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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FRED BINSCHUS, et al.,

Plaintiffs/Respondents,

vs.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS;
OKANOGAN COUNTY, a political subdivision of the State of
Washington; and SKAGIT EMERGENCY COMMUNICATIONS
CENTER d/b/a "Skagit 911," an interlocal government agency,

Defendants,

and

SKAGIT COUNTY, a political subdivision of the State of Washington,

Defendant/Petitioner.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the tort duty arising from a special relationship such as that between a jail and an inmate, as reflected in Restatement (Second) of Torts §§ 315 and 319 (1965) and this Court's decision in Petersen v. State, 100 Wn. 2d 421, 671 P.2d 230 (1983).¹

II. INTRODUCTION AND STATEMENT OF THE CASE

This review presents the Court with an opportunity to address the continuing vitality of its holding in Petersen, supra, involving the duty to

¹ As noted in WSAJ Foundation's letter-application to appear as amicus curiae in this case, certain Plaintiffs/Respondents (Fred Binschus and Troy Giddings) are represented by John R. Connelly, who is a member of the Board of Directors of WSAJ Foundation. Neither Mr. Connelly nor any member of his firm participated in the decision of the Foundation Amicus Committee to seek amicus curiae status in this case or in the preparation of this brief.

prevent a third person from causing physical harm to another, as well as the extent to which a defendant's financial considerations are relevant to imposition of the duty. Fred Binschus and others (collectively Binschus) filed suit against Skagit County (County) and others for alleged negligence in connection with harm caused by a former inmate of the county jail.² The underlying facts are drawn from the Court of Appeals decision below and the briefing of the parties. See Binschus v. State, Dept. of Corrections, 186 Wn. App. 77, 345 P.3d 818, *review granted sub nom. Binschus v. Skagit County*, 184 Wn. 2d 1001 (2015); Binschus Br. at 2-20; County Br. at 1-9; Binschus Reply Br. at 2-12; County Pet. for Rev. at 2-7; Binschus Ans. to Pet. for Rev. at 2-8; County Supp. Br. at 2-8; Binschus Supp. Br. at 1-8.

For purposes of this brief, the following facts are relevant: Isaac Zamora (Zamora) was incarcerated in the Skagit County jail from April 4 until May 29, 2008. Initially, he was held while awaiting trial on criminal

² Plaintiffs/Respondents are: Fred Binschus, individually and as Personal Representative of the Estate of Julie Ann Binschus; Tonya Fenton; Trisha Woods; Tammy Morris; Joann Gillum, as Personal Representative of the Estate of Gregory N. Gillum; Carla J. Lange, individually and as Personal Representative of the Estate of Leroy B. Lange; Nicholas Lee Lange, individually and as Personal Representative of the Estate of Chester M. Rose; Stacy Rose, individually; Richard Treston and Carol Treston, and the marital community thereof; Ben Mercado; and Pamela Radcliffe, individually and as Personal Representative of the Estate of David Radcliffe.

Binschus originally sued the State of Washington Department of Corrections, Skagit Emergency Communications Center, a/k/a "Skagit 911," and Okanogan County, along with Skagit County, but only the claims against Skagit County remain pending before the Court.

charges. Then, after pleading guilty to second degree malicious mischief and possession of a controlled substance, he began serving his sentence there.

On May 29, 2008, Skagit County transferred Zamora pursuant to an agreement with Okanogan County to house Skagit County inmates. Zamora remained in the Okanogan County jail for the remainder of his sentence, until he was released from confinement on August 2, 2008.

The parties agree that Zamora had a long-standing psychiatric disorder that was manifest for approximately a decade before his incarceration. See County Pet. for Rev. at 2. The parties also agree that Zamora had an extensive criminal history preceding his incarceration, consisting of 21 arrests and 11 periods of incarceration in Skagit County. See id.

On September 2, 2008, one month after his release from jail, Zamora killed six people and injured several others during a psychotic episode. Binschus filed suit against the County for negligence in connection with the harm caused by Zamora, claiming that the County failed to properly diagnose and treat Zamora's psychosis while he was incarcerated. Binschus's claims are based in part on the duty to control the conduct of a third person arising from a special relationship, as described

in Restatement (Second) of Torts §§ 315 and 319.³ Binschus produced evidence from an expert psychiatrist that proper evaluation and treatment during Zamora's incarceration likely would have prevented his post-release psychotic episode and the resulting harm.

The County moved for summary judgment, seeking dismissal of Binschus's claims on grounds that its duty does not extend to persons injured by Zamora after his release from jail, and that the failure to treat him while he was incarcerated is not a cause-in-fact or legal cause of the resulting harm. The County does not otherwise question the existence of a duty under Restatement §§ 315 and 319, nor does it ask this Court to overrule decisions adopting these Restatement sections. Instead, the County argues that its duty was extinguished when Zamora was released from incarceration. See County Supp. Br. at 8-11. The County and amicus curiae Washington State Association of Municipal Attorneys (WSAMA) seem to suggest that financial considerations should influence the duty

³ Binschus also asserted claims based on the duty described in Restatement (Second) of Torts § 302B (1965). The superior court dismissed these claims, and the Court of Appeals affirmed. See Binschus, 186 Wn. App. at 81. Binschus sought conditional cross review regarding the § 302B claims. See Binschus Ans. to Pet. for Rev. at 9-10 & n.12. Although this Court granted review without limitation, the County questions whether these claims have been preserved. See County Supp. Br. at 15 n.10. This brief does not address this theory of liability.

analysis. See County Pet. for Rev. at 7 & 17; WSAMA Amicus Curiae Memorandum (ACM) at 2 & 4.⁴

The superior court granted summary judgment in the County's favor, but the Court of Appeals reversed, concluding there are genuine issues of material fact whether the County breached its duty to Binschus under Restatement §§ 315 and 319 and Petersen. See Binschus, 186 Wn. App. at 93-96. This Court granted the County's petition for review.

III. ISSUES PRESENTED

1. Does the duty reflected in Restatement §§ 315 and 319 and Petersen, supra, extend to all foreseeably injured persons, as long as the tortious act or omission occurs during the special relationship? Or, is the duty extinguished by the end of the special relationship, even if the tortious act or omission occurs during the relationship?
2. To what extent, if any, are a defendant's financial resources or strategies relevant to imposition of a tort duty?

See County Pet. for Rev. at 1, 7 & 17; Binschus Ans. to Pet. for Rev. at 2; see also WSAMA ACM at 2 & 4.

IV. SUMMARY OF ARGUMENT

Under Restatement §§ 315 and 319 and this Court's teachings in Petersen, supra, the duty of one who takes charge of a third person whom

⁴ In its supplemental brief filed in this Court, the County also seems to suggest that it is entitled to immunity under RCW 71.05.120. See County Supp. Br. at 13-16.

he knows or should know is likely to cause harm to others extends to all foreseeably injured parties, as long as the tortious act or omission occurs during the “take charge” special relationship. A jail’s take charge duty includes providing necessary medical treatment to inmates. Breach of the duty is actionable for harm suffered by foreseeable plaintiffs after the inmate is released from custody.

The financial resources or strategies of a defendant, private or public, should have no bearing on imposition of this tort duty under the Restatement and Petersen, based on this Court’s holding comprised of the concurring and dissenting opinions in Bodin v. City of Stanwood, 130 Wn. 2d 726, 743-47, 927 P.2d 240 (1996) (Johnson, J., dissenting); id., 130 Wn. 2d at 742-43 (Alexander, J., concurring).

V. ARGUMENT

A. Under Restatement §§ 315 And 319 And Petersen, The Take Charge Duty Extends To All Foreseeably Injured Persons So Long As The Tortious Act Or Omission Occurs During The Special Relationship, And The Take Charge Relationship Between A Jail And Its Inmates Includes A Duty To Provide Necessary Medical Treatment.

While a person normally has no duty to exercise reasonable care to prevent a third party from causing physical injury to another, such a duty does arise when there is a special relationship between the defendant and

the third party. See Petersen, 100 Wn. 2d at 426. Restatement (Second) of Torts § 315 reflects this duty as follows:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct

(Ellipses added; formatting in original.) The Court adopted this formulation of duty in Petersen. See 100 Wn. 2d at 425-29.

Restatement § 319 specifies one type of special relationship mentioned in § 315, referred to as a “take charge” relationship. See Restatement § 315 cmt. *c* (stating “[t]he relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316-319”; brackets added). Specifically, § 319 provides:

One who *takes charge* of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

(Emphasis added.) The Court adopted this Restatement provision in Taggart v. State, 118 Wn. 2d 195, 217-25, 822 P.2d 243 (1992), citing Petersen as “controlling.” See also Hertog v. City of Seattle, 138 Wn. 2d

265, 275, 979 P.2d 400 (1999) (noting Taggart “followed the decision in *Petersen*”).⁵

On two separate occasions this Court has rejected direct challenges and upheld the duty described in Restatement §§ 315 and 319, as adopted in Petersen and Taggart. See Hertog, 138 Wn. 2d at 278-79 (rejecting City of Seattle’s arguments to overrule Taggart and “the common law principles set forth in *Petersen* and the Restatement (Second) of Torts §§ 315, 319”); Bishop v. Miche, 137 Wn. 2d 518, 528-30, 973 P.3d 465 (1999) (declining King County’s and amicus curiae State of Washington’s requests to overrule Taggart because it “is founded on common-law principles embodied in the Restatement (Second) of Torts §§ 315, 319 (1965), and addressed in *Petersen*”); see also Joyce v. State, 155 Wn. 2d 306, 318-19, 119 P.3d 825 (2005) (noting unsuccessful attempt to overrule Taggart in Hertog).

The County does not appear to contest that a take charge relationship and corresponding duty existed for the duration of Zamora’s incarceration. See County Supp. Br. at 11 (heading B, referring to “[t]he County’s ‘take charge’ relationship with Zamora while in custody”).

⁵ Restatement §§ 315 and 319, including comments, but excluding reporter’s notes, are reproduced in the Appendix.

Rather, the County argues that the duty does not include harm occurring *after* his release, even if the harm resulted from the County's tortious acts or omissions occurring *before* his release, during the "take charge" period. See id. at 8-11. The County separately argues that this take charge duty does not include providing medical treatment that would prevent Zamora from causing harm to others. See id. at 13-14.

The County is incorrect on both counts. Restatement §§ 315 and 319 contemplate liability for injuries occurring after the termination of the relationship, as well as injuries resulting from failure to provide proper medical treatment to a person in a take charge relationship. Restatement § 319 contains the following illustrations:

1. A operates a private hospital for contagious diseases. Through the negligence of the medical staff, B, who is suffering from scarlet fever, is permitted to leave the hospital with the assurance that he is entirely recovered, although his disease is still in an infectious stage. Through the negligence of a guard employed by A, C, a delirious smallpox patient, is permitted to escape. B and C communicate the scarlet fever and smallpox to D and E respectively. A is subject to liability to D and E.

2. A operates a private sanitarium for the insane. Through the negligence of the guards employed by A, B, a homicidal maniac, is permitted to escape. B attacks and causes harm to C. A is subject to liability to C.

Illustrations 1 and 2 both contemplate a duty that extends to harm suffered after the end of the take charge relationship. Illustration 1 further

contemplates a duty to provide medical treatment for the benefit of those who may be injured by the third person in a take charge relationship.

This Court has recognized that the take charge relationship that exists between a jailor and an inmate entails a common-law duty to provide medical treatment to the inmate. See Shea v. City of Spokane, 17 Wn. App. 236, 241-42, 562 P.2d 264 (1977), *aff'd*, 90 Wn. 2d 43, 578 P.2d 42 (1978) (adopting Court of Appeals opinion per curiam).⁶

This common-law duty is bolstered by statutes that express “the intent of the legislature that all jail inmates receive appropriate and cost-effective emergency and necessary medical care,” RCW 70.48.130(1). The Legislature also requires jails to adopt standards “necessary to meet federal and state constitutional requirements relating to health, safety, and welfare of inmates and staff, and specific state and federal statutory requirements, and to provide for the public’s health, safety, and welfare,” RCW 70.48.071.⁷

⁶ The County suggests that the duty of a psychiatrist differs from the duty of a jailor. See County Supp. Br. at 13-14. This suggestion is at odds with the non-delegable nature of the jail’s duty to care for the health of inmates. See Shea, 17 Wn. App. at 242 (stating jail “cannot be relieved of liability for the negligent exercise of that duty [i.e., the duty of providing for the health of an inmate] by delegating it to an ‘independent contractor’ physician”; brackets added).

⁷ The full text of the current versions of RCW 70.48.071 and 70.48.130 are reproduced in the Appendix. The common-law duty recognized in Petersen and Shea is independent of any statutory or constitutional duties, although they are wholly compatible in this case. See Hertog, 138 Wn. 2d at 275-79 & n.3 (noting common-law basis for rule of Petersen and Taggart); Bishop, 137 Wn. 2d at 529 (similar).

The County acknowledges the duty to provide medical care to jail inmates for the benefit of the inmates themselves, but not for the benefit of those who may be injured by the inmate. It principally relies on Melville v. State, 115 Wn. 2d 34, 793 P.2d 952 (1990), where the Court held that then-existing statutes did not impose a duty in tort to provide mental health treatment to an inmate who harmed others after his release. See County Supp. Br. at 11-12. Melville is distinguishable because the plaintiff did not invoke Restatement §§ 315 or 319, but instead expressly limited his claim to violations of certain former statutes and internal “Policy Directives” of the State Department of Corrections. See 115 Wn. 2d at 36 (noting plaintiff’s limited definition of the scope and source of the claimed duty); id. at 37 (noting three statutes cited by plaintiff); id. at 39 & n.3 (noting 15 policy directives cited by plaintiff). This Court found that, of the statutes cited by plaintiff, only former RCW 72.09.010 was pertinent, and the statute’s hortatory statements that the state correctional system “should ensure the public safety” and “invest[] in effective rehabilitation programs” “do not require the kind of specific actions from which a duty in tort should arise.” Melville, 115 Wn. 2d at 38 (brackets added); accord id. at 39 (holding “the statutes cited by plaintiff did not create the duty to provide mental health treatment to a prison inmate”). The current statutes,

RCW 70.48.130(1) and 70.48.071, are more specific, and wholly consistent with the common-law underpinnings of Binschus's claims. With respect to the policy directives cited by the plaintiff in Melville, the Court declined to express an opinion regarding their legal effect because the parties did not address the issue. See id. at 40. In light of the limited way in which plaintiff framed the issue of duty, Melville is unhelpful in resolving the issues presented by this case.

Moreover, contrary to the County's argument, the common-law duty to provide medical treatment to jail inmates does not exist solely for the benefit of the inmate. In Petersen, the Court found a psychiatrist liable for releasing a mentally ill patient who subsequently injured another person in a motor vehicle collision. Petersen relied on the Court's earlier decision in Kaiser v. Suburban Transp. Sys., 65 Wn. 2d 461, 398 P.2d 14, 401 P.2d 350 (1965), described as follows:

In *Kaiser v. Suburban Transp. Sys.*, 65 Wn.2d 461, 398 P.2d 14, 401 P.2d 350 (1965), we allowed a cause of action against a doctor favoring a third person who was injured by the doctor's patient where the doctor failed to warn his patient, a bus driver, of the side effects of a drug prescribed for the treatment of a nasal condition. The plaintiff, a bus passenger, was injured when the driver lost consciousness and struck a telephone pole. We held that since the doctor should reasonably have foreseen the harm resulting from his failure to warn of the side effects of the drug the

bus passenger was entitled to present evidence that the doctor's negligence was the proximate cause of her injuries.

100 Wn.2d at 426-27; accord id. at 428 (stating “we follow the approach utilized in ... *Kaiser*”; ellipses added); see also *Hartley v. State*, 103 Wn. 2d 768, 783, 698 P.2d 77 (1985) (stating “*Petersen* was premised on our earlier holding in *Kaiser*”).

Under Petersen, the duty embodied in Restatement §§ 315 and 319 runs to all foreseeably injured parties. See Petersen at 427-29 (specifically rejecting limitation of duty to “readily identifiable” victims and adopting duty that extends to “anyone who might foreseeably be endangered”); Taggart, 118 Wn. 2d at 218-19 (stating “the scope of this duty is not limited to readily identifiable victims, but includes anyone foreseeably endangered by the patient’s condition”; citing Petersen and Kaiser); Joyce, 155 Wn. 2d at 315 (stating “[o]nce the theoretical duty exists, the question remains whether the injury was reasonably foreseeable”; citing Taggart). Foreseeability in this sense relates to the scope of the duty owed, rather than the existence of the duty, as the Court of Appeals below correctly

held. See Binschus at 96 (citing Joyce).⁸ An injury is foreseeable if it is within the general field of danger that should have been anticipated. See McKown, 182 Wn. 2d at 763-64. This formulation contemplates that, under the Restatement and Petersen, tortious conduct occurring during the course of the take charge special relationship may give rise to liability for harm occurring after the end of the relationship, if reasonably foreseeable.

Nonetheless, the County points to language in cases following Petersen that there must be a “definite, established continuing relationship between the defendant and the third party,” emphasizing the word “continuing.” See County Supp. Br. at 9 (quoting Taggart). The County also cites Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 41 cmt. g (2012), for the proposition that “[t]he duty of care is limited to the period of actual custody.” See County Supp. Br. at 10-11.⁹ The language in the post-Petersen decisions referring to a continuing relationship, and the comment in § 41 of Restatement (Third) should be

⁸ The County mixes the issue of whether a duty *exists* with the *scope* of the duty when it cites McKown v. Simon Property Group, Inc., 182 Wn. 2d 752, 344 P.3d 661 (2015), for the proposition that foreseeability is not an all-expansive standard for defining the limits of duty. See County Pet. for Rev. at 19. McKown distinguishes between foreseeability as it relates to the existence of a duty, which is a question of law for the Court, and foreseeability as a limit on the scope of a duty, which is a question of fact for the jury. See 182 Wn. 2d at 762-64. In this case, the existence of the duty in question has already been established by Petersen, and the only issue of foreseeability that arguably remains is the jury question regarding the scope of the duty.

⁹ Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 41, including comments, but excluding reporter’s notes, is reproduced in the Appendix.

understood as requiring only that the negligent act or omission occur during the relationship, not that the injury must also occur before the relationship ends. Nothing in this Court's cases or Restatement (Third) indicates otherwise.¹⁰

The reasonable foreseeability approach of Petersen does not unduly expand liability. The plaintiff must still prove a "take charge" relationship existed, breach of the duty of care during the relationship, and a causal connection between such breach and the resulting harm. See Bishop, 137 Wn. 2d at 529-30 (stating "[u]nder *Taggart* ... liability only

¹⁰ While the County does not argue that the reasonable foreseeability standard of Petersen is incorrect and harmful and should be overruled, it does contend that Petersen has been either "repudiated" or "narrowed" by RCW 71.05.120. See County Supp. Br. at 14-16; see also In re Stranger Creek, 77 Wn. 2d 649, 653, 466 P.2d 508 (1970) (stating "incorrect and harmful" test for overruling precedent). The full text of the current version of RCW 71.05.120 is reproduced in the Appendix.

Subsection (1) of RCW 71.05.120, which existed in simpler form when Petersen was decided, provides a qualified immunity to specified persons or entities "performing functions necessary to the administration of this chapter" or "performing duties pursuant to this chapter," i.e., Ch. 71.05 RCW. Subsection (2) of RCW 71.05.120 was added to modify the qualified immunity granted by subsection (1), and has the effect of limiting the application of Petersen in cases where Ch. 71.05 is otherwise applicable. See Laws of 1987, Ch. 212, § 301. Subsection (2) does not constitute a freestanding alteration of the duty recognized in Petersen, as the legislation adding subsection (2) states only that it is amending *the existing statute*. See id.

It is questionable whether Ch. 71.05 RCW has any application to this case. See County Pet. for Rev. at 13-14 (recognizing that a jail is not considered an "evaluation or treatment facility" under Ch. 71.05 RCW, quoting RCW 71.05.020(16)); Binschus Ans. to Pet. for Rev. at 10 (stating theory of liability does not rest upon Ch. 71.05). To the extent the qualified immunity granted by subsection (1) of RCW 71.05.120, as modified by subsection (2), is applicable, the existence of such immunity would seem to presume the existence of a duty. Cf. Beggs v. State, 171 Wn. 2d 69, 78, 247 P.3d 421 (2011) (stating "[a] grant of immunity from liability clearly implies that civil liability can exist in the first place"; quotation omitted).

arises where conduct does not conform to the standard of reasonable care”; brackets & ellipses added).¹¹

Cutting off liability at the end of the special relationship for negligent acts or omissions that occurred during the relationship is arbitrary and would call into question well-established foreseeability analysis in other tort contexts. See generally Rikstad v. Holmberg, 76 Wn. 2d 265, 268-69, 456 P.2d 355 (1969) (discussing foreseeability). It would also be inconsistent with the deterrent and compensatory functions of tort law. See Bishop, 137 Wn. 2d at 529 (“maintaining the potential of state liability ... can be expected to have the salutary effect of providing the State an incentive to ensure that reasonable care is used in fashioning guidelines and procedures for the supervision of parolees”; ellipses added, quoting Savage v. State, 127 Wn. 2d 434, 446, 899 P.2d 1270 (1995)); see also Ford v. Trendwest Resorts, Inc., 146 Wn. 2d 146, 154, 43 P.3d 1223 (2002) (describing purposes of tort law).

¹¹ The County and amici curiae also argue that the alleged negligence in failing to treat Zamora is not a legal cause of the harm resulting from his psychotic episode. See County Supp. Br. at 18-19; State of Washington ACM at 8-10; Washington Cities Insurance Authority, et al. ACM at 2-3, 7-8. However, in cases such as this, the existence of a special relationship is dispositive of the issue of legal cause. See Hertog at 284 (rejecting legal cause argument, and stating “[w]here a special relation exists based upon taking charge of the third party, the ability and duty to control the third party indicate that defendant’s actions in failing to meet that duty are not too remote to impose liability”).

The Court should reject the County's attempt to eliminate its duty to all foreseeably injured parties under Petersen and Restatement §§ 315 and 319.

B. The Financial Resources Or Strategies Of A Defendant, Private Or Public, Are Irrelevant To Determining The Existence Of A Tort Duty.

The County and amicus WSAMA advert to the potential financial ramifications of upholding its duty in this case. See County Pet. for Rev. at 7 (referring to “an enormous new burden on financially strapped counties to provide mental health services for jail inmates”); id. at 17 (referring to “onerous financial obligations”); see also WSAMA ACM at 2 & 4. These financial considerations are not part of the record.

The Court should reject any implication that financial resources or strategies of a defendant, private or public, have any bearing on the analysis of duty, based on the concurrence of five Justices in this Court's decision in Bodin v. City of Stanwood, 130 Wn. 2d 726, 743-47, 927 P.2d 240 (1996) (Johnson, J., dissenting); id., 130 Wn. 2d at 742-43 (Alexander, J., concurring). See also Wright v. Terrell, 162 Wn.2d 192, 195-96, 170 P.3d 570, 571 (2007) (per curiam opinion, recognizing agreement on a point of law by five Justices in concurring/dissenting

opinion and dissenting opinion is a holding of the Court entitled to stare decisis effect).

Bodin involved a claim against the City of Stanwood for negligence in failing to raise sewage lagoon dikes that overflowed and caused damage to adjacent property. In his dissent, joined by three other Justices, Justice Johnson stated it was error to admit evidence of a City's efforts to obtain grant money to raise the dikes because "the duty of care owed to another does not change according to a party's financial situation." 130 Wn. 2d at 743.¹² After the waiver of sovereign immunity, financial considerations are just as irrelevant in the context of governmental liability as they are for private defendants. See id. at 746-47 (Johnson, J., dissenting).

Likewise, in his separate concurring opinion, Justice Alexander agreed that it was error to admit evidence of financial considerations, although he found the error harmless. See id. at 742. Specifically, he stated:

I am inclined to agree with the view advanced by Justice Johnson in his dissent to the effect that evidence of the City of Stanwood's efforts to obtain federal grant money to raise lagoon dikes was not

¹² Accord Bodin at 744 (stating "evidence of such [i.e., lack of funds] is not relevant to the issue of duty"); id. at 747 (stating "[e]vidence of financial strategy is not relevant to the basic issue of duty in a negligence action").

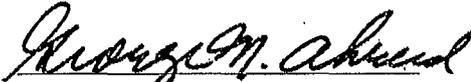
relevant on the issue of the City's negligence. This evidence, at the very least, is a close relative to poverty defense evidence and has no place in a negligence action.

Id. The concurring and dissenting opinions in Bodin should foreclose the County's and WSAMA's attempt to interject financial considerations into the analysis of duty here.¹³

VI. CONCLUSION

The Court should resolve the issues on review in accordance with the analysis set forth in this brief.

Dated this 3rd day of December, 2015.


GEORGE M. AHREND


FOR BRYAN P. HARNETIAUX, WITH AUTHORITY

On Behalf of WSAJ Foundation

¹³ Cost evidence may have a bearing on whether a duty of reasonable care was breached, depending on the circumstances, but not on the issue of whether a duty exists. See Bodin, 130 Wn. 2d at 746 (Johnson, J., dissenting; discussing Bartlett v. Northern Pac. Ry. Co., 74 Wn. 2d 881, 883, 447 P.2d 735 (1968)).

APPENDIX

West's Revised Code of Washington Annotated
Title 70. Public Health and Safety (Refs & Annos)
Chapter 70.48. City and County Jails Act (Refs & Annos)

West's RCWA 70.48.071

70.48.071. Standards for operation--Adoption by units of local government

Currentness

All units of local government that own or operate adult correctional facilities shall, individually or collectively, adopt standards for the operation of those facilities no later than January 1, 1988. Cities and towns shall adopt the standards after considering guidelines established collectively by the cities and towns of the state; counties shall adopt the standards after considering guidelines established collectively by the counties of the state. These standards shall be the minimums necessary to meet federal and state constitutional requirements relating to health, safety, and welfare of inmates and staff, and specific state and federal statutory requirements, and to provide for the public's health, safety, and welfare. Local correctional facilities shall be operated in accordance with these standards.

Credits

[1987 c 462 § 17.]

Notes of Decisions (1)

West's RCWA 70.48.071, WA ST 70.48.071

Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

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West's Revised Code of Washington Annotated
Title 70. Public Health and Safety (Refs & Annos)
Chapter 70.48. City and County Jails Act (Refs & Annos)

West's RCWA 70.48.130

70.48.130. Emergency or necessary medical and health care for confined
persons--Reimbursement procedures--Conditions--Limitations

Effective: July 24, 2015
Currentness

(1) It is the intent of the legislature that all jail inmates receive appropriate and cost-effective emergency and necessary medical care. Governing units, the health care authority, and medical care providers shall cooperate to achieve the best rates consistent with adequate care.

(2) Payment for emergency or necessary health care shall be by the governing unit, except that the health care authority shall directly reimburse the provider pursuant to chapter 74.09 RCW, in accordance with the rates and benefits established by the authority, if the confined person is eligible under the authority's medical care programs as authorized under chapter 74.09 RCW. After payment by the authority, the financial responsibility for any remaining balance, including unpaid client liabilities that are a condition of eligibility or participation under chapter 74.09 RCW, shall be borne by the medical care provider and the governing unit as may be mutually agreed upon between the medical care provider and the governing unit. In the absence of mutual agreement between the medical care provider and the governing unit, the financial responsibility for any remaining balance shall be borne equally between the medical care provider and the governing unit. Total payments from all sources to providers for care rendered to confined persons eligible under chapter 74.09 RCW shall not exceed the amounts that would be paid by the authority for similar services provided under Title XIX medicaid, unless additional resources are obtained from the confined person.

(3) For inpatient, outpatient, and ancillary services for confined persons that are not paid by the medicaid program pursuant to subsection (2) of this section, unless other rates are agreed to by the governing unit and the hospital, providers of hospital services that are hospitals licensed under chapter 70.41 RCW must accept as payment in full by the governing units the applicable facility's percent of allowed charges rate or fee schedule as determined, maintained, and posted by the Washington state department of labor and industries pursuant to chapter 51.04 RCW.

(4) As part of the screening process upon booking or preparation of an inmate into jail, general information concerning the inmate's ability to pay for medical care shall be identified, including insurance or other medical benefits or resources to which an inmate is entitled. The inmate may also be evaluated for medicaid eligibility and, if deemed potentially eligible, enrolled in medicaid. This information shall be made available to the authority, the governing unit, and any provider of health care services. To the extent that federal law allows, a jail or the jail's designee is authorized to act on behalf of a confined person for purposes of applying for medicaid.

(5) The governing unit or provider may obtain reimbursement from the confined person for the cost of health care services not provided under chapter 74.09 RCW, including reimbursement from any insurance program or from other medical benefit programs available to the confined person. Nothing in this chapter precludes civil or criminal remedies to recover the costs of medical care provided jail inmates or paid for on behalf of inmates by the governing unit. As part of a judgment and sentence,

the courts are authorized to order defendants to repay all or part of the medical costs incurred by the governing unit or provider during confinement.

(6) To the extent that a confined person is unable to be financially responsible for medical care and is ineligible for the authority's medical care programs under chapter 74.09 RCW, or for coverage from private sources, and in the absence of an interlocal agreement or other contracts to the contrary, the governing unit may obtain reimbursement for the cost of such medical services from the unit of government whose law enforcement officers initiated the charges on which the person is being held in the jail: PROVIDED, That reimbursement for the cost of such services shall be by the state for state prisoners being held in a jail who are accused of either escaping from a state facility or of committing an offense in a state facility.

(7) There shall be no right of reimbursement to the governing unit from units of government whose law enforcement officers initiated the charges for which a person is being held in the jail for care provided after the charges are disposed of by sentencing or otherwise, unless by intergovernmental agreement pursuant to chapter 39.34 RCW.

(8) Under no circumstance shall necessary medical services be denied or delayed because of disputes over the cost of medical care or a determination of financial responsibility for payment of the costs of medical care provided to confined persons.

(9) Nothing in this section shall limit any existing right of any party, governing unit, or unit of government against the person receiving the care for the cost of the care provided.

Credits

[2015 c 267 § 8, eff. July 24, 2015; 2011 1st sp.s. c 15 § 85, eff. July 1, 2011; 1993 c 409 § 1; (2007 c 259 § 66 expired June 30, 2009); 1986 c 118 § 9; 1977 ex.s. c 316 § 13.]

Notes of Decisions (2)

West's RCWA 70.48.130, WA ST 70.48.130

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Revised Code of Washington Annotated
Title 71. Mental Illness (Refs & Annos)
Chapter 71.05. Mental Illness (Refs & Annos)

West's RCWA 71.05.120

71.05.120. Exemptions from liability

Currentness

(1) No officer of a public or private agency, nor the superintendent, professional person in charge, his or her professional designee, or attending staff of any such agency, nor any public official performing functions necessary to the administration of this chapter, nor peace officer responsible for detaining a person pursuant to this chapter, nor any *county designated mental health professional, nor the state, a unit of local government, or an evaluation and treatment facility shall be civilly or criminally liable for performing duties pursuant to this chapter with regard to the decision of whether to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment: PROVIDED, That such duties were performed in good faith and without gross negligence.

(2) This section does not relieve a person from giving the required notices under RCW 71.05.330(2) or 71.05.340(1)(b), or the duty to warn or to take reasonable precautions to provide protection from violent behavior where the patient has communicated an actual threat of physical violence against a reasonably identifiable victim or victims. The duty to warn or to take reasonable precautions to provide protection from violent behavior is discharged if reasonable efforts are made to communicate the threat to the victim or victims and to law enforcement personnel.

Credits

[2000 c 94 § 4; 1991 c 105 § 2; 1989 c 120 § 3; 1987 c 212 § 301; 1979 ex.s. c 215 § 7; 1974 ex.s. c 145 § 7; 1973 2nd ex.s. c 24 § 5; 1973 1st ex.s. c 142 § 17.]

Notes of Decisions (14)

West's RCWA 71.05.120, WA ST 71.05.120

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Restatement (Second) of Torts § 315 (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

Title A. Duty to Control Conduct of Third Persons

§ 315 General Principle

Comment:

Case Citations - by Jurisdiction

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Comment:

a. The rule stated in this Section is a special application of the general rule stated in § 314.

b. Distinction between duty to act for another's protection and duty to act for self-protection. In the absence of either one of the kinds of special relations described in this Section, the actor is not subject to liability if he fails, either intentionally or through inadvertence, to exercise his ability so to control the actions of third persons as to protect another from even the most serious harm. This is true although the actor realizes that he has the ability to control the conduct of a third person, and could do so with only the most trivial of efforts and without any inconvenience to himself. Thus if the actor is riding in a third person's car merely as a guest, he is not subject to liability to another run over by the car even though he knows of the other's danger and knows that the driver is not aware of it, and knows that by a mere word, recalling the driver's attention to the road, he would give the driver an opportunity to stop the car before the other is run over. On the other hand, under the rule stated in § 495, the actor is guilty of contributory negligence if he fails to exercise an ability which he in fact has to control the conduct of any third person, where a reasonable man would realize that the exercise of his control is necessary to his own safety. Thus if the actor, while riding merely as a guest, does not warn the driver of a danger of which he knows and of which he has every reason to believe that the driver is unaware, he becomes guilty of contributory negligence which precludes him from recovery against another driver whose negligent driving is also a cause of a collision in which the actor himself is injured.

Comment on Clauses (a) and (b):

c. The relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316- 319. The relations between the actor and the other which require the actor to control the conduct of third persons for the protection of the other are stated in §§ 314A and 320.

Case Citations - by Jurisdiction

U.S.
C.A.1
C.A.3
C.A.4
C.A.6
C.A.7
C.A.8
C.A.9
C.A.10,
C.A.10
C.A.11
C.A.D.C.
C.A.Fed.
N.D.Ala.
D.Colo.
D.Conn.
D.Del.
D.D.C.
M.D.Fla.
S.D.Fla.
S.D.Fla.Bkrcty.Ct.
M.D.Ga.
S.D.Ga.
D.Hawaii
D.Idaho
C.D.Ill.
N.D.Ill.
N.D.Ind.
N.D.Iowa
S.D.Iowa
D.Kan.
E.D.Ky.
E.D.La.
W.D.La.
D.Md.
D.Mass.
W.D.Mich.
S.D.Miss.
D.Neb.
D.Nev.

Restatement (Second) of Torts § 319 (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

Title A. Duty to Control Conduct of Third Persons

§ 319 Duty of Those in Charge of Person Having Dangerous Propensities

Comment:

Reporter's Notes

Case Citations - by Jurisdiction

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

See Reporter's Notes.

Comment:

a. The rule stated in this Section applies to two situations. The first situation is one in which the actor has charge of one or more of a class of persons to whom the tendency to act injuriously is normal. The second situation is one in which the actor has charge of a third person who does not belong to such a class but who has a peculiar tendency so to act of which the actor from personal experience or otherwise knows or should know.

Illustrations:

1. A operates a private hospital for contagious diseases. Through the negligence of the medical staff, B, who is suffering from scarlet fever, is permitted to leave the hospital with the assurance that he is entirely recovered, although his disease is still in an infectious stage. Through the negligence of a guard employed by A, C, a delirious smallpox patient, is permitted to escape. B and C communicate the scarlet fever and smallpox to D and E respectively. A is subject to liability to D and E.

2. A operates a private sanitarium for the insane. Through the negligence of the guards employed by A, B, a homicidal maniac, is permitted to escape. B attacks and causes harm to C. A is subject to liability to C.

Reporter's Notes

Restatement (Third) of Torts: Phys. & Emot. Harm § 41 (2012)

Restatement of the Law - Torts

Database updated October 2015

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

Chapter 7. Affirmative Duties

§ 41 Duty to Third Parties Based on Special Relationship with Person Posing Risks

Comment:

Reporters' Note

Case Citations - by Jurisdiction

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

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

(1) a parent with dependent children,

(2) a custodian with those in its custody,

(3) an employer with employees when the employment facilitates the employee's causing harm to third parties, and

(4) a mental-health professional with patients.

Comment:

a. History. Section 315 of the Second Restatement of Torts stated the general proposition that there is no affirmative duty to control the conduct of a third party so as to prevent the third party from causing harm to another. Subsection (a) provided an exception to that general rule based on a special relationship between the actor and the third party. Subsequent Sections elaborated on the relationships that were sufficient to impose such a duty: § 316 imposed a duty of reasonable care on parents to control the conduct of their minor children; § 317 imposed a duty of reasonable care on employers to control the conduct of their employees acting outside the scope of employment; and § 319 imposed a duty of reasonable care on those who take charge of persons known to be likely to cause bodily harm to others. This Section replaces §§ 315(a), 316, 317, and 319 and includes an additional relationship creating an affirmative duty, that of mental-health professional and patient. Section 318 of the Second Restatement, which imposed a duty of reasonable care on possessors of land to control the conduct of their licensees, has been replaced by § 51 of this Restatement.

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. Duty of reasonable care. The duty imposed by this Section is to exercise reasonable care under the circumstances. It is not to ensure that the other person is controlled. If the other person poses a risk of harm to third parties, the actor must take reasonable steps, in light of the foreseeable probability and magnitude of any harm, to prevent it from occurring. In addition,

the relationships identified in this Section are ones in which the actor has some degree of control over the other person. The extent of that control also bears on whether the actor exercised reasonable care.

If the actor neither knows nor should know of a risk of harm, no action is required. Thus, if a person in custody appears to pose no risk to others, the custodian is not negligent if the person in custody harms another. When no reasonable jury could find that there was a foreseeable risk of harm or a failure to exercise reasonable care, courts find no liability as a matter of law. See § 40, Comment *d*.

The duty imposed by this Section subjects an actor to liability for the actor's own tortious conduct. Liability for breach of the duty provided in this Section is not vicarious and does not depend on whether the third party also committed a tort.

d. Duty of parent of dependent children. The basis of the parents' duty with regard to dependent children is the parents' responsibility for child-rearing, their control over their children, and the incapacity of some children to understand, appreciate, or engage in appropriate conduct. As children reach adolescence, courts recognize that the process of gaining independence is an important consideration in determining what constitutes reasonable care on the part of parents. When children reach majority or are no longer dependent, parents no longer have control, and the duty no longer exists.

Parents often will have no reasonable warning that their child is about to engage in conduct that causes physical harm. Even parents of children who have displayed a propensity toward dangerous conduct may have no reasonable or practical method for ameliorating many of the dangers. These are issues that affect a determination of reasonable care.

A number of cases involve parents who furnish or provide access to alcohol to minor children. Those cases do not engage the affirmative duty addressed in this Section. Instead, they are cases of an actor creating a risk of harm to others and therefore are governed by § 7. See § 7, Comment *c*; § 19.

e. Duty of employers. The duty provided in Subsection (b)(3) encompasses the employer's duty to exercise reasonable care in the hiring, training, supervision, and retention of employees, although the ordinary duty imposed by § 7 will often overlap with the duty provided in this Subsection. The duty of employers provided in this Subsection is independent of the vicarious liability of an employer for an employee's tortious conduct, which is limited to conduct within the scope of employment, and extends to conduct by the employee that occurs outside the scope of employment when the employment facilitates the employee causing harm to third parties.

With the advent of comparative responsibility and the modification of joint and several liability, an employer's negligence liability under this Subsection may be important for purposes of apportionment of liability even when the employer is also vicariously liable for an employee's tortious conduct. See Restatement Third, Torts: Apportionment of Liability § 7, Comment *j*.

Employment facilitates harm to others when the employment provides the employee access to physical locations, such as the place of employment, or to instrumentalities, such as a concealed weapon that a police officer is required to carry while off duty, or other means by which to cause harm that would otherwise not be available to the employee.

Illustration:

1. Welch Repair Service knows that its employee Don had several episodes of assault in his previous employment. Don goes to Traci's residence, where he had previously been dispatched by Welch to perform repairs, and misrepresents to Traci that he is there on Welch business to check those repairs. After Traci admits Don to her home, he assaults her. Welch is subject to a duty under this Subsection with regard to Don's assault on Traci.

f. Duty of custodians. Custodians of those who pose risks to others have long owed a duty of reasonable care to prevent the person in custody from harming others. The classic custodian under this Section is a jailer of a dangerous criminal. Other

well-established custodial relationships include hospitals for the mentally ill and for those with contagious diseases. Custodial relationships imposing a duty of care are limited to those relationships that exist, in significant part, for the protection of others from risks posed by the person in custody. The duty of care is limited to the period of actual custody. A custodial relationship that exists solely for rehabilitative purposes is insufficient to create a duty to protect others. Thus, an inpatient clinic treating an individual with a compulsive-gambling addiction does not have a special relationship with the patient that imposes a duty of reasonable care to third parties.

The custodial relationship need not be full-time physical custody giving the custodian complete control over the other person for a duty to arise. So long as there is some custody and control of a person posing dangers to others, the custodian has an affirmative duty to exercise reasonable care, consistent with the extent of custody and control.

Courts have been reluctant to impose a duty on actors who make discretionary determinations about parole or prerelease programs, even though these decisions arise in a custodial relationship. Imposing such a duty, thereby creating concern about potential liability, might detrimentally affect the decisionmaking of parole boards and others making similar determinations. By contrast, those who supervise parolees, probationers, or others in prerelease programs engage in more ministerial functions, and they are held to an affirmative duty of reasonable care. The extent of control exercised by the custodian—parole and probation officers have limited control over those whom they supervise—is a factor in determining whether the custodian has breached the duty of reasonable care. Even when an affirmative duty under this Section exists, significant questions about factual causation may arise in suits against supervisors of persons conditionally released from incarceration.

g. Duty of mental-health professionals. The seminal case of *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976), recognized a special relationship between a psychotherapist and an outpatient, and a corresponding duty of care on the part of the psychotherapist to third parties whom the patient might harm. The court in *Tarasoff* acknowledged the importance of confidentiality to the psychotherapist-patient relationship but concluded that the protection of third parties outweighed these concerns. Notably, in *Tarasoff*, the psychotherapists had already compromised confidentiality by contacting the police to have the patient detained so that he could be committed because of the dangers that he posed. The core holding of *Tarasoff* has been widely embraced, but courts often disagree about specifics. The primary points of contention are the content of the duty and to whom the duty is owed.

Consistent with the general approach of this Chapter, the duty imposed by Subsection (b)(4) on mental-health professionals is one of reasonable care under the circumstances. A mental-health professional has a duty to use customary care in determining whether a patient poses a risk of harm. Once such a patient is identified, the duty imposed by reasonable care depends on the circumstances: reasonable care may require providing appropriate treatment, warning others of the risks posed by the patient, seeking the patient's agreement to a voluntary commitment, making efforts to commit the patient involuntarily, or taking other steps to ameliorate the risk posed by the patient. In some cases, reasonable care may require a warning to someone other than the potential victim, such as parents, law-enforcement officials, or other appropriate government officials.

In some cases, one or more of these options may be clearly inappropriate, and courts appropriately rule as a matter of law that there has been no negligence for failing to pursue that course of action. In addition, some deference to the judgment of a psychotherapist acting in good faith is appropriate. The psychotherapy profession has been attentive to the duty imposed on it; students are routinely taught about their obligations to protect others from dangerous patients. Providing more certain guidelines than “reasonable care” to this attentive audience may be appropriate, especially where profit or other self-interest motivations are not significant. A standard of deference to the good-faith choices made by mental-health professionals would alleviate some tension prompted by the uncertainty of a reasonable-care standard. This deference might be effected by permitting argument on the subject, by an instruction to the jury explaining why it should give some deference to conscious and good-faith judgments of the defendant, or by crafting a good-faith rule roughly analogous to the business-judgment rule employed for corporate directors. Some legislatures have responded to this concern for greater certainty by enacting more inflexible rules limiting the scope of psychotherapists' duties.

The rule stated in this Section sets no limit on those to whom the duty is owed. Many courts and legislatures have limited the duty to warning third parties who are reasonably identifiable. Reasonable care itself does not require warning individuals who cannot be identified, so such a limitation is properly a question of reasonable care, not a question of the existence of a duty. However, when reasonable care requires confining a patient who poses a real risk of harm to the community, the duty of the mental-health professional ordinarily extends to those members of the community who are put at risk by the patient.

The duty imposed by this Section is limited to steps that are reasonably available to the mental-health professional. Patients who are not in custody cannot be “controlled” in the classic sense, and the duty imposed is only one of reasonable care. Yet a health-care professional can pursue, and may have a statutory obligation to seek, involuntary commitment of patients who are dangerous to themselves or others. Other less intrusive measures may be available and appropriate depending on the circumstances.

Illustrations:

2. Dr. Jones, a psychiatrist, sees a patient, Todd. During the course of therapy, Todd expresses a desire to harm his former girlfriend, Caroline, who had severed their relationship. Dr. Jones concludes that Todd poses a real risk of acting on his threat. Although Todd does not name his girlfriend in his sessions with Dr. Jones, her name was in Todd's medical records based on an initial history completed when Todd first became a patient of Dr. Jones. Dr. Jones does nothing to notify Caroline or otherwise take steps to protect her. Todd physically harms Caroline, who sues Dr. Jones. Dr. Jones owes Caroline a duty of reasonable care and is subject to liability for Caroline's harm.

3. Steve, a 14-year-old having adolescent adjustment difficulties, is referred to Dr. Cress, a psychologist. Dr. Cress treats Steve for several months, concluding that Steve suffers from mild depression and deficits in peer social skills. Steve occasionally expresses generalized anger at his circumstances in life but never blames others or gives any other indication that he might act violently, and Dr. Cress has no reason to think that Steve poses a risk of harm to others. Steve hacks his parents to death with a scythe. Dr. Cress had no duty to Steve's parents and is not subject to liability to the administrators of their estates.

4. Dr. Strand, a clinical psychologist, becomes aware, during the course of counseling, that a patient, Lester, is sexually abusing his eight-year-old stepdaughter, Kelly. Dr. Strand does not communicate this information to Kelly's mother or to appropriate officials of the state Department of Social Services, or take any other steps to prevent Lester from continuing his sexual assaults on Kelly. Dr. Strand owes a duty of reasonable care to Kelly and is subject to liability for the harm due to Lester's continuing abuse of her.

5. Perrin suffers from schizophrenia, which can generally be controlled with medication. However, Perrin intermittently, with no apparent pattern, stops taking his medication. On these occasions he suffers severe delusions and frequently believes that he is under attack by various inanimate objects. Several of these episodes are punctuated by aggressive and threatening behavior that leads Dr. Hillsley, his treating psychotherapist, to believe that Perrin cannot live on his own and poses a significant danger to others unless he continues taking his medication. Dr. Hillsley receives a call from Perrin one Saturday morning, during which it becomes clear that he is not taking his medicine. Perrin requests an immediate office visit and tells Dr. Hillsley that pedestrians on the street are carrying surgical instruments with which to investigate Perrin's brain; Perrin assures Dr. Hillsley that he will retaliate in kind at the first provocation. Dr. Hillsley, not wanting to be bothered on the weekend, declines to meet with Perrin to evaluate whether he should be involuntarily committed or to recommend that Perrin seek an evaluation at the local psychiatric hospital. Instead, he suggests that Perrin go home and call his office on a weekday to make an appointment to see him during regular hours. Instead of going home, Perrin grabs Jake, a passerby on the street, and stabs him in the neck. Dr. Hillsley has a special relationship with Perrin and a duty of reasonable care to Jake and others put at risk by Perrin. Dr. Hillsley is subject to liability for Jake's harm.

Even when a duty exists pursuant to Subsection (b)(4) and an actor breaches it, factual causation must exist for the actor to be subject to liability. Thus, when the actor's breach consists of failing to warn third parties who suffer harm, the actor is not

subject to liability unless the warning would have prevented the harm. When those third parties are already aware of all the material information that would have been provided by the mental-health professional, any warning would not have made a difference and, hence, the actor is not subject to liability. Courts often express the reason for this outcome in duty terms: there is no duty to warn when the information is already known. It would be more accurate, however, to characterize the reason as the absence of factual causation.

Mental-health professionals subject to the duty imposed by Subsection (b)(4) include psychiatrists, psychologists, social workers, and others who have a relationship with a mental patient and provide professional psychotherapeutic services to the patient.

In addition to the affirmative duty to third parties imposed by Subsection (b)(4), mental-health professionals, like other health-care professionals, have a duty of care to their patients once they enter into a professional-patient relationship. A mental-health professional may fail to exercise the appropriate standard of care in treating a patient. When professional malpractice causes harm to the patient or to others, the professional is subject to liability. The source of such duty is not contained in this Chapter, but in the general principles regarding the duty of professionals not to harm others by failing to exercise appropriate care.

h. Duty of non-mental-health physicians to third parties. The duty of mental-health physicians to third parties for risks posed by the physician's patient's dangerousness is addressed in Subsection (b)(4) and Comment *g*. Although no black-letter provision in this Restatement imposes an affirmative duty on non-mental-health physicians to third parties, this Comment addresses that question. There are times when a medical patient's condition, such as a contagious disease, might pose a risk to others. In that event, the duty of the treating physician would be appropriately assessed based on the considerations contained in this Comment. This Comment's reference to "physicians" is to instances in which the rule contained in Subsection (b)(4) imposing a duty on mental-health professionals is inapplicable.

Unlike most duties, the physician's duty to the patient is explicitly relational: physicians owe a duty of care to *patients*. That duty encompasses both the ordinary duty not to harm the patient through negligent conduct and an affirmative duty to use appropriate care to help the patient.

In some cases, care provided to a patient may create risks to others. This may occur because of negligent treatment, such as prescribing an inappropriate medication that impairs the patient. It can also occur because of appropriate care of the patient, such as properly prescribing medication that impairs the patient. In these instances, the physician's duty to third parties is governed by § 7, not by this Chapter. In other cases, however, a physician may have no role in creating the risk. An example is a physician who treats a patient with a communicable disease. In those cases, any duty of the physician is an affirmative one that arises under this Section and Comment.

The physician-patient relationship is not among the relationships listed in this Section as creating an affirmative duty. That does not mean that physicians have no affirmative duty to third parties. Some of the obligations of physicians to third parties, such as with patients who are HIV-infected, have been addressed by legislatures. In other areas, the case law is sufficiently mixed, the factual circumstances sufficiently varied, and the policies sufficiently balanced, that this Restatement leaves to further development the question of when physicians have a duty to use reasonable care or some more limited duty—such as to warn only the patient—to protect third parties. In support of a duty is the fact that an affirmative duty for physicians would be analogous to the affirmative duty imposed on mental-health professionals. See Comment *g*. In fact, the burden on a physician might be less than that imposed on a mental-health practitioner, because the costs of breaching confidentiality may be lower. Additionally, diagnostic techniques may be more reliable for physical disease and the risks that it poses than for mental disease and its risks.

Many courts have been influenced by the patient's preferences regarding warnings or other precautions to benefit family members or others with whom the patient has a relationship. The case for an affirmative duty to be imposed on a physician is stronger when the patient would prefer protective measures for the third party. This is similar to the intended third-party-

beneficiary rule that courts have used in other professional contexts. Courts generally have held physicians liable to nonpatient family members for failing to provide the patient with information about a communicable disease. On the other hand, some courts are concerned that any precaution a physician might take would have little or no effect in reducing the risk, especially for warnings to patients about risks of which they were already aware. These courts may lack confidence in their ability to address factual causation in these cases. They may also be concerned with the administrative costs of identifying the few cases in which causation exists. This Restatement takes no position on how these competing concerns should be resolved.

If a court does impose an affirmative duty on physicians to nonpatients, it must address both the content of the duty and the question of who can recover. For example, a court might limit the scope of a physician's duty to warning the patient of risks that the patient poses to others. A court might then hold that the physician's liability extends to any person harmed by the patient's condition or to a more limited class based on relationship with the patient, time, or place.

i. Nonexclusivity of relationships. As with § 40, the list of special relationships provided in this Section is not exclusive. Courts may decide that additional relationships justify exceptions to the no-duty rule contained in § 37. Indeed, the addition of the duty of mental-health professionals to third parties for risks posed by patients that is provided in Subsection (b)(4) is a relationship that courts have developed since the Second Restatement.

Reporters' Note

Comment c. Duty of reasonable care. The Second Restatement imposed a duty on parents and employers to control the conduct of minor children and employees only if they knew or had reason to know of their ability to control and knew or had reason to know of the necessity of and opportunity for control. See Restatement Second, Torts §§ 316-317. In this Restatement, those conditions are subsumed within the analysis of reasonable care; they are not prerequisites for the existence of a duty. See § 3. Similarly, whether reasonable care requires controlling the conduct of another or merely providing a warning is a question of breach (and governed by Chapter 3), not the existence of a duty.

As the North Carolina Supreme Court explained, after discussing the requirements of Restatement Second of Torts § 316 (duty of parent to control child), “[t]he issue in the final analysis is whether the particular parent exercised reasonable care under all of the circumstances.” *Moore v. Crumpton*, 295 S.E.2d 436, 440 (N.C. 1982).

Comment d. Duty of parent of dependent children. For cases affirming the existence of an affirmative duty to third parties based on the parent-child relationship, see *Parsons v. Smithey*, 504 P.2d 1272 (Ariz. 1973); *Linder v. Bidner*, 270 N.Y.S.2d 427 (Sup. Ct. 1966); *Moore v. Crumpton*, 295 S.E.2d 436 (N.C. 1982); *Isbell v. Ryan*, 983 S.W.2d 335 (Tex. App. 1998); *Nieuwendorp v. Am. Family Ins. Co.*, 529 N.W.2d 594 (Wis. 1995).

It is often said that parents are not vicariously liable for the torts of their children. See *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 123, at 913 (5th ed. 1984). This Section is not contrary to that proposition. Before liability may be imposed on parents, they must act negligently with regard to risks posed by their minor children. Some states have enacted statutes that impose vicarious liability on parents in limited circumstances, typically for intentional torts, and with a limit on the amount of the parents' liability for damages. See, e.g., *NEB. REV. STAT. § 43-801* (vicarious liability of parents for intentional torts of child; liability limited to \$1000 in case of personal injury). Liability imposed by those statutes is independent of the provisions contained in this Section.

For courts that have refused to extend the duty imposed by Subsection (b)(1) to adult children, see *Trammel v. Bradberry*, 568 S.E.2d 715, 722 (Ga. Ct. App. 2002); *Alioto v. Marnell*, 520 N.E.2d 1284 (Mass. 1988); *Reinert v. Dolezel*, 383 N.W.2d 148 (Mich. Ct. App. 1985); *Maxwell v. Keas*, 639 A.2d 1215 (Pa. Super. Ct. 1994); *Martin v. Doughtie*, 2010 WL 22815 (Tenn. Ct. App. 2010); *Villacana v. Campbell*, 929 S.W.2d 69 (Tex. App. 1996); see also *Linder v. Bidner*, 270 N.Y.S.2d 427 (Sup. Ct. 1966) (whether minor child is emancipated and, thus, parents are not subject to duty to control child, is a question of fact).

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Dear Mr. Carpenter:

On behalf of the WSAJ Foundation, an Amicus Curiae Brief is attached to this email for filing. Counsel for the parties and other Amicus Curiae are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

--

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