO PROTECT ITS STUDENTS

Under most circumstances, an actor only has a tort duty with respect to risks of harm created by his or her own conduct, and does not have a duty to protect another person or come to their aid with respect to risks of harm that he or she has not created. *See C.J.C. v. Corporation of Catholic Bishop of Yakima*, 138 Wn. 2d 699, 738, 985 P.2d 262 (1999) (quoting Restatement (Second) of Torts § 314 (1965) with approval). However, a duty to protect does arise from certain types of special relationships. *See Shea v. City of Spokane,* 17 Wn. App. 236, 241-42, 562 P.2d 264 (1977) (adopting Restatement (Second) of Torts § 314A), *aff'd,* 90 Wn. 2d 43, 578 P.2d 42 (1978) (adopting Court of Appeals opinion per curiam); *Gregoire v. City of Oak Harbor,* 170 Wn. 2d 628, 647, 244 P.3d 924 (2010) (lead opinion, citing § 314A with approval).

One of the archetypal special relationships giving rise to a duty to protect is the relationship that exists between a school and its students. *See Christensen v. Royal Sch. Dist. No. 160,* 156 Wn. 2d 62, 67, 124 P.3d 283 (2005) (referring to "the well-established law in Washington that a school district has an enhanced and solemn duty to protect minor students in its care"); *Quynn v. Bellevue Sch. Dist.,* 195 Wn. App. 627, 633, 383 P.3d 1053 (2016)

(stating "[p]ursuant to well-established case law, the special relationship between school districts and their pupils give rise to such a duty to protect"; brackets added).

The school's duty to protect arises because "the protective custody of teachers is mandatorily substituted for that of the parent." *McLeod v. Grant County Sch. Dist. No. 128,* 42 Wn. 2d 316, 319, 255 P.2d 360 (1953); *see also N.L. v. Bethel Sch. Dist.*, 186 Wn. 2d 422, 433 & 440-41, 378 P.3d 162 (2016) (discussing *McLeod* and stating "the essential rationale for imposing a duty 'is that the victim is placed under the control and protection of the other party, the school, with resulting loss of control to protect himself or herself'"; quotation omitted); *Chapman v. State*, 6 Wn. App. 316, 320-21, 492 P.2d 607 (1972) (stating "a school district may be held liable for negligent supervision of students attending the public school based upon the concept the school stands in loco parentis to the child during the time the child is in its custody").

The school's duty to protect requires the school "to anticipate dangers which may reasonably be anticipated, and then to take precautions to protect the pupils in its custody from such dangers." *McLeod,* 42 Wn. 2d at 320; *accord N.L.*, 186 Wn. 2d at 440 (quoting *McLeod*); *Hopkins v. Seattle Public Sch. Dist. No. 1,* 195

Wn. App. 96, 99, 380 P.3d 584 (2016) (describing *McLeod* as "the leading case" on the special relationship and the duty owed by schools). In particular, a school should reasonably anticipate that students might be injured by equipment used in connection with school activities, and take adequate precautions to prevent such injuries. *See, e.g., Banks v. Seattle Sch. Dist. No. 1,* 195 Wash. 321, 322-24, 80 P.2d 835 (1938) (printing press); *Travis v. Bohannon,* 128 Wn. App. 231, 115 P.3d 342 (2005) (wood splitter).

The school's duty to protect its students is often described as an "enhanced" duty, *see N.L.*, 186 Wn. 2d at 430 (quoting *Christensen,* 156 Wn. 2d at 67); or a "heightened" duty, *see Schwartz v. Elerding*, 166 Wn. App. 608, 618, 270 P.3d 630, 636 (2012) (stating "*McLeod* recognized that a heightened duty was owed"); *Hendrickson,* 199 Wn. App. at 249 (similar). This does not mean that that a school owes a duty greater than reasonable care to its students. It simply means that a school duty extends to all risks of harm that occur within the scope of the school-student relationship, not just those created by the conduct of the school or its agents. *See generally* Restatement (Second) of Torts § 314A & cmts. *c* & *d* (1965); *id.*, Topic 7 Scope Note (regarding duties of affirmative action); 16 Wash. Prac., Tort Law & Practice §§ 2.6-2.7

(4th ed.) (regarding liability for nonfeasance). A school does not thereby become a guarantor of students' safety, because liability still hinges upon proof of negligence and causation, and, where appropriate, foreseeability.

With a proper understanding regarding the nature of a school's duty to its students, it is now possible to address the grounds for review.

VII. ARGUMENT WHY REVIEW OF MLSD'S PETITION SHOULD BE DENIED

A. The Court of Appeals followed this Court's precedent regarding the nature of a school's duty to its students.

MLSD argues that the Court of Appeals departed from this Court's precedent by imposing a "heightened" duty of care. *See* MLSD Pet. for Rev., at 5. However, it is clear from the text of the decision below that the court was simply using the word "heightened" to refer to the duty as described by this Court in *McLeod, supra*. Specifically, the court stated:

> There is no serious dispute over whether the trial court should have issued an instruction explaining the district's heightened duty of care. School districts have a special relationship with the students in their custody. *Id.* Based on this relationship, school districts have a duty "to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in [their] custody from such dangers." *McLeod v. Grant County Sch. Dist.*, 42 Wash.2d 316, 320, 255 P.2d 360 (1953). Jurors are entitled

> to receive instructions on the unique nature of a school district's duty of care. *Hopkins*, 195 Wash.App. at 108, 380 P.3d 584. The failure to provide such instruction is error. *Id.* Given this legal landscape, the trial court should have provided an instruction explaining the district's enhanced duty of care.

Hendrickson, 199 Wn. App. at 249 (footnote omitted). The court is not the first to describe this duty as "heightened," *see Schwartz*, 166 Wn. App. at 618; and its use of the word "heightened" is comparable to this Court's description of the duty as "enhanced." *See N.L.*, 186 Wn. 2d at 430 (quoting *Christensen,* 156 Wn. 2d at 67).

MLSD appears to be confusing the word "heightened" with something more than reasonable care. *See* MLSD Pet. for Rev., at 5 (stating "a school district does not have any heightened duty of care but must exercise ordinary care"). However, nothing in the decision below can legitimately be read as requiring more than reasonable care, and MLSD points to nothing other than the word "heightened."

Contrary to MLSD's argument, the Court of Appeals decision below is entirely consistent with this Court's precedent regarding the nature of a school's duty to protect its students, and review is not warranted on this issue.

B. The Court of Appeals' determination that the superior court's erroneous instructions regarding MLSD's duty were prejudicial is sound and not worthy of review by this Court.

MLSD argues that the Court of Appeals erred in concluding that the superior court's erroneous instructions regarding its duty were prejudicial and required a remand for a new trial. MLSD Pet. for Rev., at 8. However, MLSD does not address the court's reasoning that a constricted view of the school's duty necessarily limited the jury's ability to assess proximate cause. *See Hendrickson,* 199 Wn. App. at 250-52. The reasoning is consistent with the lead opinion in *Gregoire*, which confronted a similar issue in the context of a jail's duty to protect its inmates. *See* 170 Wn. 2d at 643-44. The lead opinion found prejudicial error notwithstanding a jury finding of no causation, based on the "interplay" between duty and causation instructions. *Id.*; *see also Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 131, 86 P.3d 1175 (2004) (stating "[c]ausation flows from" a defendant's breach of duty, in a securities case), *rev. denied*, 153 Wn. 2d 1024 (2005).

In the final analysis, MLSD does not explain how this necessarily fact-specific analysis of prejudice merits review under any of the criteria set forth in RAP 13.4(b). Review of this issue should therefore be denied.

VIII. ARGUMENT WHY REVIEW OF HENDRICKSON'S CROSS PETITION SHOULD BE GRANTED

A. Whether a defense of contributory negligence is compatible with a school's duty to protect its students presents an issue of substantial public interest that should be determined by this Court under RAP 13.4(b)(4).

The Court of Appeals stated that, as a general rule, a school district's duty to protect its students does not include protection from the students' own negligence:

> Our case law has long held students responsible for negligent conduct on school grounds. *Briscoe v. Sch. Dist. No. 123*, 32 Wash.2d 353, 366, 201 P.2d 697 (1949). We have even applied contributory negligence against students in circumstances where a school district owes its highest duty of care as a common school bus carrier. *Yurkovich v. Rose*, 68 Wash.App. 643, 655-56, 847 P.2d 925 (1993). Although school districts owe students a heightened duty of care, our case law makes clear they are not guarantors of student safety. *Id.* at 654-55, 847 P.2d 925. We have recognized a jury can consider a student's own misconduct or negligence in assessing issues such as proximate cause or damages. *Id.*

Hendrickson, 199 Wn. App. at 252 (citations in original).

The authorities cited by the Court of Appeals do not support it holding. In *Briscoe*, a student sued the school for injuries sustained in an unsupervised game of "keep away" during recess under former Rem. Rev. Stat. §§ 950 & 951, a statute that authorized certain suits against school districts before the general waiver of sovereign immunity for the state and local government

entities. The court reversed a directed verdict in favor of the school district on grounds that evidence regarding the lack of supervision of recess coupled with knowledge of the rough-and-tumble manner of play was sufficient to create a jury question regarding the district's negligence. *See* 32 Wn. 2d at 362. Although the school had raised a defense of contributory negligence on the part of the student, contributory negligence was not one of the issues before the court. *See id.* at 360 & 366. Nonetheless, the Court stated:

> The defense of contributory negligence was pleaded by the respondent, but was not argued to the trial court as one of the grounds for taking the case from the jury. In view of the age of the appellant at the time of the injury, and in view of the further fact that he was merely participating in a game which the other boys of his age were playing, however rough it may have been, the very least that can be said of a charge that the boy's actions constituted contributory negligence is that it is a jury question, under proper instructions to be given by the court. Davis v. Wenatchee, 86 Wash. 13, 149 P. 337; Hutchins v. School District No. 81, 114 Wash. 548, 195 P. 1020; Rice v. School District No. 302, supra; Gattavara v. Lundin, supra; Eckerson v. Ford's Prairie School District No. 11, supra.

Id. at 366 (citations in original). This portion of *Briscoe* appears to be dicta.

The cases cited by *Briscoe* are not precedential on the issue of whether schools can raise a defense based on the contributory negligence of their students. *Davis v. City of Wenatchee*, 86 Wash. 13, 149 P. 337 (1915), did not involve a claim against a school. In the

remaining cases, which do involve schools, it does not appear that the issue was contested by the parties or squarely addressed by the Court. *Hutchins v. School Dist. No. 81.*, 114 Wash. 548, 552-53, 195 P. 1020 (1921), *Rice v. School Dist. No. 302* , 140 Wash. 189, 194, 248 P. 388 (1926), and *Gattavara v. Lundin*, 166 Wash. 548, 555, 7 P.2d 958 (1932), all affirmed jury verdicts in favor of students and rejected the schools' requests to reverse the verdicts on grounds that the students were contributorily negligent as a matter of law.

Likewise, the *Yurkovich* decision on which the Court of Appeals relied does not support its decision. In *Yurkovich*, the defendant-school appealed the superior court's refusal to give an assumption of risk instruction to the jury in addition to a contributory negligence instruction. *See* 68 Wn. App. at 656-57. The court held this was not error because the assumption of risk defense was substantively the same as the contributory negligence defense. *See id.* at 657 (stating "the defendants had the benefit of the defense"). The representatives of the deceased student did not appeal the submission of a contributory negligence defense to the jury, and the court did not address the issue whether a defense contributory negligence is compatible with a school's duty to protect. *See id.*

The Court of Appeals decision appears to be at odds with this Court's decisions in *Christensen* and *Gregoire, supra*. *Christensen* involved a negligence claim against a school arising from a sexual relationship between a teacher and a student, and the Court held that the school could not raise an affirmative defense based on alleged contributory negligence of the student because the defense is incompatible with the school's duty to protect. *See* 156 Wn. 2d at 67 (stating "the idea that a student has a duty to protect herself from sexual abuse at school by her teacher conflicts with the well-established law in Washington that a school district has an enhanced and solemn duty to protect minor students in its care"); *id.* at 70 (stating "[o]ur conclusion that the defense of contributory negligence should not be available to the Royal School District and Principal Anderson is in accord with the established Washington rule that a school has a 'special relationship' with the students in its custody and a duty to protect them 'from reasonably anticipated dangers'"; brackets added, quotation omitted). However, there is language in *Christensen* that makes it unclear whether the Court's ruling is limited to cases of sexual abuse, even though a school's duty to protect is phrased in terms of all "reasonably anticipated

dangers," without limitation. *See id.* at 69 (stating "[t]he act of sexual abuse is key here").

Following *Christensen*, the lead opinion in *Gregoire* stated that it was error to instruct the jury on affirmative defenses of contributory negligence and assumption of risk in a negligence claim against a jail arising from the suicide of an inmate. *See* 170 Wn. 2d at 631, 634 & 641. The opinion reasoned that such defenses vitiate the duty to protect that arises from the special relationship between a jail and its inmates, and concluded:

> The trial court erred by instructing the jury on contributory negligence because the injury-producing act—here, the suicide—is the very condition for which the duty is imposed. The jail's duty to protect inmates includes protection from self-inflicted harm and, in that light, contributory negligence has no place in such a scheme.

Id. at 640. The lead opinion in *Gregoire* also seemed to indicate that *Christensen* was not limited to sexual abuse of a student. *See id.* at 639 (stating "a similar principle" to the one enunciated in *Christensen* "applies to the jailor-inmate relationship"); *id.* at 640 n.6 (stating *Christensen* is "the best analogy to the facts before us"); *but see id.* at 650 (Madsen, J., concurring/dissenting opinion, stating "the *Christensen* holding was unique to sexual abuse").

While the Court of Appeals stated that *Christensen* and *Gregoire* are "based on unique policy concerns," *Hendrickson*, 199 Wn. App. at 253, and "context specific," *id.* at 254, such a narrow reading of these decisions is inconsistent with the Restatement provision on which the duty to protect is based. *See* Restatement (Second) of Torts § 314 cmt. *d* (stating "[t]he duty to protect the other ... extends to risks arising out of the actor's own conduct .... It extends also to risks arising from pure accident, *or from the negligence of the plaintiff himself*"; brackets, ellipses & emphasis added).[3]

Whether a contributory negligence defense is compatible with a school's duty to protect its students, either in general or under the specific circumstances of this case, presents an issue of substantial public interest that should be determined by this Court.

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[3] Restatement (Second) of Torts § 314A has been updated by Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 40 (2012). The updated Restatement expressly applies the duty to protect to schools. *See* Restatement (Third) of Torts § 40 cmt. *l* (stating "[d]espite the Second Restatement's limited treatment of affirmative duties of schools, such a duty has enjoyed substantial acceptance among courts since the Second Restatement's publication"; brackets added). The updated Restatement reiterates that the duty to protect includes protecting a student from him- or herself. *See id.* § 40 cmt. *g* (stating "[t]he duty described in this Section applies regardless of the source of the risk. Thus, it applies to risks created by the individual at risk as well as those created by a third party's conduct, whether innocent, negligent, or intentional"; brackets added). While Washington courts have not adopted § 40, they have repeatedly cited other provisions of the updated Restatement with approval. *See, e.g., Mohr v. Grantham,* 172 Wn. 2d 844, 854, 262 P.3d 490 (2011). Copies of § 314A from the Second Restatement and § 40 from the Third Restatement, excluding Reporter's Notes, are reproduced in the Appendix.

See RAP 13.4(b). It is often said that schools stand in the place of parents when children are at school. What parent does not view their role as including a duty to protect their child from the child's own negligence? In a case such as this, it is difficult to discern what a school's duty to protect means, if contributory negligence is available as a defense to a claim of failure to train and supervise a student who is learning to operate dangerous machinery that the student would ordinarily be legally prohibited from using.

IX. CONCLUSION

Hendrickson respectfully asks the Court to deny MLSD's petition for review, grant her cross petition, and remand this case for a new trial with instructions that the school may not raise a defense of contributory negligence.

Respectfully submitted this 25th day of September, 2017.

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CERTIFICATE OF SERVIE

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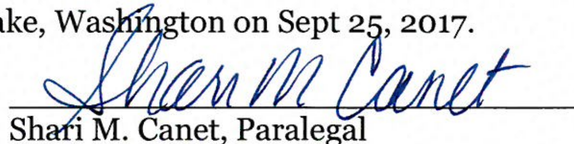

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APPENDIX

199 Wash.App. 244
Court of Appeals of Washington,
Division 3.

Heidi Jo HENDRICKSON,
a single person, Appellant,
v.
MOSES LAKE SCHOOL DISTRICT, a
municipal corporation, Respondent.

No. 34197-6-III
|
JUNE 8, 2017

Synopsis
Background: Student brought negligence action against school district after student severed her thumb during shop class. Following jury trial, the Grant Superior Court, No. 10-2-01037-4, John Michael Antosz, J., entered judgment in favor of district. Student appealed.

Holdings: The Court of Appeals, Pennell, J., held that:

[1] error in failure to instruct jury on district's heightened duty of care prejudiced student and thus was reversible error, and

[2] district's enhanced duty of care did not preclude district from asserting contributory negligence on part of student.

Reversed and remanded.

Korsmo, J., filed dissenting opinion.

West Headnotes (8)

[1] **Trial**
Matters of law

Trial
Confused or misleading instructions

Trial
Facts and Evidence

388 Trial
388VII Instructions to Jury
388VII(C) Form, Requisites, and Sufficiency
388k231 Sufficiency as to Subject-Matter
388k238 Matters of law
388 Trial
388VII Instructions to Jury
388VII(C) Form, Requisites, and Sufficiency
388k242 Confused or misleading instructions
388 Trial
388VII Instructions to Jury
388VII(D) Applicability to Pleadings and Evidence
388k249 Application of Instructions to Case
388k252 Facts and Evidence
388k252(1) In general

Jury instructions are sufficient if they are supported by the evidence, allow each party to argue its theory of the case, are not misleading, and properly inform the trier of fact of the applicable law when read as a whole; an instruction is erroneous if any of these elements is absent.

Cases that cite this headnote

[2] **Appeal and Error**
Instructions

Appeal and Error
Prejudicial Effect

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)1 In General
30k1031 Presumption as to Effect of Error
30k1031(6) Instructions
30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)18 Instructions
30k1064 Prejudicial Effect
30k1064.1 In General
30k1064.1(1) In general

If an instruction misstates the law, prejudice is presumed and is grounds for reversal unless the error was harmless.

Cases that cite this headnote

[3] **Education**
Duty and standard of care

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141E Education
141EII Public Primary and Secondary Schools
141EII(E) Pupils or Students
141EII(E)8 Injuries to Pupils or Students
141Ek791 Torts in General
141Ek793 Duty and standard of care

School districts have a special relationship with the students in their custody, and based on this relationship, school districts have a duty to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in their custody from such dangers.

Cases that cite this headnote

[4] **Education**
Tools and equipment

141E Education
141EII Public Primary and Secondary Schools
141EII(E) Pupils or Students
141EII(E)8 Injuries to Pupils or Students
141Ek800 Particular Injuries
141Ek804 Premises Liability
141Ek804(7) Tools and equipment

Failure to give instruction on school district's heightened duty of care was error, in student's negligence action against district arising out of incident in which student severed her thumb during shop class; jurors were entitled to instruction on the unique nature of district's duty.

Cases that cite this headnote

[5] **Education**
Tools and equipment

141E Education
141EII Public Primary and Secondary Schools
141EII(E) Pupils or Students
141EII(E)8 Injuries to Pupils or Students
141Ek800 Particular Injuries
141Ek804 Premises Liability
141Ek804(7) Tools and equipment

Error in failure to instruct jury on school district's heightened duty of care prejudiced student and thus was reversible error, in student's negligence action against district arising out of incident in which student severed her thumb during shop class, even though jury's verdict did find district negligent but denied relief to student through its determination of proximate cause, where student alleged three distinct types of duties and breach but jury found district negligent as to only one of student's theories.

Cases that cite this headnote

[6] **Education**
Tools and equipment

141E Education
141EII Public Primary and Secondary Schools
141EII(E) Pupils or Students
141EII(E)8 Injuries to Pupils or Students
141Ek800 Particular Injuries
141Ek804 Premises Liability
141Ek804(7) Tools and equipment

School district's enhanced duty of care did not preclude district from asserting contributory negligence on part of student, in student's negligence action against district arising from incident in which student severed her thumb while using a table saw during shop class, where there was no legal bar to student's capacity to consent to using a table saw, and student was not engaged in intentional self-harm.

Cases that cite this headnote

[7] **Education**
Duty and standard of care

141E Education
141EII Public Primary and Secondary Schools
141EII(E) Pupils or Students
141EII(E)8 Injuries to Pupils or Students
141Ek791 Torts in General
141Ek793 Duty and standard of care

Although school districts owe students a heightened duty of care, the districts are not guarantors of student safety.

Cases that cite this headnote

[8] **Negligence**
Diminished Capabilities

272 Negligence

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272XVI Defenses and Mitigating Circumstances
272k501 Plaintiff's Conduct or Fault
272k535 Diminished Capabilities
272k535(1) In general

Legal incapacity is not necessarily a bar to contributory negligence.

Cases that cite this headnote

****1200** Appeal from Grant Superior Court, No. 10-2-01037-4, Honorable John Michael Antosz.

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Opinion

Pennell, J.

***246** ¶1 School districts have a special duty to protect students in their custody and care. Heidi Jo Hendrickson claims the Moses Lake School District (the district) violated this duty when she severed her thumb during shop class. At trial, the court declined to issue a jury instruction on the district's enhanced duty of care. Instead, the instructions were limited to ordinary principles of duty and contributory negligence. We agree with Ms. Hendrickson that the trial court should have instructed the jury about the district's heightened duty of care. However, contributory negligence remained applicable. Because the inadequate instruction about the district's duty could have impacted the jury's verdict, this matter is remanded for retrial.

FACTS

¶2 Fifteen-year-old freshman Heidi Hendrickson injured herself while working on a project for shop class. Using a push stick, Ms. Hendrickson guided a board through a table saw to make a small cut. When she felt ****1201** the board come to a stop, she became scared. She set the push stick down, tried to wiggle the board free, and cut her right thumb. At the time Ms. Hendrickson cut herself, Kevin Chestnut, her shop teacher, could see the table saw area but was standing in a fenced area outside the back of the room. As a result of that cut, doctors amputated Ms. Hendrickson's thumb to her ***247** first joint. Ms. Hendrickson sued the district, alleging negligence in that the district (1) failed to use and maintain required safety equipment and guards, (2) failed to provide her with reasonable instruction, and/or (3) failed to reasonably supervise her on the use of the table saw.

¶3 At trial, Mr. Chestnut testified about how he trains students to use the table saw. After demonstrating two different types of cuts, the students would make those cuts one at a time until they performed the cut correctly. The students then took a written test. Once they passed the test, Mr. Chestnut would supervise the students over the next six weeks as they made 40-50 cuts. If the students earned his trust, Mr. Chestnut allowed them to use the table saw on their own. Specifically regarding the safe use of the table saw, Mr. Chestnut testified he told the students to always use a push stick when making their cuts and to turn off the table saw if anything unusual happens. Mr. Chestnut also stated he removed the anti-kickback device and the splitter from the table saw because, if those components became misaligned, operating the table saw could be "extremely dangerous." 5 Verbatim Report of Proceedings (Feb. 1, 2016) at 925. According to Mr. Chestnut, Ms. Hendrickson made 40-50 cuts correctly before he allowed her to use the saw on her own. At the time of her injury, Ms. Hendrickson had made approximately 100 cuts.

¶4 Before submitting the case to the jury, the trial court heard extensive argument on jury instructions. Ms. Hendrickson proposed the following instruction:

> A school district has a "special relationship" with a student in its custody and a heightened duty

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> of care to protect him or her from foreseeable harm. Harm is foreseeable if the risk from which it results was known, or in the exercise of reasonable care should have been known. The imposition of this duty is based on the placement of the student in the care of the school with the resulting loss of the student's ability to protect himself or herself. The relationship between a school district and a student is not a voluntary relationship, as children are required ***248** by law to attend school. The protective custody of teachers is thus mandatorily substituted for that of the parent.

Clerk's Papers (CP) at 1308. The court declined to give that instruction, instead instructing the jury as follows:

> INSTRUCTION NO. 12
>
> Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.
>
> INSTRUCTION NO. 13
>
> Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.
>
> INSTRUCTION NO. 14
>
> When referring to a child, ordinary care means the same care that a reasonably careful child of the same age, intelligence, maturity, training, and experience would exercise under the same or similar circumstances.
>
> ....
>
> INSTRUCTION NO. 18
>
> Every person has the right to assume that others will exercise ordinary care, and a person has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary.

CP at 1528-30, 1534. Ms. Hendrickson filed a written exception to the court's refusal to give the special relationship instruction.

****1202** ¶5 Additionally over Ms. Hendrickson's objection, the trial court instructed the jury on the district's affirmative defense of Ms. Hendrickson's contributory negligence. The district claimed Ms. Hendrickson's injuries were proximately caused by her (1) failure to use a push stick while operating the table saw and (2) failure to turn off the table saw after the board became stuck in the saw. The district emphasized Ms. Hendrickson's alleged contributory negligence in its closing argument to the jury.

***249** ¶6 The jury found the district was negligent. However, the jury also found the district's negligence was not a proximate cause of Ms. Hendrickson's injury. The court entered judgment on the verdict. Ms. Hendrickson appeals.

ANALYSIS

[1] **[2]** ¶7 This court reviews legal errors injury instructions de novo. *Hopkins v. Seattle Pub. Sch. Dist. No. 1*, 195 Wash.App. 96, 106, 380 P.3d 584, *review denied*, 186 Wash.2d 1029, 385 P.3d 123 (2016). Jury instructions are sufficient if they are supported by the evidence, allow each party to argue its theory of the case, are not misleading, and properly inform the trier of fact of the applicable law when read as a whole. *Id.* An instruction is erroneous if any of these elements is absent. *Id.* If an instruction misstates the law, prejudice is presumed and is grounds for reversal unless the error was harmless. *Id.*

Jury instructions and the district's duty

[3] **[4]** ¶8 There is no serious dispute over whether the trial court should have issued an instruction explaining the district's heightened duty of care. School districts have a special relationship with the students in their custody. *Id.* Based on this relationship, school districts have a duty "to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in [their] custody from such dangers." *McLeod v. Grant County Sch. Dist.*, 42 Wash.2d 316, 320, 255 P.2d 360 (1953).

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Jurors are entitled to receive instructions on the unique nature of a school district's duty of care. *Hopkins*, 195 Wash.App. at 108, 380 P.3d 584. The failure to provide such instruction is error. *Id.* Given this legal landscape, the trial court should have provided an instruction explaining the district's enhanced duty of care.[1] The only real argument is whether the absence of such an instruction prejudiced the jury's verdict.

1 Despite the long-standing rule regarding school districts' enhanced duty of care, case law requiring this duty to be spelled out to the jury did not arise until after Ms. Hendrickson's trial. *Quynn v. Bellevue Sch. Dist.*, 195 Wash.App. 627, 383 P.3d 1053 (2016); *Hopkins*, 195 Wash.App. 96, 380 P.3d 584. The trial court did not have the benefit of these decisions at the time it issued the instructions.

[5] ***250** ¶9 The disagreement over prejudice stems from the unique nature of the jury's verdict. Had the jury found the district was not negligent, it would not have reached the question of proximate cause and prejudice would easily have been presumed. *Id.* at 104, 108, 380 P.3d 584; *Quynn v. Bellevue Sch. Dist.*, 195 Wash.App. 627, 631, 643, 383 P.3d 1053 (2016). But the jury did find the district negligent. It only denied relief to Ms. Hendrickson through its determination of proximate cause. Based on this unique context, the district argues the jury's verdict would have been the same regardless of an instruction on an enhanced duty of care. Because there was no causal link between the district's conduct and Ms. Hendrickson's injuries, the district claims the rejection of Ms. Hendrickson's proffered instruction could not have impacted the jury's verdict. *See Griffin v. W. RS, Inc.*, 143 Wash.2d 81, 88, 18 P.3d 558 (2001).

¶10 The district's analysis of prejudice would have force if Ms. Hendrickson had only alleged one theory of negligence. Breach of a lesser duty necessarily implies breach of a corresponding greater duty. If there is no causal connection between the breach of a lesser duty and the plaintiff's injuries, then there is necessarily no causal connection between the breach of a greater duty and the ****1203** plaintiff's injuries. *See id.* (instructing on a heightened duty "would matter only if the jury had rejected breach of the lesser included duty").

¶11 But Ms. Hendrickson alleged three distinct types of duties and breach. The jury made no findings as to whether negligence pertained to one theory, two, or all three. If the jury had found negligence as to all three theories, but no proximate cause, the analysis would be the same as if there had only been one theory of negligence. Yet as the district recognizes, it is possible, if not probable, that the jury found the district negligent as to only one of Ms. Hendrickson's ***251** theories. Specifically, given Mr. Chestnut's testimony that he removed the table saw's anti-kickback device and splitter, the jury could have found the district negligent based on Ms. Hendrickson's theory that the district breached its duty to reasonably maintain safety equipment. There were facts at trial suggesting that the removed equipment would not have prevented Ms. Hendrickson's injuries. This is a likely explanation of the jury's verdict.

¶12 Had the jury actually found breach under less than all three of Ms. Hendrickson's theories, then the failure to advise the jury as to the district's enhanced duty of care could have made a difference. *See id.* at 89, 18 P.3d 558 (recognizing the causation analysis would be different if the plaintiff identifies additional duties). Taking the above example, it is possible the jury found the district was negligent in failing to maintain equipment while also finding no breach of an ordinary duty to provide instruction or supervision. However, had the jury been instructed correctly, it would have understood the district had not just an ordinary duty of care, but a heightened obligation that also encompassed protecting Ms. Hendrickson against reasonably foreseeable self-inflicted harm. *See McLeod*, 42 Wash.2d at 321, 255 P.2d 360 (enhanced duty of care includes duty to protect against foreseeable student misconduct). This more thorough understanding of the district's duties could have led the jury to believe Mr. Chestnut should have done more to prevent Ms. Hendrickson's injuries. Accordingly, the jury's assessment of proximate cause and the final verdict could have been different.

¶13 Despite this analytical possibility, the district appears to claim there was no realistic chance for Mr. Chestnut to provide additional supervision or instruction. We disagree. Mr. Chestnut was stationed 25-30 feet away from Ms. Hendrickson at the time of her injury and was focused on other students. It is possible the jury could have found this inattention to be a breach of the enhanced duty of care and supervision. Had Mr. Chestnut worked more closely ***252** with Ms. Hendrickson, he might have been able to see when she ran into problems and provide appropriate instruction on injury avoidance. The question of whether

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this was reasonably possible is something a jury must consider, after receiving accurate instructions. It is not something this court will resolve on appeal.

Jury instructions and contributory negligence

[6] ¶14 Not only does Ms. Hendrickson claim she was entitled to an instruction on the district's enhanced duty of care and protection, she also argues this enhanced duty prohibits the district from asserting contributory negligence. This latter position goes too far.

[7] ¶15 The default rule in Washington is one of contributory negligence. RCW 4.22.005. Our case law has long held students responsible for negligent conduct on school grounds. *Briscoe v. Sch. Dist. No. 123*, 32 Wash.2d 353, 366, 201 P.2d 697 (1949). We have even applied contributory negligence against students in circumstances where a school district owes its highest duty of care as a common school bus carrier. *Yurkovich v. Rose*, 68 Wash.App. 643, 655-56, 847 P.2d 925 (1993). Although school districts owe students a heightened duty of care, our case law makes clear they are not guarantors of student safety. *Id.* at 654-55, 847 P.2d 925. We have recognized a jury can consider a student's own misconduct or negligence in assessing issues such as proximate cause or damages. *Id.*

****1204** ¶16 Ms. Hendrickson claims the Washington Supreme Court altered the legal landscape on school-based contributory negligence through its decisions in *Christensen v. Royal School District No. 160,* 156 Wash.2d 62, 124 P.3d 283 (2005), and *Gregoire v. City of Oak Harbor*, 170 Wash.2d 628, 244 P.3d 924 (2010). *Christensen* held contributory negligence could not be assessed against a 13-year-old student who brought a claim against a school district for sexual abuse by a teacher. *Gregoire* involved the custodial relationship between an inmate and a jail. A ***253** plurality of our Supreme Court determined contributory negligence may not always be raised when a claim is made against a correctional institution for injuries resulting from an inmate's intentional self-harm.

¶17 *Christensen* and *Gregoire* carved out exceptions to the general rule of comparative fault based on unique policy concerns. *Christensen*, 156 Wash.2d at 68-69, 124 P.3d 283; *Gregoire*, 170 Wash.2d at 637-38, 244 P.3d 924. Because children under 16 years of age are not competent to consent to sex under our state's criminal code, *Christensen* held they also cannot be held responsible for failing to protect themselves from entering into a sexual relationship. *Christensen*, 156 Wash.2d at 67-68, 124 P.3d 283. In *Gregoire*, the justices in the plurality were concerned with ensuring correctional institutions retained an incentive to follow through with the duty of protecting inmates against self-harm. Because defenses such as assumption of risk and contributory negligence threatened to "immunize" institutions from breaching this duty, the justices declined to allow such defenses as contrary to public policy. *Gregoire*, 170 Wash.2d at 637, 244 P.3d 924. [2]

2 Former Chief Justice Madsen, whose concurrence was pivotal in reversing the Court of Appeals decision, agreed with the majority's analysis with respect to the defense of assumption of risk but favored limits on restricting the defense of contributory negligence to circumstances where a correctional institution has assumed an inmate's duty of self-care. *Gregoire*, 170 Wash.2d at 645, 244 P.3d 924 (Madsen, C.J., concurring/dissenting).

¶18 Neither *Christensen* nor *Gregoire* abrogated the general rule [3] that a defendant's special relationship to a plaintiff does not make the defendant the guarantor of the plaintiff's safety, thus eliminating comparative fault. Indeed, if all that were necessary to deny comparative fault was the existence of a special relationship, much of the analysis in *Christensen* would be rendered dicta. Never mind *Christensen*'s lengthy discussion of public policy and explicit statement that the decision was specific to the ***254** context of child sexual assault, the decision could have been rendered simply based on the well-established rule that the school district had a heightened duty to protect its student from foreseeable harms. As recognized by then Chief Justice Madsen in *Gregoire*, this was not the case: *Christensen's* "holding was unique to sexual abuse." *Gregoire*, 170 Wash.2d at 650, 244 P.3d 924 (Madsen, C.J., concurring/dissenting). Our reading of *Christensen* and *Gregoire* is that both decisions are context specific and do not fully alter a plaintiff's duty of self-care in the custodial settings of a school or penal institution.

3 *See, e.g.*, *Nivens v. 7-11 Hoagy's Corner*, 133 Wash.2d 192, 203-04, 943 P.2d 286 (1997). Contrary to Ms. Hendrickson's position, the Restatement of Torts does not create a new general rule, eliminating contributory negligence in the context of special relationships.

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[8] ¶19 Ms. Hendrickson's arguments against application of contributory negligence can only succeed if, like the plaintiffs in *Christensen* and *Gregoire*, she can articulate a context-specific reason for eliminating contributory negligence. None has been proffered, and we cannot discern any on our own. There is no legal bar to Ms. Hendrickson's capacity to consent to using a table saw. Thus, this case is unlike *Christensen*.[4] Unlike *Gregoire*, this case does not pose the public policy problem of how to incentivize a legal custodian to prevent self-harm. Ms. Hendrickson was not engaged in intentional self-harm, and application of contributory fault to her conduct would not effectively immunize the district from liability. Because there are ****1205** no unique policy reasons for excluding application of contributory negligence in Ms. Hendrickson's case, this aspect of the trial court's instructions was appropriate. On remand, the trial court shall continue to instruct the jury on contributory fault.

4 Even legal incapacity is not necessarily a bar to contributory negligence. *See Schooley v. Pinch's Deli Market, Inc.*, 134 Wash.2d 468, 481, 951 P.2d 749 (1998).

CONCLUSION

¶20 The failure to instruct the jury on the special relationship between a school district and its students was ***255** prejudicial error. We reverse the trial court's judgment and remand for a new trial.

I CONCUR:

Siddoway, J.

Korsmo, J. (dissenting)

¶21 The jury determination that Ms. Hendrickson was the cause of her own injury should be dispositive here. The error in instructing the jury on the school district's heightened duty of care was harmless in this circumstance.

¶22 I agree with the majority and the recent authority indicating that the plaintiff was entitled to an instruction indicating that the school district had a special relationship to the children in its care. *Quynn v. Bellevue Sch. Dist.*, 195 Wash.App. 627, 383 P.3d 1053 (2016); *Hopkins v. Seattle Pub. Sch. Dist. No. 1,* 195 Wash.App. 96, 380 P.3d 584, *review denied,* 186 Wash.2d 1029, 385 P.3d 123 (2016). It was error to refuse the requested instruction. That error was meaningless here, though.

¶23 In both *Quynn* and *Hopkins,* the jury declined to find the district negligent under the general negligence standard. The error in incorrectly defining the district's obligations was therefore prejudicial. That is not the case here since the jury concluded that the district's negligence was not the cause of the injury. Appellant speculates that maybe one of her theories of negligence was not accepted by the jury, but would have been accepted if the jury had been properly instructed. The problem with the argument is that she was able to argue all of her theories to the jury and they concluded that whatever negligence the district committed was not the cause of the plaintiff's injury. The jury heard every theory of liability Ms. Hendrickson had and determined none of them were the cause of the accident. That should be the end of the case.

¶24 It would be a different story if Ms. Hendrickson had been unable to assert one of her theories due to the lack of the instruction. But that is not the case here. Schools are ***256** not insurers of students' safety. The district here did everything it could to train this young lady to handle the table saw safely. She was no novice, but was quite experienced in the correct methods of operating the saw. It simply is not practical to monitor every student from a few feet away unless you reduce the class size to one or two students. The jury understandably considered, but rejected, any claim that the teacher was not close enough to oversee Ms. Hendrickson's work. That would not change if the jury had been instructed on the special relationship because it is not possible to monitor every child all of the time. Ms. Hendrickson caused this accident by not operating the saw in accordance with her training.

¶25 I think we should affirm the jury's verdict.

All Citations

199 Wash.App. 244, 398 P.3d 1199, 345 Ed. Law Rep. 1111

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FILED
JULY 27, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

HEIDI JO HENDRICKSON, a single person,	)	No. 34197-6-III
Appellant,	)	ORDER DENYING MOTION FOR RECONSIDERATION
v.	)	
MOSES LAKE SCHOOL DISTRICT, a municipal corporation,	)	
Respondent.	)	

THE COURT has considered respondent Moses Lake School District's motion for reconsideration of our June 8, 2017, opinion, and the record and file herein;

IT IS ORDERED that the respondent's motion for reconsideration is denied.

PANEL: Judges Korsmo, Siddoway and Pennell

FOR THE COURT:

ROBERT LAWRENCE-BERREY
Acting Chief Judge

INSTRUCTION No. 7.

A school district has a "special relationship" with a student in its custody and a heightened duty of care to protect him or her from foreseeable harm. Harm is foreseeable if the risk from which it results was known, or in the exercise of reasonable care should have been known. The imposition of this duty is based on the placement of the student in the care of the school with the resulting loss of the student's ability to protect himself or herself. The relationship between a school district and a student is not a voluntary relationship, as children are required by law to attend school. The protective custody of teachers is thus mandatorily substituted for that of the parent.

Christensen v. Royal City Sch. Dist. No. 160, 156 Wn.2d 62, 70 (2005) (citations omitted); *Travis v. Bohannon,* 128 Wn. App. 231, 238-39 (2005) (citing *Hutchins v. 1001 Fourth Ave. Associates,* 116 Wn.2d 217, 228 (1991)).

FILED

2016 FEB -1 AM 8:38

KIMBERLY A. ...
GRANT COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR GRANT COUNTY

HEIDI JO HENDRICKSON, a single person,, Plaintiff, vs. MOSES LAKE SCHOOL DISTRICT, a municipal corporation,, Defendant.	No. 10-2-01037-4 PLAINTIFF'S WRITTEN EXCEPTIONS TO JURY INSTRUCTIONS

To provide a complete record, plaintiff hereby submits legal authority and argument in support of its proposed jury instructions, and in opposition to the defendant's proposed instruction regarding contributory negligence, and taking formal exception to the final proposed jury instructions. To summarize the instructions addressed herein, plaintiff objects to the refusal to give the following jury instructions:

1. The duty arising from the "special relationship" between school and pupil (Plaintiff's Proposed Instruction No. 7), including the refusal to include the phrase "failed to exercise reasonable precautions to protect plaintiff from foreseeable harm"[1] as one of Plaintiff's claims in Plaintiff's Proposed Instruction No. 12 and related instruction on the non-delegable nature of the

[1] Though plaintiff notes that phrase was included in the final draft jury instruction No. 7 prepared by defense counsel following the jury instruction conference, but since this inclusion is contrary to the Court's ruling exception is taken on the assumption that the Court will order the phrase removed.

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school district's special relationship heightened duty (Plaintiff's Proposed Instruction No. 8);

2. WPI 60.03, Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy -- Evidence of Negligence (Plaintiff's Proposed Instruction No. 18);
3. WPI 60.01, Statute, Ordinance, or Administrative Rule (Plaintiff's Nos. 19-21 to instruct the Jury on CFR 1910.213(c) and WAC 296-806-48012 & -48014); and
4. WPI 30.08.02, Measure of Economic Damages—Elements of Future Damages—Lost Earning Capacity as part of WPI 30.01.01 (Plaintiff's Proposed Instruction No. 16).

In addition, plaintiff objects to giving the jury the following instructions:

5. Instruction No. 15 on contributory negligence, and related references to contributory negligence in Instructions No. 7, No. 9, No. 14, No. 16, and in the Special Verdict Form; and
6. Instruction No. 16, "Right to Assume that Others Will Exercise Ordinary Care."

I. EXCEPTIONS TO INSTRUCTIONS NOT GIVEN WHICH SHOULD BE

1. A "special relationship" instruction should be given to avoid misstating the law regarding the defendant's duty. Omitting this instruction leaves the jury to presume the ordinary rule applies which does not require any affirmative duty to "protect" another from any foreseeable harm and which is a misstatement of the law when a special relationship is involved.

The current package of jury instructions contains the instructions on negligence and ordinary care, without further qualification. To omit an instruction on the special relationship between a school and its pupils fails to instruct the jury regarding the duty that a school owes to its pupils while in the school's custody.

The defendant erroneously suggests that the "special relationship" instruction applies only in cases of sexual assault. The "special relationship" cases decided by

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1 Washington courts contain no such limitation. Instead, the "special relationship"
2 instruction is appropriate in a wide variety of cases in which the defendant not only has a
3 duty to avoid *actions* that risk harm to the plaintiff, but also has a duty to *prevent* injury to
4 the plaintiff from some other source (including that of a third party). It is true that the
5 language from which plaintiff's proposed instruction was drawn, *Christensen v. Royal*
6 *School Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005), involved a sexual assault, the
7 line of cases upon which it relied extend more broadly. For example, *McLeod v. Grant*
8 *County School Dist. No. 128*, 42 Wn.2d 316, 255 P.3d 360 (1953), stated the proposition
9 that "the duty of a school district . . . is to anticipate dangers which may reasonably be
10 anticipated, and to then take precautions to protect the pupils in its custody from such
11 dangers." *Id.* at 320, 255 P.2d at 362. *McLeod* in turn relied upon *Briscoe v. School Dist.*
12 *No. 123*, 32 Wn.2d 353, 201 P.2d 697 (1949), which involved the duty of a school district
13 to prevent injury to a school pupil engaged in athletic activities. And in *Travis v.*
14 *Bohannon*, 128 Wn.App. 231, 115 P.3d 342 (Div. 3 2005), the court applied the same
15 principle (relying upon *Briscoe*) to impose a duty of care when a high school student was
16 injured by a hydraulic wood-splitter during an off-campus activity sponsored by the
17 district.

18 In most cases the duty that the defendant owes to the plaintiff is simply to avoid
19 *causing* injury. Thus, the ordinary care and negligence instructions are appropriate. If the
20 plaintiff's injury results from a *failure* of the defendant to take some action to protect the
21 plaintiff, ordinarily the defendant is not liable unless the defendant owed a duty to the
22 plaintiff. Unless the court explains the duty that the defendant owed to the plaintiff, the
23 jury would be seriously misled regarding the scope of the defendant's duty.

24 The fact that there is no WPI instruction addressing the duty of a school toward its
25 pupils is no justification for failing to give one. It is emphasized in the Introduction to the
26 Washington Pattern Instructions that the WPI "provide a neutral starting point – not an
27 ending point – for the preparation of instructions that are individually tailored for a
28 particular case. . . . [¶] Sometimes, this process can involve adding new language for points
not addressed in the pattern instructions . . .." *WPI 0.10, Introduction to Washington's Pattern Jury Instructions for Civil Cases.*

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The presumption relied upon by the Court that the lack of a special relationship duty instruction in the WPI has any bearing on whether the jury should be fully instructed on this key point of law is in error. For example, it is of no significance that there is no pattern instruction explaining the term "special relationship"—which may apply, for example, in a case imposing a duty of care cases that arise from exceptions to the public duty doctrine. *See, for example, Volk v. Demeerleer*, 184 Wn.App. 389, 337 P.3d 372 (Div. 3 2014). In such cases, as in the current case, the court is required to instruct the jury regarding the nature of the duty that the defendant owed to the plaintiff regardless of whether this point of law has as of this date been reduced to a pattern instruction.

Defendant's Objections to the last three sentences. The last three sentences of plaintiff's proposed instructions were objected to as unnecessary to the jury's deliberations and potentially argumentative. But this objection takes nothing from the critically important nature of the first two sentences in this instruction. Plaintiff would agree to strike the last three sentences (although they correctly state the law, they admittedly contain explanations of why the law is in place rather than instructing the jury on how to deliberate), so that the instruction would read:

> A school district has a "special relationship" with a student in its custody and a duty of care to protect him or her from foreseeable harm. Harm is foreseeable if the risk from which it results was known, or in the exercise of reasonable care should have been known.

2. WPI 60.03, Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence

There are two reasons for including WPI 60.03 in the package of jury instructions in this case.

Application of an Administrative Rule. The first reason for including WPI 60.03 is that the evidence fully supports the application of administrative rules adopted by the Office of the Superintendent of Public Instruction. By the admission of the defendants at trial, school district employees regarded standards adopted by OSHA and WISHA for workplace safety to apply to their activities. The OSPI itself states that schools should comply with OSHA and WISHA standards for safe working conditions.

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In its brief opposing this instruction Defendant argues: "It would be prohibitively expensive and generally unworkable to apply OSHA and WISHA requirements on schools and its students." Defendant's Brief re: Jury Instructions, 8:15-16. However, Defendant's argument is with OSPI, not with Plaintiff. Defendant complains that Plaintiff is relying upon an "outdated guideline [issued] by OSPI that contains some vague language in it regarding the application of WISHA laws," but the District's CTE Director testified that the OSPI guidelines relied upon were the most current guidelines for CTE classes at the time of Ms. Hendrickson's injury. *Id.* at 8:18-19. The fact remains that OSPI *did* adopt WISHA standards as an administrative rule and obligated all CTE instructors to comply with those standards to protect their students. As a result Plaintiff is entitled to have the jury instructed as to the jury's ability to use such a rule as *evidence* of negligence. Defendant remains free to suggest that the jury that the district acted reasonably, despite such evidence. But the plaintiff is entitled to the instruction because it has met the requirements of Restatement § 286, which previous briefing has established.

Evidence of Industry Custom. Even if the Court rejects the application of OSPI regulations to the case at hand, WPI 60.03 should be used when there is evidence of a violation of industry standards, which (like a violation of most statutes or administrative rules) may be used as *evidence* of negligence but is not negligence *per se.* As the Comment to WPI 60.03 points out:

> **Violation of private industry standards.** Standards adopted by private parties or trade associations may be admissible on the issue of negligence when shown to be reliable and relevant, but are not conclusive evidence of negligence. [citation omitted] In a case involving private industry standards, practitioners will need to consider whether the pattern instruction should be used with appropriate modifications.

Without waiving its objection to the refusal of WPI 60.03 with regard to the adoption by OSPI of OSHA and WISHA safety standards, plaintiff requests the following alternate instruction:

> The violation, if any, of a standard established by the defendant's industry is not necessarily negligence, but may be considered by you as evidence in determining negligence.

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There was extensive testimony by experts on both sides concerning safety standards that had been adopted by schools operating a wood shop similar to the district's. Pursuant to WPI 60.03, an instruction concerning the effect of industry standards would be necessary for the jury to understand its significance.

3. WPI 60.01, Statute, Ordinance or Administrative Rule

Consistent with the application of WPI 60.03, if the jury is instructed regarding the effect of the violation of the administrative rules adopted by OSPI, the jury should be given the text of the applicable rules.

4. WPI 30.08.02, Measure of Economic Damages—Elements of Future Damages—Loss of Earnings—Adult Plaintiff

Defendant has objected to WPI 30.08.02 from inclusion in Instruction No. 19. Defendant based this objection upon an argument that the amount of the loss in future earning capacity must be proven with reasonable certainty, and that Plaintiff failed to do so. Defendant has misapplied the burden of proof applied to proving a loss of future earning capacity.

The district's own witness testified that the Plaintiff had incurred a permanent partially disabling injury that would slow down and make her work both more difficult to complete and would require special tools to (more slowly) do the same work as she would have been able to do if she had a complete hand and thumb. That testimony, coupled with the Plaintiff's statement that she intended to continue working in her chosen field but that her injury made it more difficult, slower, and required special accomodations, supplies the necessary evidence to support an instruction on impaired earning capacity. The cases are clear that the Plaintiff is not required to establish the amount of the impaired earning capacity with certainty. This is the difference between past and future economic harms. For example, in the case cited by the Defense and the Court, *Bartlett v. Hantover*, 84 Wn.2d 426, 526 P.2d 1217 (1974), the Supreme Court criticized giving an instruction that referred to the "present cash value" of an award for impaired earning capacity without there being any evidence in the record upon which the jury could apply the "present cash value"

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reduction. But the court did not therefore find that the instruction on impaired earning capacity should have been omitted. The opposite is true. Just below the portion of *Bartlett* cited by the defense the court stated: "We do agree with that portion of the Court of Appeals opinion which indicates certainty is not required in the area of proof of lost earning capacity and that portion holding that an employer can be liable for injuries caused by the intentional criminal acts of a third person." *Id.*, 84 Wn.2d at 432-33, 526 P.2d at 1220-21. If something else was meant, the later Supreme Court cases cited by plaintiff in prior briefing would be in conflict with *Bartlett* (and of course would therefore govern), but the Supreme Court itself never recognized the supposed contradiction claimed by the defense to exist.

In addition, the instruction on present cash value is only to be given when there is no evidence of what the present cash value would be. WPI 34.02, Note on Use. Thus, if the *defendant* wants an instruction concerning reduction of damages by a discount rate to present cash value, it is up to the defendant to provide evidence of how it is to be determined and what discount rate should be applied. In the absence of such evidence, it is proper for the court (and jury) to take notice of the fact that most often inflation rates and investment discount rates effectively cancel each other out leaving only de minimis differences. *Mendelsohn v. Anderson*, 26 Wn. App. 933, 940, 614 P.2d 693, 697 (1980). The defendant has persuaded the court to reverse the burden on this issue. Properly viewed, once the plaintiff has offered evidence of future impaired earning capacity – which the plaintiff not only provided in this case, but through the testimony of the district's own witness – the plaintiff is entitled to an instruction that includes an award for impaired earning capacity. It is then the defendant's burden if it wishes to make the claim to present evidence of a discount rate higher than the inflation rate such to justify giving of a present cash value instruction.

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II. EXCEPTIONS TO INSTRUCTIONS BEING GIVEN WHICH SHOULD NOT BE GIVEN

5. The defendant is not entitled to an instruction on contributory negligence, and related references to contributory negligence should be deleted

In a case that closely paralleled this case, the Court of Appeals held that the trial court was correct in denying a contributory negligence instruction when the plaintiff was faced with an emergency and took action that resulted in injury. In *Humes v. Fritz Companies, Inc.*, 125 Wn. App. 477, 105 P.3d 1000 (Div. 1 2005), as clarified on denial of reconsideration, (Mar. 14, 2005), a crane operator was in the cab of the crane loading a container onto a truck. Before he could detach the crane cables from the container, the truck driver began to drive away, threatening to pull the crane over. In response the crane operator jumped from the cab in order to avoid being crushed when the crane toppled over. The trial court applied the emergency doctrine to Humes' choice to jump from the cab, and found that there was no basis upon which a reasonable jury could decide that the decision to jump from the cab was negligent. This ruling was upheld on appeal.

If an experienced crane operator cannot be found at fault for deciding to jump from the cab of a crane, then a high school student confronted with the risk of injury from an emergency cannot be held at fault for the choice that she made.

The cases cited by the defendant to justify a contributory negligence instruction do not apply to this case. If the student creates the danger by their own conduct, they can be held partially responsible for the injury that results – even if they are held to the standard of a reasonably prudent child rather than the adult standard of care. Here, by contrast, the plaintiff's alleged negligence only occurred after she encountered a dangerous condition for which the defendant was responsible.

It is important to emphasize in this case that if the defendant was not negligent, there is no need to address alleged negligence on the part of the plaintiff – the defendant would not be held liable and the case ends. On the other hand, if the jury finds the defendant to have negligently created the condition that injured the plaintiff, then the case does not fit the precedents cited by the defendant – in which the plaintiff was independently responsible for creating the danger that she confronted. If the jury finds that the defendant negligently failed to protect the plaintiff from foreseeable harm, then the district is not

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1 entitled to blame the plaintiff for failing to avoid that harm. As the court noted in *Gregoire*
2 *v. City of Oak Harbor*, 170 Wn.2d 628, 638, 244 P.3d 924 (2010), in cases where the
3 defendant is alleged to have breached a duty to protect the plaintiff from self-inflicted harm,
4 it is error to permit a contributory fault defense:

5 The trial court erred by instructing the jury on contributory negligence because the injury-producing act--here, the suicide--is the very condition for which
6 the duty is imposed. The jail's duty to protect inmates includes protection from self-inflicted harm and, in that light, contributory negligence has no place in such a
7 scheme.

8 *Id.*, 170 Wn.2d at 641, 244 P.3d at 931.

9 **6. Instruction No. 16, Right to Assume that Others Will Exercise Reasonable**
10 **Care, has no place in the instruction package**

11 Plaintiff has previously pointed out that WPI 12.07, "Right to Assume that Others
12 Will Exercse Reasonable Care," is typically applied in a case analogous to the intersection
13 collision case in which one driver acts on the assumption that another driver will obey the
14 law and/or exercise reasonable care, and the driver acts in reliance upon that assumption.
15 In this case the district had no such right to rely, based upon their duty not only to avoid
16 injuring the plaintiff, but to use reasonable care to prevent foreseeable harm to the plaintiff.
17 Because the pupils in a school are dependent upon the school to use reasonable care to
18 protect them from foreseeable harm, they stand in a far different position from the plaintiff
19 who is approaching an intersection and must choose whether to yield the right of way to
20 another driver. In such a situation each driver is entitled to assume that the other driver(s)
21 will obey the rules of the road and exercise reasonable care to avoid injury. Here, by
22 contrast, the duty of the defendant is to anticipate that inexperienced pupils will confront
23 dangers in the wood shop that because of their immaturity they are unprepared to address.
24 The district has no "right" that is analogous to the right of a driver on the highway
approaching an intersection.

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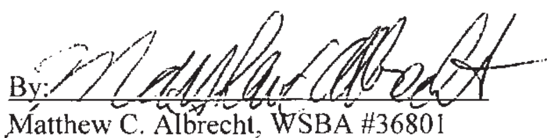
CONCLUSION

Plaintiff respectfully requests that the jury be given the correct statements of law governing this case included in Section I above, and not be given the instructions in Section II which do not properly apply to this case.

DATED January 31, 2016.

ALBRECHT LAW PLLC
Co-Attorneys for Plaintiff



By: ______________________
Matthew C. Albrecht, WSBA #36801

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DECLARATION OF SERVICE

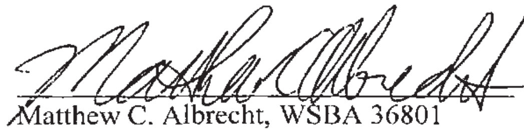
The undersigned does hereby declare under oath and penalty of perjury of the laws of the State of Washington that I served the document to which this declaration is appended as follows on the date shown below:

By personal delivery to:

Jerry Moberg
Jerry Moberg & Associates, PS
PO Box 130
Ephrata WA 98823

Bryce P. McPartland
McPartland Law Offices
1426 S. Pioneer Way
P.O. Box 1055
Moses Lake WA 98837-0160

Signed at Spokane, Washington on February 1, 2016.



Matthew C. Albrecht, WSBA 36801

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INSTRUCTION NO. 7

The plaintiff claims that the defendant was negligent in one or more of the following respects:

That the defendant:

- Failed to use and maintain required safety equipment and guards,
- Failed to provide reasonable instruction to plaintiff,
- Failed to reasonably supervise the plaintiff on the use of the table saw, and

The defendant denies these claims.

The defendant claims as an affirmative defense that plaintiff's conduct was a proximate cause of plaintiff's own injuries and damage in one or more of the following respects:

- That the plaintiff failed to use a push stick while operating the table saw, and
- That the plaintiff failed to turn off the table saw after the wood became stuck in the saw.

The plaintiff denies these claims.

INSTRUCTION NO. 9

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting or failing to act, the defendant was negligent;

Second, that the plaintiff was injured;

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

The defendant has the burden of proving both of the following propositions:

First, that the plaintiff acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiff was negligent;

Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own injuries and was therefore contributory negligence.

INSTRUCTION NO. 12

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

INSTRUCTION NO. 13

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

INSTRUCTION NO. 14

When referring to a child, ordinary care means the same care that a reasonably careful child of the same age, intelligence, maturity, training, and experience would exercise under the same or similar circumstances.

INSTRUCTION NO. 15

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

INSTRUCTION NO. 16

If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the Plaintiff. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

INSTRUCTION NO. 18

Every person has the right to assume that others will exercise ordinary care, and a person has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary.

FILED
FEB 0 1 2016
KIMBERLY A. ALLEN
GRANT COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF GRANT

HEIDI JO HENDRICKSON, a single person,; Plaintiff, v. MOSES LAKE SCHOOL DISTRICT, a municipal corporation; Defendant.	NO. 10-2-01037-4 SPECIAL VERDICT FORM

ORIGINAL

QUESTION 1: Was the defendant negligent?

ANSWER: Yes (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.)

QUESTION 2: Was the defendant's negligence a proximate cause of injury to the plaintiff?

ANSWER: NO (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 3.)

QUESTION 3: What do you find to be the plaintiff's amount of damages? Do not consider the issue of contributory negligence, if any, in your answer.

ANSWER: $__________

(DIRECTION: If you answered Question 3 with any amount of money, answer Question 4. If you found no damages in Question 3, sign this verdict form.)

QUESTION 4: Was the plaintiff also negligent?

ANSWER: (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 4, sign this verdict form. If you answered "yes" to Question 4, answer Question 5.)

QUESTION 5: Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?

ANSWER: (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 5, sign this verdict form. If you answered "yes" to Question 5, answer Question 6.)

QUESTION 6: Assume that 100% represents the total combined fault that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to the defendant's negligence, and what percentage of this 100% is attributable to the negligence of the plaintiff? Your total must equal 100%.

ANSWER:

To defendant Moses Lake School District : _____%

To plaintiff Heidi Hendrickson : _____%

TOTAL: 100%

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATE: 2-1-16

Presiding Juror

Restatement (Second) of Torts § 314A (1965)

Restatement of the Law - Torts

Database updated October 2015
Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

§ 314A Special Relations Giving Rise to Duty to Aid or Protect

Comment:
Reporter's Notes
Case Citations - by Jurisdiction

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against unreasonable risk of physical harm, and

(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

(2) An innkeeper is under a similar duty to his guests.

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

See Reporter's Notes.

Caveat:

The Institute expresses no opinion as to whether there may not be other relations which impose a similar duty.

Comment:

a. An additional relation giving rise to a similar duty is that of an employer to his employee. (See § 314B.) As to the duty to protect the employee against the conduct of third persons, see Restatement of Agency, Second, Chapter 14.

b. This Section states exceptions to the general rule, stated in § 314, that the fact that the actor realizes or should realize that his action is necessary for the aid or protection of another does not in itself impose upon him any duty to act. The duties stated in this Section arise out of special relations between the parties, which create a special responsibility, and take the case out of the general rule. The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found. There may be other such relations, as for example that of

husband and wife, where the duty is recognized by the criminal law, but there have as yet been no decisions allowing recovery in tort in jurisdictions where negligence actions between husband and wife for personal injuries are permitted. The question is therefore left open by the Caveat, preceding Comment *a* above. The law appears, however, to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.

c. The rules stated in this Section apply only where the relation exists between the parties, and the risk of harm, or of further harm, arises in the course of that relation. A carrier is under no duty to one who has left the vehicle and ceased to be a passenger, nor is an innkeeper under a duty to a guest who is injured or endangered while he is away from the premises. Nor is a possessor of land under any such duty to one who has ceased to be an invitee.

d. The duty to protect the other against unreasonable risk of harm extends to risks arising out of the actor's own conduct, or the condition of his land or chattels. It extends also to risks arising from forces of nature or animals, or from the acts of third persons, whether they be innocent, negligent, intentional, or even criminal. (See § 302B.) It extends also to risks arising from pure accident, or from the negligence of the plaintiff himself, as where a passenger is about to fall off a train, or has fallen. The duty to give aid to one who is ill or injured extends to cases where the illness or injury is due to natural causes, to pure accident, to the acts of third persons, or to the negligence of the plaintiff himself, as where a passenger has injured himself by clumsily bumping his head against a door.

e. The duty in each case is only one to exercise reasonable care under the circumstances. The defendant is not liable where he neither knows nor should know of the unreasonable risk, or of the illness or injury. He is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate, or to give aid to one whom he has no reason to know to be ill. He is not required to take any action where the risk does not appear to be an unreasonable one, as where a passenger appears to be merely carsick, and likely to recover shortly without aid.

f. The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured. He is not required to take any action beyond that which is reasonable under the circumstances. In the case of an ill or injured person, he will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained. He is not required to give any aid to one who is in the hands of apparently competent persons who have taken charge of him, or whose friends are present and apparently in a position to give him all necessary assistance.

Illustrations:

1. A, a passenger on the train of B Railroad, negligently falls off of the train, and is injured. The train crew discover that he has fallen off, but do nothing to send aid to him, or to notify others to do so. A lies unconscious by the side of the track in a cold rain for several hours, as a result of which his original injuries are seriously aggravated. B Railroad is subject to liability to A for the aggravation of his injuries.

2. A, a passenger riding on the train of B Railroad, suffers an apoplectic stroke, and becomes unconscious. The train crew unreasonably assume that A is drunk, and do nothing to obtain medical assistance for him, or to turn him over at a station to those who will do so. A continues to ride on the train in an unconscious condition for five hours, during which time his illness is aggravated in a manner which proper medical attention would have avoided. B Railroad is subject to liability to A for the aggravation of his illness.

3. A is a guest in B's hotel. Without any fault on the part of B, a fire breaks out in the hotel. Although they could easily do so, B's employees fail to call A's room and warn him to leave it. As a result A is overcome by smoke and carbon monoxide before he can escape, and is seriously injured. B is subject to liability to A.

4. A, a child six years old, accompanies his mother, who is shopping in B's department store. Without any fault on the part of B, A runs and falls, and gets his fingers caught in the mechanism of the store escalator. B's employees see

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what has occurred, but unreasonably delay in shutting off the escalator. As a result, A's injuries are aggravated in a manner which would have been avoided if the escalator had been shut off with reasonable promptness. B is subject to liability to A for the aggravation of his injuries.

5. A, a patron attending a play in B's theatre, suffers a heart attack during the performance, and is disabled and unable to move. He asks that a doctor be called. B's employees do nothing to obtain medical assistance, or to remove A to a place where it can be obtained. As a result, A's illness is aggravated in a manner which reasonably prompt medical attention would have avoided. B is subject to liability to A for the aggravation of his illness.

6. A is imprisoned in a jail, of which B is the jailor. A suffers an attack of appendicitis, and cries for medical assistance. B does nothing to obtain it for three days, as a result of which A's illness is aggravated in a manner which proper medical attention would have avoided. B is subject to liability to A for the aggravation of his illness.

7. A is a small child sent by his parents for the day to B's kindergarten. In the course of the day A becomes ill with scarlet fever. Although recognizing that A is seriously ill, B does nothing to obtain medical assistance, or to take the child home or remove him to a place where help can be obtained. As a result, A's illness is aggravated in a manner which proper medical attention would have avoided. B is subject to liability to A for the aggravation of his injuries.

Reporter's Notes

This Section has been added to the first Restatement.

Illustration 1 is based on Yazoo & M.V.R. Co. v. Byrd, 89 Miss. 308, 42 So. 286 (1906); Layne v. Chicago & Alton R. Co., 175 Mo.App. 34, 157 S.W. 850 (1913); Cincinnati, H. & D.R. Co. v. Kassen, 49 Ohio St. 230, 31 N.E. 282, 16 L.R.A. 674 (1892); Yu v. New York, N.H. & H.R. Co., 145 Conn. 451, 144 A.2d 56 (1958); Continental Southern Lines, Inc. v. Robertson, 241 Miss. 796, 133 So.2d 543, 92 A.L.R.2d 653 (1961), passenger injured through his own negligence.

Illustration 2 is taken from Middleton v. Whitridge, 213 N.Y. 499, 108 N.E. 192, Ann.Cas. 1916C, 856 (1915). Cf. Kambour v. Boston & Maine R. Co., 77 N.H. 33, 86 A. 624, 45 L.R.A. N.S. 1188 (1913); Jones v. New York Central R. Co., 4 App.Div.2d 967, 168 N.Y.S.2d 927 (1957), affirmed, 4 N.Y.2d 963, 177 N.Y.S.2d 492, 152 N.E.2d 519 (1958); Yu v. New York, N.H. & H.R. Co., 145 Conn. 451, 144 A.2d 56 (1958).

Compare, as to the duty of a carrier to protect its passengers from dangers arising from the conduct of third persons: Hillman v. Georgia Ry. & Banking Co., 126 Ga. 814, 56 S.E. 68, 8 Ann.Cas. 222 (1906); Nute v. Boston & Maine R. Co., 214 Mass. 184, 100 N.E. 1099 (1913); Kuhlen v. Boston & N. St. R. Co., 193 Mass. 341, 79 N.E. 815, 7 L.R.A. N.S. 729, 118 Am.St.Rep. 516 (1907); Exton v. Central R. Co. of New Jersey, 62 N.J.L. 7, 42 A. 486, 56 L.R.A. 508 (1898), affirmed, 63 N.J.L. 356, 46 A. 1099, 56 L.R.A. 512; Kinsey v. Hudson & Manhattan R. Co., 130 N.J.L. 285, 32 A.2d 497, 14 N.C.C.A.N.S. 692 (Sup.Ct.1943), affirmed, 131 N.J.L. 161, 35 A.2d 888 (Ct. Err. & App.); Harpell v. Public Service Coordinate Transport, 20 N.J. 309, 120 A.2d 43 (1955); Mulhause v. Monongahela St. R. Co., 201 Pa. 237, 50 A. 937 (1902); St. Louis, I.M. & S.R. Co. v. Hatch, 116 Tenn. 580, 94 S.W. 671 (1906); Kline v. Milwaukee Elec. R. Co., 146 Wis. 134, 131 N.W. 427, Ann Cas. 1912C, 276 (1911).

Illustration 3 is based on Dove v. Lowden, 47 F.Supp. 546 (W.D.Mo.1942); West v. Spratling, 204 Ala. 478, 86 So. 32 (1920); Stewart v. Weiner, 108 Neb. 49, 187 N.W. 121 (1922); Texas Hotel Co. of Longview v. Cosby, 131 S.W.2d 261 (Tex.Civ.App.1939), error dismissed; cf. Hercules Powder Co. v. Crawford, 163 F.2d 968 (8 Cir.1947).

Compare, as to the duty of an innkeeper to protect his guests from dangers arising from the conduct of third persons: Knott Corp. v. Furman, 163 F.2d 199 (4 Cir.1947), certiorari denied, 332 U.S. 809, 68 S.Ct. 111, 92 L.Ed. 387, rehearing denied, 332 U.S. 826, 68 S.Ct. 164, 92 L.Ed. 401; Fortney v. Hotel Rancroft, 5 Ill.App.2d 327, 125 N.E.2d 544 (1955); McFadden v.

Restatement (Third) of Torts: Phys. & Emot. Harm § 40 (2012)

Restatement of the Law - Torts

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Restatement (Third) of Torts: Liability for Physical and Emotional Harm

Chapter 7. Affirmative Duties

§ 40 Duty Based on Special Relationship with Another

Comment:
Reporters' Note
Case Citations - by Jurisdiction

(a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.

(b) Special relationships giving rise to the duty provided in Subsection (a) include:

(1) a common carrier with its passengers,

(2) an innkeeper with its guests,

(3) a business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises,

(4) an employer with its employees who, while at work, are:

(a) in imminent danger; or

(b) injured or ill and thereby rendered helpless,

(5) a school with its students,

(6) a landlord with its tenants, and

(7) a custodian with those in its custody, if:

(a) the custodian is required by law to take custody or voluntarily takes custody of the other; and

(b) the custodian has a superior ability to protect the other.

Comment:

a. History. Restatement Second of Torts § 314A imposed affirmative duties of reasonable care on actors with certain special relationships with others. This Section replaces § 314A. In addition, § 344 of the Second Restatement imposed a duty of reasonable care on businesses for risks to persons on the premises caused by the conduct of third parties. This duty overlapped with § 314A, and this Section also replaces § 344. Chapter 9 contains the ordinary, non-affirmative duties of land possessors to entrants on the land. Section 41 addresses duties owed by an actor to another based on the actor's special relationship with a third person causing the harm.

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b. Court determinations 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 § 7(b).

c. Relationship to ordinary duty of reasonable care when creating a risk of harm. In some cases, the duty imposed by this Section is a pure affirmative duty because the actor had no role in creating the risk of harm to the other, as in Illustration 1 below. In other cases, the actor's conduct might have played a role in creating the risk to the injured party, such as by hiring an employee with known dangerous propensities. In these cases, the source of the duty of reasonable care is § 7. See § 37, Comment *d*.

In some cases, such as a business located in a dangerous area, determining whether a case is governed by § 7 can be problematic, requiring an inquiry into what would have happened if the actor's conduct, such as opening a business, had never occurred. Numerous possible scenarios, requiring significant speculation, might be conjured in answering this counterfactual inquiry. This Section obviates the need for such inquiries. Regardless of whether the actor played any role in the creation of the risk, a special relationship with others imposes a duty of reasonable care.

d. Duty of reasonable care. The affirmative duty recognized by the Restatement Second of Torts § 314A(1)(b) was limited to providing first aid and temporary care to ill or injured persons until appropriate medical care could be obtained. This Section adopts a more general duty of reasonable care, thereby recognizing both the variety of situations in which the duty may arise and advancements in medical technology that may enable an actor to provide more than just first aid. Nevertheless, the duty imposed requires only *reasonable* care under the circumstances. One of the relevant circumstances to be considered is whether a pure affirmative duty as described in Comment *c* is involved. For example, an individual with an incipient heart attack does not impose the burden of paying for necessary medical care on a hotel by checking into the hotel. In the case of illnesses, actors will frequently satisfy their duty by ascertaining that no emergency requiring immediate attention exists and by summoning appropriate medical care. However, when the nature of the relationship impedes the ability of the other to take appropriate action, as is true of the guard-inmate relationship, the actor may be required to be proactive or to act more aggressively to satisfy the duty of reasonable care.

When a court is persuaded that, under the particular circumstances involved in the case, no reasonable jury could conclude that the defendant acted unreasonably, the court should find the evidence of negligence insufficient as a matter of law. Such a resolution is preferable to employing a no-duty rule that is based on the particular facts of the case. See § 7, Comment *j*.

e. Special relationship a matter of law. Whether or not a particular type of relationship supports a duty of care is a question of law for the court. If disputed historical facts bear on whether the relationship exists, as with a dispute over whether a plaintiff was a paying guest in a hotel or was a trespasser, the jury should resolve the factual dispute with appropriate alternative instructions.

f. Scope of the duty. The duty imposed in this Section applies to dangers that arise within the confines of the relationship and does not extend to other risks. Generally, the relationships in this Section are bounded by geography and time. Thus, this Section imposes no affirmative duty on a common carrier to a person who left the vehicle and is no longer a passenger. Similarly, an innkeeper is ordinarily under no duty to a guest who is injured or endangered while off the premises. Of course, if the relationship is extended—such as by a cruise ship conducting an onshore tour—an affirmative duty pursuant to this Section might be appropriate.

Illustrations:

1. While eating lunch alone at the Walkalong restaurant, Joe suddenly suffers a severe asthma attack. Several waiters at the restaurant recognize that Joe is suffering an asthma attack. All of them ignore Joe, and another 10 minutes pass before another patron observes Joe and summons medical care. The delay results in Joe suffering more serious injury

than if he had received medical attention promptly after the waiters observed his plight. The Walkalong restaurant is subject to liability to Joe for his enhanced injury due to the delay in his receiving medical care.

2. Same facts as Illustration 1, except Joe suffers his asthma attack after finishing his meal at Walkalong and departing. Rich, a waiter at Walkalong, sees Joe through a window and appreciates that he is suffering an asthma attack but does nothing, thereby delaying appropriate medical care for Joe. Walkalong is not subject to liability for any enhanced injury to Joe due to the delay in his receiving medical care because Joe's asthma attack occurred outside the scope of the relationship he had with Walkalong.

3. Audrey, a passenger on a train of the Duncan Railroad, is negligent in disembarking the train, resulting in a fall and consequent injury. Barbara, a conductor on the train, sees Audrey fall onto the platform and knows that she is unconscious but does nothing to summon aid or notify others about Audrey's predicament. As a result of the delay in Audrey's being discovered and receiving treatment, Audrey suffers enhanced injury. Duncan is subject to liability for Audrey's enhanced injury because Audrey's fall occurred within the scope of her relationship with Duncan.

g. Risks within the scope of the duty of care. The duty described in this Section applies regardless of the source of the risk. Thus, it applies to risks created by the individual at risk as well as those created by a third party's conduct, whether innocent, negligent, or intentional. If the actor's conduct plays a role in creating the risk of harm, § 7 is also a source of a duty, as explained in Comment *c*.

h. Rationale. The term “special relationship” has no independent significance. It merely signifies that courts recognize an affirmative duty arising out of the relationship where otherwise no duty would exist pursuant to § 37. Whether a relationship is deemed special is a conclusion based on reasons of principle or policy.

As explained in Comment *c*, some of the duties imposed by this Section overlap with the general duty of reasonable care addressed in § 7—the former are a specialized application of the latter. To that extent, requiring actors to exercise reasonable care to avoid harming others is justified by deterrence and corrective-justice policies explained more fully in § 6, Comment *d*. No algorithm exists to provide clear guidance about which policies in which proportions justify the imposition of an affirmative duty based on a relationship. The special relationships established by this Section are justified in part because the reasons for the no-duty rule in § 37 are obviated by the existence of the relationship. A relationship identifies a specific person to be protected and thus provides a more limited and justified incursion on autonomy, especially when the relationship is entered into voluntarily. In addition, some relationships necessarily compromise a person's ability to self-protect, while leaving the actor in a superior position to protect that person. Many of the relationships also benefit the actor. Finally, for those cases in which it is unclear whether the risk is one created by the actor's conduct, see Comment *c*, this Section avoids the need to engage in the difficult inquiry into what would have happened if the actor had never engaged in its business or other operations.

These reasons do not consistently explain why courts find some relationships sufficient and others inadequate. Intuition is often misleading; indeed, for most people, the rule that there is no general duty to rescue—not even an easy rescue—is counterintuitive. Some courts have relied on the *ex ante* expectations of the parties to the relationship to determine whether the relationship is special. The difficulty with this standard is similar to the problem that results from relying on intuition: almost everyone in virtually any kind of relationship expects that another would engage in an easy rescue in the event of serious peril.

i. Duty of common carriers. In addition to common carriers, others who transport the public may be subject to the affirmative duty provided in this Section. Thus, airport-shuttle vans, courtesy vans, and limousines that are available to transport members of the public are subject to a duty of reasonable care. In some of these cases, the relationship may overlap with other special relationships provided in this Section, such as the custodial relationship in the case of a school bus or the innkeeper-guest relationship in the case of a hotel van.

j. Duty of business or other possessor of land who holds its premises open to the public. The general duty of a possessor of land to others on the land for conditions or activities on the land is addressed in Chapter 9 of this Restatement.

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This Section imposes an affirmative duty on a subset of land possessors for certain risks that do not arise from conditions or activities on the land. Businesses and other possessors of land who hold their land open to the public owe a duty of reasonable care to persons lawfully on their land who become ill or endangered by risks created by third parties.

Illustrations:

4. Carol is shopping at Brown's Dress & Gown store when she suffers heart palpitations and faints. A Brown's sales clerk observes Carol's condition and ignores her for 15 minutes while the clerk finishes serving another customer. The 15-minute delay in summoning medical care for Carol results in her suffering enhanced injury. Brown's owes a duty of reasonable care to Carol pursuant to this Section and is subject to liability for Carol's enhanced injury.

5. Same facts as Illustration 4, except as Carol falls she strikes a sharp, pointed object that had been left on the floor by a salesclerk setting up a display. Carol suffers a concussion when her head hits the floor and a deep puncture wound in her thigh due to the sharp object. As a result of a sales clerk's ignoring Carol's condition, medical care is delayed for 30 minutes, which increases the neurologic harm Carol suffers. Brown's owes a duty of reasonable care to Carol pursuant to this Section with regard to Carol's enhanced head injury. Brown's duty to Carol for the puncture wound is governed by the applicable law for possessors of land with respect to conditions on the land. See Chapter 9.

k. Duty of employers. Workers' compensation has displaced most common-law occupational tort claims. Where workers' compensation is applicable, it governs employer liability for employees' occupational injuries. In those limited instances in which it is inapplicable, § 7 provides the ordinary duty of reasonable care owed by employers to employees based on risks created by the employment environment. This Subsection provides for a limited affirmative duty owed by employers based on the employment relationship.

The circumstances in which the affirmative duty imposed in this Subsection might apply have been largely limited to the risk to an employee of a criminal attack by a third party that occurs at the place of employment, an illness or injury suffered by an employee while at work (but not resulting from employment) that renders the employee helpless and in need of emergency care or assistance, and the occasional case that falls through the cracks of workers'-compensation coverage and implicates an affirmative duty as opposed to the ordinary duty imposed by § 7. The cases that fall through the cracks are quite varied because of the variations that exist in different states' workers'-compensation statutes.

The Restatement Second of Torts § 314B addressed the affirmative duty of an employer to an employee by incorporating the provisions contained in the Restatement Second of Agency § 512, which had been published earlier. There has been little development in this area because of workers' compensation and its exclusive-remedy provision. This Subsection replaces § 314B.

This Subsection retains the requirements of imminent danger and helplessness contained in the Restatement Second of Torts. However, this Subsection rejects the requirement of knowledge or foreseeability of the danger as an aspect of the duty determination. This is consistent with the treatment of foreseeability throughout this Restatement as a matter encompassed within the negligence determination, and not as an aspect of the threshold question of duty. See § 7, Comment *j*.

l. Duty of schools. The affirmative duty imposed on schools in this Section is in addition to the ordinary duty of a school to exercise reasonable care in its operations for the safety of its students and the duties provided in Chapter 9 to entrants on the land. The relationship between a school and its students parallels aspects of several other special relationships—it is a custodian of students, it is a land possessor who opens the premises to a significant public population, and it acts partially in the place of parents. The Second Restatement of Torts contained no provision that specifically identified the school-student relationship as special. However, a generally ignored passage in § 320, Comment *b*, which imposed an affirmative duty on custodians to control third parties in order to prevent them from harming the one in custody, observes that the custodial relationship is also applicable

to schools and their students. Despite the Second Restatement's limited treatment of affirmative duties of schools, such a duty has enjoyed substantial acceptance among courts since the Second Restatement's publication. As with the other duties imposed by this Section, it is only applicable to risks that occur while the student is at school or otherwise engaged in school activities. And because of the wide range of students to which it is applicable, what constitutes reasonable care is contextual—the extent and type of supervision required of young elementary-school pupils is substantially different from reasonable care for college students.

m. Duty of landlords. The prominent case of Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970), began a trend toward recognizing an affirmative duty of reasonable care owed by landlords to their tenants and to their tenants' guests with respect to common areas under the landlord's control. Courts have not been unanimous in recognizing this duty, and some that have recognized a duty have used a variety of devices to limit its scope. Nevertheless, the rationale for imposing a duty on landlords is similar to the rationale for other special relationships in this Section. In addition, the landlord has control over common areas, has superior means for providing security, and derives commercial advantage from the relationship. The landlord also has an ongoing contractual relationship with the tenant, and the lease itself could allocate responsibility for exercising care. Because the landlord usually is in a better position than individual tenants to exercise control over common areas and, with respect to individual units, to provide locks and other security devices, imposing a duty on the landlord replicates the result that might be reached if landlords and tenants with similar bargaining power addressed this matter.

Reasonable care cannot prevent every breach of security. Courts have been protective of landlords in these circumstances, often by employing no-duty rulings based on the particular circumstances of the case. These decisions do not undermine the general duty imposed by this Section but are better understood as a determination by the court that no reasonable jury could find negligence under the particular circumstances.

The affirmative duty imposed by this Section applies to common areas and other areas of the premises over which the landlord has control. It applies to both residential and commercial landlords. The circumstances of a commercial lease might affect the degree of care reasonably expected of the landlord, indeed might even affect the existence of a duty, such as when a single tenant exercises sole control over the premises. The duty also applies to others who act functionally as landlords, such as condominium associations.

A landlord owes an affirmative duty to tenants for risks that occur within common areas of the apartment complex, similar to the duty owed by businesses and other possessors of land under Subsection (b)(3). Thus, if a tenant suffers a heart failure in a common area, the landlord and its agents owe a duty of reasonable care. If no one is present or otherwise aware of the tenant's predicament, no breach of the duty occurs.

The duty imposed by this Section is not exclusive. Landlords might also have an affirmative duty to their tenants under § 41. They have a duty to tenants with regard to the safety of the leasehold conditions under Restatement Second of Torts §§ 355-362. They have a duty for their own risk-creating conduct under § 7. And they, as possessors of and lessors of land, are also subject to the duties in § 53 of Chapter 9.

n. Duty of custodians. Section 320 of the first Restatement of Torts imposed a duty on custodians to protect persons in their charge from risks posed by third parties. When the Second Restatement added § 314A, it subsumed the more circumscribed duty set forth in the old § 320. This Section retains the general affirmative duty owed by custodians to persons in their custody. The custodial relationships that courts have recognized as imposing an affirmative duty include day-care centers and the children for whom they care, hospitals and their patients, nursing homes with their residents, camps and their campers, parents and their dependent minor children, and, of course, the classic jailer-inmate relationship. Section 41 imposes a duty of reasonable care on custodians to protect others from risks created by those in custody. In addition to state tort law, federal constitutional provisions provide affirmative duties on behalf of those who are involuntarily in the custody of governmental officials.

The duty imposed by this Section is conditioned on a legal obligation or on voluntarily assuming custody. It does not extend beyond the temporal limits of the custodial relationship, for example to a nursing-home resident taken home for Thanksgiving by his children. Similarly, no duty exists pursuant to Subsection (b)(7) if an infant is abandoned in a restaurant by a troubled parent.

o. Nonexclusivity of relationships. The list of special relationships provided in this Section is not exclusive. Courts may, as they have since the Second Restatement, identify additional relationships that justify exceptions to the no-duty rule contained in § 37.

One likely candidate for an addition to recognized special relationships is the one among family members. This relationship, particularly among those residing in the same household, provides as strong a case for recognition as a number of the other special relationships recognized in this Section. To date, there has been little precedent addressing the family relationship as a basis for an affirmative duty, although family immunities have long been removed as an impediment to this development. Family exclusions in liability insurance may have stunted doctrinal development in this area. However, bases do exist for affirmative duties that overlap with a duty imposed by an intra-family special relationship. Thus, parents owe an affirmative duty to their children based on the custodial relationship. Statutes imposing duties on parents to provide for their children are another potential source for an affirmative tort duty pursuant to § 38.

Reporters' Note

*Comment a. History.*This Chapter is organized differently from the first and Second Restatements of Torts. The first Restatement imposed no general affirmative duties on actors in a special relationship with another. It addressed only duties to control the conduct of third parties based on a special relationship with them or with the injured person. The Second Restatement, in § 314A, added general affirmative duties to another based on a special relationship with the other. This created a redundancy between the general duty owed to the person in the special relationship and the duty owed to the person in the special relationship to control the conduct of third parties. This Chapter describes general duties owed to persons with whom the actor has a special relationship (this Section) without regard to whether the harm is caused by a third person and duties owed by actors to third parties (§ 41) based on a special relationship between the actor and another causing harm. It thus eliminates the redundancy in the Second Restatement.

*Comment c. Relationship to ordinary duty of reasonable care when creating a risk of harm.*Marshall v. Burger King Corp., 856 N.E.2d 1048 (Ill. 2006), is an example of a case that straddles the line between the ordinary duty of reasonable care and an affirmative duty. A restaurant was alleged to have an affirmative duty to protect its patrons with regard to the risk of third-party negligence—a driver lost control of her vehicle, crashed through the wall of the restaurant, and killed plaintiff's decedent. The court treated the case as one involving an affirmative duty based on the special relationship between a business and its invitees. However, the court noted that plaintiff alleged that the restaurant's location in a high-traffic area, construction with a half-wall, relationship to a sidewalk, and lack of protective columns created a risk of harm to patrons inside the restaurant.

*Comment d. Duty of reasonable care.*The duties imposed by Restatement Second of Torts §§ 314A and 344 achieved substantial acceptance by courts. See Lundy v. Adamar, Inc., 34 F.3d 1173, 1200 n.25 (3d Cir. 1994) (Becker, J., concurring and dissenting) (applying New Jersey law) ("Section 314A has met with astounding success: the great majority of the cases mentioned in this Section handed down after 1965 adopt it or cite it with approval.").

Even the Second Restatement recognized that there might be circumstances in which an actor would have a duty to do more than provide first aid and obtain appropriate medical attention. Restatement Second, Torts § 314A, Comment *f* (the actor "will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician"). Judge Becker, in a lengthy opinion, surveyed a number of cases from a variety of states to assist in determining how the New Jersey Supreme Court would rule in a case that raised the issue of the duty of a business to a patron who suffered a heart attack. Judge Becker concluded that the duty went beyond merely rendering first aid and summoning medical care, and included an obligation not only to summon medical assistance but also "to take other reasonable steps under the circumstances to

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