No. 101294-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

VAN B. HICKS,

Petitioner,

vs.

KLICKITAT COUNTY SHERIFF'S OFFICE, SHIRLEY DeARMOND, and THE WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondents.

WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

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On behalf of
Washington State Association for Justice Foundation

I. IDENTITY AND INTEREST OF AMICUS

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus program and has an interest in the rights of persons seeking redress under the civil justice system.

II. INTRODUCTION

The appellate decision below demonstrates substantial confusion in Washington surrounding the torts of negligent investigation and negligent retention. Regarding the first, the court rigidly interpreted the "harmful placement decision" element of negligent child abuse investigation under RCW 26.44.050 to exclude no-contact orders issued in criminal proceedings, even when those proceedings arise directly from the negligent investigation. It also rejected Hicks' argument that negligent investigation may sometimes be established without proof of a harmful placement decision, failing to consider whether such a claim is available under Washington common law.

Regarding negligent retention, the court required proof the employee was acting outside the scope of employment, disregarding this Court's teachings. And it offered an alternative basis for dismissal of the negligent retention claim based on the alleged absence of a harmful placement decision. Review is warranted.

III. BACKGROUND

Van Hicks and his ex-wife, Chelsey Moss, have two children, PH and FH. In 2012, Moss contacted Child Protective Services (CPS) to report suspicions that Hicks was sexually abusing the children. CPS assigned Shirley DeArmond to investigate, despite knowledge that DeArmond's daughter was a friend of Moss and her granddaughter was a friend of PH.

DeArmond worked with Klickitat County Sheriff's Office (KCSO) in conducting the investigation. DeArmond interviewed FH with KCSO Sergeant Erik Anderson. After some prodding, FH made statements suggesting inappropriate contact may have occurred. Based on the interview, Anderson arrested Hicks and booked him into jail. Anderson prepared a probable cause affidavit and the prosecutor charged Hicks with first degree child

molestation. The superior court issued sexual assault protection orders prohibiting Hicks from having contact with his children. The Department issued a "founded" finding, which Hicks appealed.

The Department assigned Berta Norton to the appeal. Norton concluded DeArmond's interview was improper and changed the Department finding to "unfounded." The court granted the prosecutor's motion to dismiss all charges. The no-contact orders were lifted.

Hicks sued the Department, DeArmond and KCSO for negligent investigation under RCW 26.44.050, common law negligence, and negligent retention. Experts evaluating DeArmond's interview described it as "extremely poor," a "model of how not to interview a child," and one of the worst interviews the experts had ever seen. Pet. for Rev. at 6. The Department had previously received numerous complaints about DeArmond.

Defendants moved for summary judgment. The trial court granted the motion as to negligent investigation under RCW 26.44.050, concluding Hicks failed to establish a "harmful

placement decision," dismissed common law negligence as duplicative of the statutory claim, and denied summary judgment on negligent retention.

Division II affirmed summary judgment as to negligent investigation and negligence and reversed the denial of summary judgment on negligent retention. Hicks petitioned for review.

III. ISSUES PRESENTED

1) Regarding negligent investigation, is review warranted to to:
    a. Clarify the harmful placement decision element of negligent investigation under RCW 26.44.050?
    b. Address whether a claim exists under Washington common law where a negligent investigation constitutes an affirmative act of misfeasance that creates an unreasonable risk of harm?
2) Regarding negligent retention, is review warranted to address whether the court erred in:
    a. Requiring proof the employee acted outside the scope of employment?

b. Ruling that Hicks' negligent retention claim failed for lack of a harmful placement decision?

IV. ARGUMENT

Review is warranted because the Court of Appeals' decision conflicts with opinions of this Court and involves issues of substantial public interest. *See* RAP 13.4(b)(1) & 13.4(b)(4).

A. The Court Erred In Dismissing Hicks' Negligent Investigation Claims.

1. Limiting "harmful placement decisions" to orders issued in dependency proceedings disregards the language and purpose of chapter 26.44 RCW and this Court's decisions in *M.W.* and *Tyner*.

The appellate court concluded a "harmful placement decision" is not established by proof that a fit and safe parent is denied contact with his children via an order issued in criminal, as opposed to dependency, proceedings. Relying exclusively on another Division II decision, the court ruled: "'[A] no-contact order issued in criminal proceedings that is not designed to address the parent-child relationship and the child's residence' cannot satisfy RCW 26.44.050's requirement for a 'harmful placement decision.'" *Hicks v. Klickitat County Sheriff's Office,*

et al., __Wn. App. 2d__, 515 P.3d 556, 562 (2022) (citing *McCarthy v. Clark County,* 193 Wn. App. 314, 333, 376 P.3d 1127, *review denied,* 186 Wn.2d 1018 (2016)).

a. The court misapprehends what constitutes actionable harm under RCW 26.44.050.

The court did not examine the text of chapter 26.44 RCW or this Court's precedents, and failed to appreciate the nature of a harmful placement decision and the type of harm it encompasses. In *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 591, 70 P.3d 954 (2003), this Court clarified a negligent investigation claim under RCW 26.44.050 is available only "when DSHS conducts a biased or faulty investigation that leads to a harmful placement decision." It offered examples of harmful placement decisions – a list that was illustrative, *not* exhaustive: "a claim for negligent investigation . . . is available only [when it] . . . results in a harmful placement decision, *such as* removing a child from a nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home." *Id.* at 602 (brackets added). Observing that "a cause of action inferred from a statutory duty is limited by the harm the statute is meant to address," the Court identified two categories within

which actionable harm must fall: "The harm addressed by [RCW 26.44.050] is the abuse of the children within the home and *unnecessary interference with the integrity of the family*." *Id.* (brackets added; emphasis added).

M.W. must be read in conjunction with *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 1 P.3d 1148 (2000), which recognized the implied cause of action under RCW 26.44.050 and allowed a claim by a father wrongly accused of abuse. The Court noted RCW 26.44.010 identifies the "paramount importance" of "the bond between a child and his or her parent, custodian, or guardian," and concluded the Legislature intended two purposes for the duty under RCW 26.44.050: "children are protected from potential abuse and needless separation from their families and family members are protected from unwarranted separation from their children." *Id.* at 78-79. The Court reinstated a jury verdict for Tyner, who had been removed from the family home and separated from his children by a court order issued under RCW 26.44.063, followed by shelter care orders. *See id.* at 71, 73-75, 89.

Nothing in *Tyner* or chapter 26.44 RCW suggests a relevant distinction exists between no-contact orders issued outside, and those issued within, dependency proceedings. Whether forced separation of a child from a safe and fit parent is effectuated through dependency or criminal proceedings, the harm to the child, the parent, and the family is identical. The court's arbitrary construction of a harmful placement decision is inconsistent with evidence of legislative intent and in tension with this Court's teachings.

b. The court's limitation fails to recognize the integrated nature of the system designed to protect children and families.

The notion that the only relevant "placement" under RCW 26.44.050 is that effectuated by the Department through dependency proceedings is based on a misconception of the Department as compartmentalized from other agencies. In fact, chapter 26.44 RCW is replete with evidence of legislative intent to create an integrated system of cooperating agencies and departments that perform interrelated functions.[1] And in

[1] The versions of the statutes from ch. 26.44 RCW cited herein that were in effect at the time the incidents in this case took place are reproduced in the Appendix.

particular, the role of law enforcement is inextricably intertwined with Department child abuse investigations. *See, e.g.,* RCW 26.44.030(1)(a) (mandatory reporters must report suspected abuse to the Department or "the proper law enforcement agency"); RCW 26.44.030(4) (Department must report suspected abuse to law enforcement); RCW 26.44.030(5) (law enforcement receiving reports of abuse must notify the Department and county prosecutor or city attorney); RCW 26.44.035 (creating integrated response system between Department and law enforcement agencies); RCW 26.44.050 (law enforcement or the Department must investigate and report to the protective services section); RCW 26.44.063(2), (9) and 26.44.067(3) (violation of a no-contact order issued in any judicial proceeding is a criminal offense); RCW 26.44.180 (requiring coordination among Department, law enforcement and other agencies investigating sexual abuse).

The text of the statutes in chapter 26.44 RCW demonstrates legislative intent that the Department and law enforcement are to work in tandem, as they did in this case, to operate within an integrated system aimed at protecting children

and families. The court's ruling is at odds with this scheme and warrants review.

2. The Court should address whether Hicks can sustain a negligence claim under Washington common law.

In his complaint, Hicks alleged Defendants breached their common law duty to act reasonably in the course of their investigation. The court did not directly address Hicks' common law claim, but did reject his argument that he could sustain a negligent investigation claim without proof of a harmful placement decision. *See Hicks*, 515 P.3d at 561.

To reach this conclusion, the court cited the rule frequently stated by Washington appellate courts: "There is no general tort claim for negligent investigation against the State." 515 Wn. App. at 561 (citation omitted). Whether this rule accurately captures Washington law is unclear in light of this Court's recent statement clarifying it has not ruled on the issue. *See Mancini v. City of Tacoma*, 196 Wn.2d 864, 878 n.7, 479 P.3d 656 (2021).

It is well-settled that all persons have a duty to refrain from affirmative acts of misfeasance. *See Robb v. City of Seattle,* 176 Wn.2d 427, 435-37, 295 P.3d 212 (2013). While nonfeasance

consists of "passive inaction," misfeasance involves an affirmative act that creates a situation of peril to another. *Robb,* 176 Wn.2d at 437. This duty applies in a broad range of contexts, including caseworkers' care and placement of vulnerable adults, *see Turner v. DSHS,* 198 Wn.2d 273, 295, 493 P.3d 117 (2021), police interrogations, *see Beltran-Serrano v. City of Tacoma,* 193 Wn.2d 537, 550-51, 442 P.3d 608 (2019), service of no-contact orders, *see Washburn v. City of Federal Way,* 178 Wn.2d 732, 757-58, 310 P.3d 1275 (2013), and execution of search warrants, *see Mancini,* 196 Wn.2d at 879.

Here, Hicks alleged Defendants initiated a biased investigation and caused unwarranted separation of Hicks from his children, creating an unreasonable risk of harm. The Court should examine whether Defendants' conduct constituted an affirmative act of misfeasance giving rise to a claim under Washington common law.

B. Review Is Warranted To Clarify The Elements Of A Negligent Retention Claim.

1. Negligent retention should not require proof the employee was acting outside the scope of employment.

The court held negligent retention requires proof the employee was acting outside the scope of employment. *See Hicks,* 515 P.3d at 563. This holding is inconsistent with *Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343, 356-63, 423 P.3d 197 (2018), which distinguished negligent retention from negligent supervision and training, with only the latter two theories subject to the scope of employment rule.

But the foundations of the "outside the scope of employment" rule applied under any of these theories are questionable and warrant scrutiny. First, the rule is based in a misreading of *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997). There, this Court held that while *vicarious* liability is generally limited to employee conduct undertaken *within* the scope of employment, *direct* liability claims may lie "even where" employees' acts occur outside the scope of employment. *See* 131 Wn.2d at 51. It neither stated nor implied such a showing is *required.*

Yet in *LaPlant v. Snohomish County*, 162 Wn. App. 476, 479-80 & n.7, 271 P.2d 254 (2011), the appellate court ascribed this rule to *Niece* (stating "a cause of action for negligent

supervision requires a plaintiff to show that an employee acted *outside* the scope of his or her employment" (citing *Niece,* 131 Wn.2d at 48)). Other appellate decisions have relied on *LaPlant* to entrench this rule. *See Evans v. Tacoma Sch. Dist.*, 195 Wn. App. 25, 47, 380 P.3d 553 (2016); *McCarthy*, 193 Wn. App. 314, ¶ 107 (unpublished portion of decision); *Garrison v. Sagepoint Financial, Inc.*, 185 Wn. App. 461, 484, 345 P.3d 792, *review denied,* 183 Wn.2d 1009 (2015) (negligent supervision); *Brownfield v. City of Yakima,* 178 Wn. App. 850, 877-78, 316 P.3d 520 (2014) (negligent hiring, supervision and retention).

It is true that in *Anderson* this Court recognized an outside the scope of employment requirement with respect to negligent supervision and training claims. *See* 191 Wn.2d at 361-63. However, the language in *Anderson* appears to be dicta.

Additionally, the two bases on which *Anderson* relies for its statement are dubious. First, it rests on the misreading of *Niece* found in *LaPlant. See id.* at 361. Second, *Anderson* cited *Restatement (Second) of Torts* § 317 (1965), whose "outside the scope of employment" requirement has been abandoned by the Third Restatement. *Compare Restatement (Second)* § 317 &

comment a, *with Restatement (Third) of Torts* § 41 (2012) & comment e.[2] *Restatement (Third)* recognizes direct and vicarious liability theories are distinct, and their coexistence is critical to accurately allocating fault:

> 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.

Restatement (Third) § 41 comment e. This Court should address whether claims of negligent hiring, retention, training or supervision should require proof the employee acted outside the scope of employment.

2. Review is warranted to examine whether Hicks' negligent retention claim should require proof of a harmful placement decision.

As an alternative basis for dismissal, the court stated the "negligent retention claim necessarily has the same limitations of the negligent investigation claim, including the requirement for a 'harmful placement decision.'" *Hicks,* 515 P.3d at 563 n.10.

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[2] *Restatement (Second)* § 317 and *Restatement (Third)* § 41 are reproduced in the Appendix.

Negligent retention is a distinct tort under Washington common law: "Negligent retention 'consists of . . . retaining the employee with knowledge of his unfitness, or of failing to use reasonable care to discover it before . . . retaining him." *Anderson,* 191 Wn.2d at 358 (citation omitted). Negligent investigation under RCW 26.44.050 is established when a defendant "conducts a biased or faulty investigation that leads to a harmful placement decision." *M.W.*, 149 Wn.2d at 591. On review, this Court should examine whether the court's alternative basis for dismissal was improper.

VI. CONCLUSION

The Court should grant review.

This document contains 2,498 words, excluding the parts of the document that are exempted from the word count by RAP 18.17.

DATED this 14th day of November, 2022.

for Valerie D. McOmie

Daniel E. Huntington

On behalf of WSAJ Foundation

Appendix

A-1: RCW 26.44.010

A-2: RCW 26.44.030
(Laws of 2012, ch. 55, § 1)

A-3: RCW 26.44.035

A-4: RCW 26.44.050
(Laws of 1999, ch. 176, § 33)

A-5: 26.44.063
(Laws of 2008, ch. 267, § 4)

A-6: RCW 26.44.067

A-7: RCW 26.44.180
(Laws of 2010, ch. 176, § 2)

A-8: *Restatement (Second) of Torts* § 317 (1965)

A-9: *Restatement (Third) of Torts* § 41 (2012)

WASHINGTON STATE LEGISLATURE

PDF **RCW 26.44.010**

Declaration of purpose.

The Washington state legislature finds and declares: The bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian, or guardian; however, instances of nonaccidental injury, neglect, death, sexual abuse and cruelty to children by their parents, custodians or guardians have occurred, and in the instance where a child is deprived of his or her right to conditions of minimal nurture, health, and safety, the state is justified in emergency intervention based upon verified information; and therefore the Washington state legislature hereby provides for the reporting of such cases to the appropriate public authorities. It is the intent of the legislature that, as a result of such reports, protective services shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of such children. When the child's physical or mental health is jeopardized, or the safety of the child conflicts with the legal rights of a parent, custodian, or guardian, the health and safety interests of the child should prevail. When determining whether a child and a parent, custodian, or guardian should be separated during or immediately following an investigation of alleged child abuse or neglect, the safety of the child shall be the department's paramount concern. Reports of child abuse and neglect shall be maintained and disseminated with strictest regard for the privacy of the subjects of such reports and so as to safeguard against arbitrary, malicious or erroneous information or actions. This chapter shall not be construed to authorize interference with child-raising practices, including reasonable parental discipline, which are not proved to be injurious to the child's health, welfare and safety.

[**2012 c 259 § 12**; **1999 c 176 § 27**; **1987 c 206 § 1**; **1984 c 97 § 1**; **1977 ex.s. c 80 § 24**; **1975 1st ex.s. c 217 § 1**; **1969 ex.s. c 35 § 1**; **1965 c 13 § 1**.]

NOTES:

Findings—Purpose—Severability—Conflict with federal requirements—1999 c 176: See notes following RCW **74.34.005**.

Purpose—Intent—Severability—1977 ex.s. c 80: See notes following RCW **4.16.190**.

CERTIFICATION OF ENROLLMENT

ENGROSSED SUBSTITUTE SENATE BILL 5991

Chapter 55, Laws of 2012

62nd Legislature
2012 Regular Session

CHILD ABUSE OR NEGLECT--REPORTING--HIGHER EDUCATION

EFFECTIVE DATE: 06/07/12

Passed by the Senate February 14, 2012
YEAS 49 NAYS 0

BRAD OWEN

President of the Senate

Passed by the House March 1, 2012
YEAS 84 NAYS 12

FRANK CHOPP

Speaker of the House of Representatives

Approved March 19, 2012, 2:07 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 5991** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

March 19, 2012

Secretary of State
State of Washington

ENGROSSED SUBSTITUTE SENATE BILL 5991

Passed Legislature - 2012 Regular Session

State of Washington 62nd Legislature 2012 Regular Session

By Senate Human Services & Corrections (originally sponsored by Senators Kohl-Welles, Carrell, Tom, Hill, Hargrove, Conway, Haugen, Fraser, Litzow, Kline, Fain, Roach, and Frockt)

READ FIRST TIME 02/03/12.

AN ACT Relating to reporting child abuse or neglect; amending RCW 26.44.030; and adding a new section to chapter 28B.10 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 26.44.030 and 2009 c 480 s 1 are each amended to read as follows:

(1)(a) When any practitioner, county coroner or medical examiner, law enforcement officer, professional school personnel, registered or licensed nurse, social service counselor, psychologist, pharmacist, employee of the department of early learning, licensed or certified child care providers or their employees, employee of the department, juvenile probation officer, placement and liaison specialist, responsible living skills program staff, HOPE center staff, or state family and children's ombudsman or any volunteer in the ombudsman's office has reasonable cause to believe that a child has suffered abuse or neglect, he or she shall report such incident, or cause a report to be made, to the proper law enforcement agency or to the department as provided in RCW 26.44.040.

(b) When any person, in his or her official supervisory capacity with a nonprofit or for-profit organization, has reasonable cause to

believe that a child has suffered abuse or neglect caused by a person over whom he or she regularly exercises supervisory authority, he or she shall report such incident, or cause a report to be made, to the proper law enforcement agency, provided that the person alleged to have caused the abuse or neglect is employed by, contracted by, or volunteers with the organization and coaches, trains, educates, or counsels a child or children or regularly has unsupervised access to a child or children as part of the employment, contract, or voluntary service. No one shall be required to report under this section when he or she obtains the information solely as a result of a privileged communication as provided in RCW 5.60.060.()

Nothing in this subsection (1)(b) shall limit a person's duty to report under (a) of this subsection.

For the purposes of this subsection, the following definitions apply:

(i) "Official supervisory capacity" means a position, status, or role created, recognized, or designated by any nonprofit or for-profit organization, either for financial gain or without financial gain, whose scope includes, but is not limited to, overseeing, directing, or managing another person who is employed by, contracted by, or volunteers with the nonprofit or for-profit organization.

(ii) "Regularly exercises supervisory authority" means to act in his or her official supervisory capacity on an ongoing or continuing basis with regards to a particular person.

(c) The reporting requirement also applies to department of corrections personnel who, in the course of their employment, observe offenders or the children with whom the offenders are in contact. If, as a result of observations or information received in the course of his or her employment, any department of corrections personnel has reasonable cause to believe that a child has suffered abuse or neglect, he or she shall report the incident, or cause a report to be made, to the proper law enforcement agency or to the department as provided in RCW 26.44.040.

(d) The reporting requirement shall also apply to any adult who has reasonable cause to believe that a child who resides with them, has suffered severe abuse, and is able or capable of making a report. For the purposes of this subsection, "severe abuse" means any of the following: Any single act of abuse that causes physical trauma of

sufficient severity that, if left untreated, could cause death; any single act of sexual abuse that causes significant bleeding, deep bruising, or significant external or internal swelling; or more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness.

(e) The reporting requirement also applies to guardians ad litem, including court-appointed special advocates, appointed under Titles 11, 13, and 26 RCW, who in the course of their representation of children in these actions have reasonable cause to believe a child has been abused or neglected.

(f) The reporting requirement in (a) of this subsection also applies to administrative and academic or athletic department employees, including student employees, of institutions of higher education, as defined in RCW 28B.10.016, and of private institutions of higher education.

(g) The report must be made at the first opportunity, but in no case longer than forty-eight hours after there is reasonable cause to believe that the child has suffered abuse or neglect. The report must include the identity of the accused if known.

(2) The reporting requirement of subsection (1) of this section does not apply to the discovery of abuse or neglect that occurred during childhood if it is discovered after the child has become an adult. However, if there is reasonable cause to believe other children are or may be at risk of abuse or neglect by the accused, the reporting requirement of subsection (1) of this section does apply.

(3) Any other person who has reasonable cause to believe that a child has suffered abuse or neglect may report such incident to the proper law enforcement agency or to the department of social and health services as provided in RCW 26.44.040.

(4) The department, upon receiving a report of an incident of alleged abuse or neglect pursuant to this chapter, involving a child who has died or has had physical injury or injuries inflicted upon him or her other than by accidental means or who has been subjected to alleged sexual abuse, shall report such incident to the proper law enforcement agency. In emergency cases, where the child's welfare is endangered, the department shall notify the proper law enforcement agency within twenty-four hours after a report is received by the

department. In all other cases, the department shall notify the law enforcement agency within seventy-two hours after a report is received by the department. If the department makes an oral report, a written report must also be made to the proper law enforcement agency within five days thereafter.

(5) Any law enforcement agency receiving a report of an incident of alleged abuse or neglect pursuant to this chapter, involving a child who has died or has had physical injury or injuries inflicted upon him or her other than by accidental means, or who has been subjected to alleged sexual abuse, shall report such incident in writing as provided in RCW 26.44.040 to the proper county prosecutor or city attorney for appropriate action whenever the law enforcement agency's investigation reveals that a crime may have been committed. The law enforcement agency shall also notify the department of all reports received and the law enforcement agency's disposition of them. In emergency cases, where the child's welfare is endangered, the law enforcement agency shall notify the department within twenty-four hours. In all other cases, the law enforcement agency shall notify the department within seventy-two hours after a report is received by the law enforcement agency.

(6) Any county prosecutor or city attorney receiving a report under subsection (5) of this section shall notify the victim, any persons the victim requests, and the local office of the department, of the decision to charge or decline to charge a crime, within five days of making the decision.

(7) The department may conduct ongoing case planning and consultation with those persons or agencies required to report under this section, with consultants designated by the department, and with designated representatives of Washington Indian tribes if the client information exchanged is pertinent to cases currently receiving child protective services. Upon request, the department shall conduct such planning and consultation with those persons required to report under this section if the department determines it is in the best interests of the child. Information considered privileged by statute and not directly related to reports required by this section must not be divulged without a valid written waiver of the privilege.

(8) Any case referred to the department by a physician licensed under chapter 18.57 or 18.71 RCW on the basis of an expert medical

opinion that child abuse, neglect, or sexual assault has occurred and that the child's safety will be seriously endangered if returned home, the department shall file a dependency petition unless a second licensed physician of the parents' choice believes that such expert medical opinion is incorrect. If the parents fail to designate a second physician, the department may make the selection. If a physician finds that a child has suffered abuse or neglect but that such abuse or neglect does not constitute imminent danger to the child's health or safety, and the department agrees with the physician's assessment, the child may be left in the parents' home while the department proceeds with reasonable efforts to remedy parenting deficiencies.

(9) Persons or agencies exchanging information under subsection (7) of this section shall not further disseminate or release the information except as authorized by state or federal statute. Violation of this subsection is a misdemeanor.

(10) Upon receiving a report of alleged abuse or neglect, the department shall make reasonable efforts to learn the name, address, and telephone number of each person making a report of abuse or neglect under this section. The department shall provide assurances of appropriate confidentiality of the identification of persons reporting under this section. If the department is unable to learn the information required under this subsection, the department shall only investigate cases in which:

(a) The department believes there is a serious threat of substantial harm to the child;

(b) The report indicates conduct involving a criminal offense that has, or is about to occur, in which the child is the victim; or

(c) The department has a prior founded report of abuse or neglect with regard to a member of the household that is within three years of receipt of the referral.

(11)(a) For reports of alleged abuse or neglect that are accepted for investigation by the department, the investigation shall be conducted within time frames established by the department in rule. In no case shall the investigation extend longer than ninety days from the date the report is received, unless the investigation is being conducted under a written protocol pursuant to RCW 26.44.180 and a law enforcement agency or prosecuting attorney has determined that a longer

investigation period is necessary. At the completion of the investigation, the department shall make a finding that the report of child abuse or neglect is founded or unfounded.

(b) If a court in a civil or criminal proceeding, considering the same facts or circumstances as are contained in the report being investigated by the department, makes a judicial finding by a preponderance of the evidence or higher that the subject of the pending investigation has abused or neglected the child, the department shall adopt the finding in its investigation.

(12) In conducting an investigation of alleged abuse or neglect, the department or law enforcement agency:

(a) May interview children. The interviews may be conducted on school premises, at day-care facilities, at the child's home, or at other suitable locations outside of the presence of parents. Parental notification of the interview must occur at the earliest possible point in the investigation that will not jeopardize the safety or protection of the child or the course of the investigation. Prior to commencing the interview the department or law enforcement agency shall determine whether the child wishes a third party to be present for the interview and, if so, shall make reasonable efforts to accommodate the child's wishes. Unless the child objects, the department or law enforcement agency shall make reasonable efforts to include a third party in any interview so long as the presence of the third party will not jeopardize the course of the investigation; and

(b) Shall have access to all relevant records of the child in the possession of mandated reporters and their employees.

(13) If a report of alleged abuse or neglect is founded and constitutes the third founded report received by the department within the last twelve months involving the same child or family, the department shall promptly notify the office of the family and children's ombudsman of the contents of the report. The department shall also notify the ombudsman of the disposition of the report.

(14) In investigating and responding to allegations of child abuse and neglect, the department may conduct background checks as authorized by state and federal law.

(15) The department shall maintain investigation records and conduct timely and periodic reviews of all founded cases of abuse and

neglect. The department shall maintain a log of screened-out nonabusive cases.

(16) The department shall use a risk assessment process when investigating alleged child abuse and neglect referrals. The department shall present the risk factors at all hearings in which the placement of a dependent child is an issue. Substance abuse must be a risk factor. The department shall, within funds appropriated for this purpose, offer enhanced community-based services to persons who are determined not to require further state intervention.

(17) Upon receipt of a report of alleged abuse or neglect the law enforcement agency may arrange to interview the person making the report and any collateral sources to determine if any malice is involved in the reporting.

(18) Upon receiving a report of alleged abuse or neglect involving a child under the court's jurisdiction under chapter 13.34 RCW, the department shall promptly notify the child's guardian ad litem of the report's contents. The department shall also notify the guardian ad litem of the disposition of the report. For purposes of this subsection, "guardian ad litem" has the meaning provided in RCW 13.34.030.

NEW SECTION. **Sec. 2.** A new section is added to chapter 28B.10 RCW to read as follows:

(1)(a) All employees of institutions of higher education, not considered academic or athletic department employees, who have reasonable cause to believe a child has suffered abuse or neglect, must report such abuse or neglect immediately to the appropriate administrator or supervisor, as designated by the institution. The administrator or supervisor to whom the report was made, if not already a mandatory reporter under RCW 26.44.030, must report the abuse or neglect within forty-eight hours to a mandatory reporter designated by the institution for this purpose.

(b) For purposes of this section, "child" has the same meaning as in RCW 26.44.020(2).

(c) For purposes of this section, "abuse or neglect" has the same meaning as in RCW 26.44.020(1).

(2) Institutions of higher education must ensure that the employees covered by the provisions of RCW 26.44.030 and subsection (1)(a) of

WASHINGTON STATE LEGISLATURE

PDF **RCW 26.44.035**

Response to complaint by more than one agency—Procedure—Written records.

(1) If the department or a law enforcement agency responds to a complaint of alleged child abuse or neglect and discovers that another agency has also responded to the complaint, the agency shall notify the other agency of their presence, and the agencies shall coordinate the investigation and keep each other apprised of progress.

(2) The department, each law enforcement agency, each county prosecuting attorney, each city attorney, and each court shall make as soon as practicable a written record and shall maintain records of all incidents of suspected child abuse reported to that person or agency.

(3) Every employee of the department who conducts an interview of any person involved in an allegation of abuse or neglect shall retain his or her original written records or notes setting forth the content of the interview unless the notes were entered into the electronic system operated by the department which is designed for storage, retrieval, and preservation of such records.

(4) Written records involving child sexual abuse shall, at a minimum, be a near verbatim record for the disclosure interview. The near verbatim record shall be produced within fifteen calendar days of the disclosure interview, unless waived by management on a case-by-case basis.

(5) Records kept under this section shall be identifiable by means of an agency code for child abuse.

[**1999 c 389 § 7**; **1997 c 386 § 26**; **1985 c 259 § 3**.]

NOTES:

Application—Effective date—1997 c 386: See notes following RCW **13.50.010**.

Legislative findings—1985 c 259: See note following RCW **26.44.030**.

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 1620

Chapter 176, Laws of 1999

56th Legislature
1999 Regular Session

VULNERABLE ADULTS--PROTECTIVE SERVICES

EFFECTIVE DATE: 7/25/99

Passed by the House March 16, 1999
Yeas 96 Nays 1

CLYDE BALLARD
Speaker of the House of Representatives

FRANK CHOPP
Speaker of the House of Representatives

Passed by the Senate April 15, 1999
Yeas 45 Nays 0

BRAD OWEN
President of the Senate

Approved May 5, 1999

GARY LOCKE
Governor of the State of Washington

CERTIFICATE

We, Dean R. Foster and Timothy A. Martin, Co-Chief Clerks of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 1620** as passed by the House of Representatives and the Senate on the dates hereon set forth.

DEAN R. FOSTER
Chief Clerk

TIMOTHY A. MARTIN
Chief Clerk

FILED

May 5, 1999 - 3:54 p.m.

Secretary of State
State of Washington

Sec. 33. RCW 26.44.050 and 1987 c 450 s 7 and 1987 c 206 s 5 are each reenacted and amended to read as follows:

Upon the receipt of a report concerning the possible occurrence of abuse or neglect, ((~~it shall be the duty of~~)) the law enforcement agency or the department of social and health services ((~~to~~)) must investigate and provide the protective services section with a report in accordance with ((~~the provision of~~)) chapter 74.13 RCW, and where necessary to refer such report to the court.

A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050. The law enforcement agency or the department of social and health services investigating such a report is hereby authorized to photograph such a child ((~~or adult dependent or developmentally disabled person~~)) for the purpose of providing documentary evidence of the physical condition of the child((~~, adult dependent or developmentally disabled person~~)).

Sec. 34. RCW 74.39A.060 and 1997 c 392 s 210 are each amended to read as follows:

(1) The aging and adult services administration of the department shall establish and maintain a toll-free telephone number for receiving complaints regarding a facility that the administration licenses or with which it contracts for long-term care services.

(2) All facilities that are licensed by, or that contract with the aging and adult services administration to provide chronic long-term care services shall post in a place and manner clearly visible to residents and visitors the department's toll-free complaint telephone number and the toll-free number and program description of the long-term care ombudsman as provided by RCW 43.190.050.

(3) The aging and adult services administration shall investigate complaints if the subject of the complaint is within its authority unless the department determines that: (a) The complaint is intended to willfully harass a licensee or employee of the licensee; or (b) there is no reasonable basis for investigation; or (c) corrective action has been taken as determined by the ombudsman or the department.

(4) The aging and adult services administration shall refer complaints to appropriate state agencies, law enforcement agencies, the

CERTIFICATION OF ENROLLMENT

ENGROSSED SUBSTITUTE SENATE BILL 6792

Chapter 267, Laws of 2008

60th Legislature
2008 Regular Session

DEPENDENCY MATTERS

EFFECTIVE DATE: 06/12/08 - Except section 6, which becomes effective 12/31/08.

Passed by the Senate March 13, 2008
YEAS 49 NAYS 0

BRAD OWEN

President of the Senate

Passed by the House March 12, 2008
YEAS 97 NAYS 0

FRANK CHOPP

Speaker of the House of Representatives

Approved March 31, 2008, 11:41 a.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 6792** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

April 1, 2008

Secretary of State
State of Washington

or her home or to safely return the child home should not be part of the permanency plan of care for the child, reasonable efforts shall be made to place the child in a timely manner and to complete whatever steps are necessary to finalize the permanent placement of the child.

(5) The identified outcomes and goals of the permanency plan may change over time based upon the circumstances of the particular case.

(6) The court shall consider the child's relationships with the child's siblings in accordance with RCW 13.34.130(3).

(7) For purposes related to permanency planning:

(a) "Guardianship" means a dependency guardianship or a legal guardianship pursuant to chapter 11.88 RCW or equivalent laws of another state or a federally recognized Indian tribe.

(b) "Permanent custody order" means a custody order entered pursuant to chapter 26.10 RCW.

(c) "Permanent legal custody" means legal custody pursuant to chapter 26.10 RCW or equivalent laws of another state or a federally recognized Indian tribe.

Sec. 4. RCW 26.44.063 and 2000 c 119 s 12 are each amended to read as follows:

(1) It is the intent of the legislature to minimize trauma to a child involved in an allegation of sexual or physical abuse. The legislature declares that removing the child from the home or the care of a parent, guardian, or legal custodian often has the effect of further traumatizing the child. It is, therefore, the legislature's intent that the alleged ((~~offender~~)) abuser, rather than the child, shall be removed or restrained from the ((~~home~~)) child's residence and that this should be done at the earliest possible point of intervention in accordance with RCW 10.31.100, ((~~13.34.130~~)) chapter 13.34 RCW, this section, and RCW 26.44.130.

(2) In any judicial proceeding in which it is alleged that a child has been subjected to sexual or physical abuse, if the court finds reasonable grounds to believe that an incident of sexual or physical abuse has occurred, the court may, on its own motion, or the motion of the guardian ad litem or other parties, issue a temporary restraining order or preliminary injunction restraining or enjoining the person accused of committing the abuse from:

(a) Molesting or disturbing the peace of the alleged victim;

(b) Entering the family home of the alleged victim except as specifically authorized by the court;

(c) Having any contact with the alleged victim, except as specifically authorized by the court;

(d) Knowingly coming within, or knowingly remaining within, a specified distance of a specified location.

(3) If the caretaker is willing, and does comply with the duties prescribed in subsection (8) of this section, uncertainty by the caretaker that the alleged abuser has in fact abused the alleged victim shall not, alone, be a basis to remove the alleged victim from the caretaker, nor shall it be considered neglect.

(4) In issuing a temporary restraining order or preliminary injunction, the court may impose any additional restrictions that the court in its discretion determines are necessary to protect the child from further abuse or emotional trauma pending final resolution of the abuse allegations.

((~~(4)~~)) (5) The court shall issue a temporary restraining order prohibiting a person from entering the family home if the court finds that the order would eliminate the need for an out-of-home placement to protect the child's right to nurturance, health, and safety and is sufficient to protect the child from further sexual or physical abuse or coercion.

((~~(5)~~)) (6) The court may issue a temporary restraining order without requiring notice to the party to be restrained or other parties only if it finds on the basis of the moving affidavit or other evidence that irreparable injury could result if an order is not issued until the time for responding has elapsed.

((~~(6)~~)) (7) A temporary restraining order or preliminary injunction:

(a) Does not prejudice the rights of a party or any child which are to be adjudicated at subsequent hearings in the proceeding; and

(b) May be revoked or modified.

((~~(7)~~)) (8) The person having physical custody of the child shall have an affirmative duty to assist in the enforcement of the restraining order including but not limited to a duty to notify the court as soon as practicable of any violation of the order, a duty to request the assistance of law enforcement officers to enforce the order, and a duty to notify the department of social and health

services of any violation of the order as soon as practicable if the department is a party to the action. Failure by the custodial party to discharge these affirmative duties shall be subject to contempt proceedings.

((~~(8)~~)) (9) Willful violation of a court order entered under this section is a misdemeanor. A written order shall contain the court's directive and shall bear the legend: "Violation of this order with actual notice of its terms is a criminal offense under chapter 26.44 RCW, is also subject to contempt proceedings, and will subject a violator to arrest."

((~~(9)~~)) (10) If a restraining order issued under this section is modified or terminated, the clerk of the court shall notify the law enforcement agency specified in the order on or before the next judicial day. Upon receipt of notice that an order has been terminated, the law enforcement agency shall remove the order from any computer-based criminal intelligence system.

Sec. 5. RCW 71.24.035 and 2007 c 414 s 2, 2007 c 410 s 8, and 2007 c 375 s 12 are each reenacted and amended to read as follows:

(1) The department is designated as the state mental health authority.

(2) The secretary shall provide for public, client, and licensed service provider participation in developing the state mental health program, developing contracts with regional support networks, and any waiver request to the federal government under medicaid.

(3) The secretary shall provide for participation in developing the state mental health program for children and other underserved populations, by including representatives on any committee established to provide oversight to the state mental health program.

(4) The secretary shall be designated as the regional support network if the regional support network fails to meet state minimum standards or refuses to exercise responsibilities under RCW 71.24.045.

(5) The secretary shall:

(a) Develop a biennial state mental health program that incorporates regional biennial needs assessments and regional mental health service plans and state services for adults and children with mental illness. The secretary shall also develop a six-year state mental health plan;

WASHINGTON STATE LEGISLATURE

PDF **RCW 26.44.067**

Temporary restraining order or preliminary injunction—Contents—Notice —Noncompliance—Defense—Penalty.

(1) Any person having had actual notice of the existence of a restraining order issued by a court of competent jurisdiction pursuant to RCW **26.44.063** who refuses to comply with the provisions of such order shall be guilty of a misdemeanor.

(2) The notice requirements of subsection (1) of this section may be satisfied by the peace officer giving oral or written evidence to the person subject to the order by reading from or handing to that person a copy certified by a notary public or the clerk of the court to be an accurate copy of the original court order which is on file. The copy may be supplied by the court or any party.

(3) The remedies provided in this section shall not apply unless restraining orders subject to this section bear this legend: VIOLATION OF THIS ORDER WITH ACTUAL NOTICE OF ITS TERMS IS A CRIMINAL OFFENSE UNDER CHAPTER **26.44** RCW AND IS ALSO SUBJECT TO CONTEMPT PROCEEDINGS.

(4) It is a defense to prosecution under subsection (1) of this section that the court order was issued contrary to law or court rule. No right of action shall accrue against any peace officer acting upon a properly certified copy of a court order lawful on its face if such officer employs otherwise lawful means to effect the arrest.

[**2000 c 119 § 13**; **1993 c 412 § 16**; **1989 c 373 § 23**; **1985 c 35 § 2**.]

NOTES:

Application—2000 c 119: See note following RCW **10.31.100**.

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 2596

Chapter 176, Laws of 2010

61st Legislature
2010 Regular Session

CHILDREN'S ADVOCACY CENTERS--CHILD ABUSE INVESTIGATION PROTOCOLS

EFFECTIVE DATE: 06/10/10

Passed by the House February 11, 2010
Yeas 97 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate March 10, 2010
Yeas 47 Nays 0

BRAD OWEN

President of the Senate

Approved March 23, 2010, 2:21 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 2596** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

March 23, 2010

Secretary of State
State of Washington

of a credible report of abuse or neglect and is not referred for investigation.

(19) "Sexual exploitation" includes: (a) Allowing, permitting, or encouraging a child to engage in prostitution by any person; or (b) allowing, permitting, encouraging, or engaging in the obscene or pornographic photographing, filming, or depicting of a child by any person.

(20) "Sexually aggressive youth" means a child who is defined in RCW 74.13.075(1)(b) as being a sexually aggressive youth.

(21) "Social service counselor" means anyone engaged in a professional capacity during the regular course of employment in encouraging or promoting the health, welfare, support, or education of children, or providing social services to adults or families, including mental health, drug and alcohol treatment, and domestic violence programs, whether in an individual capacity, or as an employee or agent of any public or private organization or institution.

(22) "Supervising agency" means an agency licensed by the state under RCW 74.15.090 or an Indian tribe under RCW 74.15.190 that has entered into a performance-based contract with the department to provide child welfare services.

(23) "Unfounded" means the determination following an investigation by the department that available information indicates that, more likely than not, child abuse or neglect did not occur, or that there is insufficient evidence for the department to determine whether the alleged child abuse did or did not occur.

(24) "Children's advocacy center" means a child-focused facility in good standing with the state chapter for children's advocacy centers and that coordinates a multidisciplinary process for the investigation, prosecution, and treatment of sexual and other types of child abuse. Children's advocacy centers provide a location for forensic interviews and coordinate access to services such as, but not limited to, medical evaluations, advocacy, therapy, and case review by multidisciplinary teams within the context of county protocols as defined in RCW 26.44.180 and 26.44.185.

Sec. 2. RCW 26.44.180 and 1999 c 389 s 4 are each amended to read as follows:

(1) Each agency involved in investigating child sexual abuse shall

document its role in handling cases and how it will coordinate with other local agencies or systems and shall adopt a local protocol based on the state guidelines. The department and local law enforcement agencies may include other agencies and systems that are involved with child sexual abuse victims in the multidisciplinary coordination.

(2) Each county shall develop a written protocol for handling criminal child sexual abuse investigations. The protocol shall address the coordination of child sexual abuse investigations between the prosecutor's office, law enforcement, ((~~the department~~)) children's protective services, children's advocacy centers, where available, local advocacy groups, community sexual assault programs, as defined in RCW 70.125.030, and any other local agency involved in the criminal investigation of child sexual abuse, including those investigations involving multiple victims and multiple offenders. The protocol shall be developed by the prosecuting attorney with the assistance of the agencies referenced in this subsection.

(3) Local protocols under this section shall be adopted and in place by July 1, 2000, and shall be submitted to the legislature prior to that date.

Sec. 3. RCW 26.44.185 and 2007 c 410 s 3 are each amended to read as follows:

(1) Each county shall revise and expand its existing child sexual abuse investigation protocol to address investigations of child fatality, child physical abuse, and criminal child neglect cases and to incorporate the statewide guidelines for first responders to child fatalities developed by the criminal justice training commission. The protocols shall address the coordination of child fatality, child physical abuse, and criminal child neglect investigations between the county and city prosecutor's offices, law enforcement, children's protective services, children's advocacy centers, where available, local advocacy groups, emergency medical services, and any other local agency involved in the investigation of such cases. The protocol revision and expansion shall be developed by the prosecuting attorney in collaboration with the agencies referenced in this section.

(2) Revised and expanded protocols under this section shall be adopted and in place by July 1, 2008. Thereafter, the protocols shall

Restatement (Second) of Torts § 317 (1965)

Restatement of the Law - Torts October 2022 Update

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

§ 317 Duty of Master to Control Conduct of Servant

Comment:
Reporter's Notes
Case Citations - by Jurisdiction

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is using a chattel of the master, and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

See Reporter's Notes.

Comment:

a. The rule stated in this Section is applicable only when the servant is acting outside the scope of his employment. If the servant is acting within the scope of his employment, the master may be vicariously liable under the principles of the law of Agency. See Restatement of Agency, Second, Chapter 7.

b. Master's duty to police his premises and use made of his chattels. A master is required to police his own premises, and those upon which, though in the possession of another, he has a privilege of entry for himself and his servants, to the extent of using

reasonable care to exercise his authority as a master in order to prevent his servant from doing harm to others. So too, he is required to exercise his authority as master to prevent them from misusing chattels which he entrusts to them for use as his servants. This is true although the acts of the servant while upon the premises or in the use of the master's chattels are done wholly for the servant's own purposes and are, therefore, outside the course of the servant's employment and thus do not subject the master to liability under the rules of the law of Agency. On the other hand, the master as such is under no peculiar duty to control the conduct of his servant while he is outside of the master's premises, unless the servant is at the time using a chattel entrusted to him as servant. Thus, a factory owner is required to exercise his authority as master to prevent his servants, while in the factory yard during the lunch hour, from indulging in games involving an unreasonable risk of harm to persons outside the factory premises. He is not required, however, to exercise any control over the actions of his employees while on the public streets or in a neighboring restaurant during the lunch interval, even though the fact that they are his servants may give him the power to control their actions by threatening to dismiss them from his employment if they persist.

c. Retention in employment of servants known to misconduct themselves. There may be circumstances in which the only effective control which the master can exercise over the conduct of his servant is to discharge the servant. Therefore the master may subject himself to liability under the rule stated in this Section by retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others. This is true although he has without success made every other effort to prevent their misconduct by the exercise of his authority as master. Thus a railroad company which knows that the crews of its coal trains are in the habit of throwing coal from the cars as they pass along tracks laid through a city street, to the danger of travelers, is subject to liability if it retains the delinquents in its employment, although it has promulgated rules strictly forbidding such practices.

d. Cases in which servant not liable. In order that the master may be subject to liability under the rule stated in this Section, it is not necessary that the act of the servant which he has failed to control is one which is negligent on the part of the servant and, therefore, subjects the servant to liability. The master may know of circumstances of which the servant is excusably ignorant which should cause the master to realize that the servant's actions involve an unreasonable risk of harm to others of which the servant neither is nor should be aware.

Reporter's Notes

In the following cases an employer was held liable for harm caused by conduct of his employees which was found to be outside of the scope of their employment, because the master had known that the servants were in the habit of engaging in conduct dangerous to others: Hogle v. H.H. Franklin Mfg. Co., 199 N.Y. 388, 92 N.E. 794, 32 L.R.A.N.S. 1038 (1910); Fletcher v. Baltimore & P. R. Co., 168 U.S. 135, 18 S.Ct. 35, 42 L.Ed. 411 (1897); Palmer v. Keene Forestry Ass'n, 80 N.H. 68, 112 A. 798, 13 A.L.R. 995 (1921). Cf. In re Sabbatino & Co., 150 F.2d 101 (2 Cir.1945); McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947). In the Hogle case the court went so far as to hold that the mere giving of strict orders was not sufficient to relieve the master from liability, although it does not appear that the orders given were actually enforced, or even that any effort was made to discover whether the orders had been sufficient to prevent the continuance of the improper practices.

The mere fact that the servants are using the master's chattels dangerously or misconducting themselves upon the master's premises is not enough to make the master liable. It is necessary to show that the master knew of the practices, and that he did not take the appropriate steps to stop them; or at least that he reasonably should have discovered them. Walker v. Hannibal & St. Joseph R. Co., 121 Mo. 575, 26 S.W. 360, 24 L.R.A. 363, 42 Am.St.Rep. 547 (1894); Walton v. New York Cent. Sleeping Car Co., 139 Mass. 556, 2 N.E. 101 (1885); De Ryss v. New York Central R. Co., 275 N.Y. 85, 9 N.E.2d 788 (1937); Dincher v. Great A. & P. Tea Co., 356 Pa. 151, 51 A.2d 710 (1947).

See Harper & Kime, The Duty To Control the Conduct of Another, 43 Yale L.J. 886 (1934).

Case Citations - by Jurisdiction

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

Restatement of the Law - Torts October 2022 Update

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).

There must be a reasonably foreseeable risk of harm before parents can be found negligent in failing to control their child. See Moore v. Crumpton, 295 S.E.2d 436 (N.C. 1982). However, there is no threshold number, type, or similarity of activities that are required for foreseeability to exist. See Parsons v. Smithey, 504 P.2d 1272, 1276 (Ariz. 1973). Thus, cases that require that the child have a known, habitual proclivity for dangerous conduct before a parent may be found negligent are inconsistent with this Section. See, e.g., Popple v. Rose, 573 N.W.2d 765 (Neb. 1998). Similarly, when there are no feasible means for taking precautions for even foreseeable risks posed by a child, the parent has not breached the duty of reasonable care. Courts often decide such cases on the basis of no duty rather than no breach as a matter of law. See, e.g., Smith v. Freund, 121 Cal. Rptr. 3d 427 (Ct. App. 2011); Cooper v. Meyer, 365 N.E.2d 201 (Ill. App. Ct. 1977); J.S. v. Harris, 227 P.3d 1089 (Okla. Civ. App. 2009) (because defendant could not reasonably foresee the threat her grandson posed as a potential child molester, defendant owed no duty to control grandson's actions).

With regard to who constitutes a parent, Gritzner v. Michael R., 611 N.W.2d 906 (Wis. 2000), employed a functional approach and extended the duty to a live-in boyfriend who had a custodial relationship with the child and served as a de facto parent. In Eldredge v. Kamp Kachess Youth Servs., Inc., 583 P.2d 626 (Wash. 1978), the court treated the operator of a youth-detention facility as a parent in a suit based on the damage caused by two youth escapees. Alternatively, the court might have found that the facility had an affirmative duty as a custodian under this Section.

Comment e. Duty of employers. The Restatement Second of Torts § 317 imposed a duty on masters to third parties for the acts of their servants occurring on the master's premises or other premises to which the servant was provided access because of the employment relationship or when the employee was using a chattel of the employer. The idea of the employment facilitating the employee causing harm captures these requirements contained in the Second Restatement and provides a bit of flexibility for courts confronting unusual situations.

The Second Restatement duty was limited to occasions when the employee was acting outside the scope of the relationship. As this Comment explains, even when the employer is vicariously liable, the employer's direct negligence can play an important role in apportioning liability. Thus, this Subsection is not limited to acts of the employee that are outside the scope of employment. For courts affirming or applying the principle of the Restatement Second of Torts § 317, see Int'l Distrib. Corp. v. Am. Dist. Tel. Co., 569 F.2d 136 (D.C. Cir. 1977); Marusa v. District of Columbia, 484 F.2d 828 (D.C. Cir. 1973) (city-employer subject to liability for police officer's off-duty shooting of plaintiff with service revolver that officer was required to carry when off duty); McGuire v. Ariz. Prot. Agency, 609 P.2d 1080 (Ariz. Ct. App. 1980) (burglar-alarm-installation company had duty of reasonable care to customer with regard to burglary by employee of company); Hills v. Bridgeview Little League Ass'n, 745 N.E.2d 1166 (Ill. 2000) (accepting validity of § 317, but concluding no duty existed because of lack of control of employer under the circumstances); Platson v. NSM, Am., Inc., 748 N.E.2d 1278 (Ill. App. Ct. 2001) (student intern sexually assaulted by employee at workplace; employer owed a duty of care with regard to employee); Gariup Constr. Co. v. Foster, 519 N.E.2d 1224 (Ind. 1988) (while social-host liability is not recognized, employer that furnished alcohol at company party to intoxicated employee had a duty of reasonable care with regard to employee); Ponticas v. K.M.S. Invs., 331 N.W.2d 907 (Minn. 1983) (apartment owner and employer of resident manager liable for rape of tenant by resident manager who was provided passkey for all units in apartment house); McCrink v. City of New York, 71 N.E.2d 419 (N.Y. 1947) (city-employer that required police to carry service revolvers when off duty had affirmative duty to third parties for police officer with history of intoxication who shot plaintiff); Hutchison v. Luddy, 742 A.2d 1052 (Pa. 1999) (finding that priest's access to motel room where he abused teenager satisfied requirement of § 317); Dempsey v. Walso Bureau, Inc., 246 A.2d 418 (Pa. 1968) (applying § 317, but concluding no duty existed because employer lacked knowledge of danger posed by employee); Kirlin v. Halverson, 758 N.W.2d 436, 451 (S.D. 2008) (contractor-employer had a duty to third party with regard to assault by employee under § 317); Nabors Drilling, U.S.A., Inc. v. Escoto, 288 S.W.3d 401 (Tex. 2009) (employer had no duty to third party with regard to work-fatigued employee who was off duty and driving his own automobile); Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983) (employer owed duty of care with regard to employee who became intoxicated at work and subsequently caused accident with plaintiff while driving home. Other courts have imposed a duty of care on an employer for acts of an employee outside the scope of employment similar to that provided in this Section, but grounded the duty in other bases for an affirmative duty. See Marquay v. Eno, 662 A.2d 272 (N.H. 1995) (duty of school district to students who were sexually abused by employees outside school hours); Funkhouser v. Wilson, 950 P.2d 501 (Wash. Ct. App. 1998) (church youth leader who sexually abused children of pastor).

When the employment relationship does not increase the risk of the employee harming another, the employer is not subject to liability. Thus, in Pursley v. Ford Motor Co., 462 N.E.2d 247 (Ind. Ct. App. 1984), employees were drinking surreptitiously while on the job and continued to drink after they completed their shift. While driving home from a bar, one of the employees ran into the plaintiff, who sued the employer. While the drinking occurred on the employer's premises, the location of the drinking did not increase the risk that the employee would be intoxicated while commuting to or from work. The court held that the employer was not subject to liability for the plaintiff's harm, relying on the accident and on the negligence of the employee occurring outside the employer's premises. See also Tallariti v. Kildare, 820 P.2d 952 (Wash. Ct. App. 1991) (employees obtained and consumed alcohol after work on job site; employer owed no duty to plaintiff injured in crash with intoxicated employee).

An employer may also have a duty, pursuant to § 7, if, in the course of employment, an employee is subject to such extreme demands that even after the employee is off duty a risk of harm to others exists. See, e.g., Robertson v. LeMaster, 301 S.E.2d 563 (W. Va. 1983) (employer required employee to work for 27 straight hours; while driving home from work, employee fell asleep and crashed into another automobile). Indeed, many of the cases in which courts impose a duty pursuant to this Subsection may also be cases in which the § 7 duty would be applicable. As with other affirmative duties in this Chapter, the provision of an affirmative duty in this Chapter avoids difficult inquiries of whether the employer in some way created the risk of harm by conducting the employer's business or whether the harm would have occurred even in the absence of the employer's business.

Illustration 1 is based on Coath v. Jones, 419 A.2d 1249 (Pa. Super. Ct. 1980). For other cases in which an employee only had access to premises because of an existing or prior employment relationship, see Int'l Distrib. Corp. v. Am. Dist. Tel. Co., 569 F.2d 136 (D.C. Cir. 1977) (employees of burglar-alarm company who robbed liquor store after disabling burglar alarm provided by employer); Ponticas v. K.M.S. Invs., 331 N.W.2d 907 (Minn. 1983) (apartment owner and employer of resident manager

liable for rape of tenant by resident manager who was provided passkey for all units in apartment house); Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc., 474 A.2d 436 (R.I. 1984).

Comment f. Duty of custodians. Section 319 of the first and Second Restatements of Torts has been influential and accepted by most courts. See Buchler v. State, 853 P.2d 798, 802 (Or. 1991) ("The majority of jurisdictions appear to apply common-law principles that are like section 319 in these types of cases. Many jurisdictions simply adopt Restatement section 319, by reference, as the law of that state."). For cases since the Second Restatement reaffirming the duty of jailers to third parties, see Shepherd v. Washington Cnty., 962 S.W.2d 779 (Ark. 1998); Cansler v. State, 675 P.2d 57 (Kan. 1984); Wilson v. Dep't of Pub. Safety & Corr., 576 So. 2d 490 (La. 1991); Lopez v. Great Falls Pre-Release Servs., Inc., 986 P.2d 1081 (Mont. 1999); State v. Silva, 478 P.2d 591 (Nev. 1970); Christensen v. Epley, 585 P.2d 416 (Or. Ct. App. 1978), aff'd by an equally divided court, 601 P.2d 1216 (Or. 1979); E.P. v. Riley, 604 N.W.2d 7 (S.D. 1999) (employees of Department of Social Services who had custody of teenager owed duty to third parties based on custody and knowledge that teen posed a risk of sexually abusing other children); Joyce v. State, Dep't of Corr., 119 P.3d 825 (Wash. 2005) (convicted criminal offender under community supervision). For cases reaffirming the duty of hospitals that have custody of those with mental illnesses, see Hicks v. United States, 511 F.2d 407 (D.C. Cir. 1975) (Federal Tort Claims Act case); Bradley Ctr., Inc. v. Wessner, 287 S.E.2d 716 (Ga. Ct. App.), aff'd, 296 S.E.2d 693 (Ga. 1982); Maroon v. State Dep't of Mental Health, 411 N.E.2d 404 (Ind. Ct. App. 1980); Rum River Lumber Co. v. State, 282 N.W.2d 882 (Minn. 1979); Petersen v. State, 671 P.2d 230 (Wash. 1983). But see Davenport v. Cmty. Corr. of the Pikes Peak Region, Inc., 962 P.2d 963 (Colo. 1998) (private community corrections facility had no duty with regard to person placed in custody of facility).

That the custody must have a purpose of protection of others is illustrated by Bergmann v. United States, 689 F.2d 789 (8th Cir. 1982), in which the plaintiff's decedent was killed by a person in the federal witness-protection program. In denying a duty to the deceased, the court observed that the purpose of the witness-protection program is the protection of witnesses, not third parties. See also Kulaga v. State, 322 N.Y.S.2d 542 (App. Div. 1971) (state liable for harm due to convict's escape based upon trial court's observation that confinement was not merely for punishment, but also for the protection of society), aff'd, 290 N.E.2d 437 (N.Y. 1972).

Courts have been particularly reluctant to impose a duty on those who make discretionary decisions whether to release juveniles or others who are eligible for prerelease programs. See, e.g., Sherrill v. Wilson, 653 S.W.2d 661 (Mo. 1983) (treating physician of involuntary patient at mental-health institution owed no duty in connection with discretionary decision to provide patient two-day pass); Sorge v. State, 762 A.2d 816 (Vt. 2000) (citing cases). But see Perreira v. State, 768 P.2d 1198 (Colo. 1989). Those courts express concern that imposing such a duty could interfere with the primary purpose of rehabilitating the person in custody by making their custodians overly concerned about risks to third parties and about the custodians' potential liability. While the benefits of rehabilitation are primarily enjoyed by the person in custody and by the public generally, imposing liability for harm to third parties on custodians could make them overly protective. One court responded to this tension by imposing a duty to avoid grossly negligent or reckless conduct. See Grimm v. Ariz. Bd. of Pardons & Paroles, 564 P.2d 1227, 1234 (Ariz. 1977) ("The standard of care owed, however, is that of avoiding grossly negligent or reckless release of a highly dangerous prisoner.").

That the custodial relationship need not be complete physical custody is demonstrated by the cases imposing a duty on parole and probation officers with regard to those they supervise on probation and parole. See Rieser v. District of Columbia, 563 F.2d 462 (D.C. Cir. 1977), modified on other grounds on rehearing en banc, 580 F.2d 647 (D.C. Cir. 1978); Semler v. Psychiatric Inst., 538 F.2d 121 (4th Cir. 1976); Sterling v. Bloom, 723 P.2d 755 (Idaho 1986); A.L. v. Commonwealth, 521 N.E.2d 1017 (Mass. 1988); Starkenburg v. State, 934 P.2d 1018 (Mont. 1997); Faile v. S.C. Dep't of Juvenile Justice, 566 S.E.2d 536 (S.C. 2002); Hertog v. City of Seattle, 979 P.2d 400 (Wash. 1999) (prerelease counselor); Bishop v. Miche, 973 P.2d 465 (Wash. 1999); Taggart v. State, 822 P.2d 243 (Wash. 1992) (parole officer). The Supreme Court of Alaska explained the basis for an affirmative duty despite lack of complete control:

> Although the state was required to release Nukapigak, he remained under state supervision as a parolee. It could regulate his movements within the state, require him to report to a parole officer under conditions set by that officer or a prison counselor, require him to undergo treatment for

> alcoholism, and impose and enforce special conditions of parole including requirements that he refrain from the use of alcohol, participate in an alcohol rehabilitation program, and that he consent to a search of his residence to see if he possessed firearms. It could revoke his parole and reincarcerate him if he violated these conditions. While the state could not completely control Nukapigak's conduct, it was hardly in the position of a stranger who (at least according to the traditional rule) cannot be expected to interfere with the conduct of a third person.

Div. of Corr. v. Neakok, 721 P.2d 1121, 1126 (Alaska 1986); see also E.P. v. Riley, 604 N.W.2d 7 (S.D. 1999) (department of social services had affirmative duty with regard to foster child in its legal, but not physical, custody). Thus, this Section rejects the reasoning of courts like Seibel v. City of Honolulu, 602 P.2d 532 (Haw. 1979), which declined to impose an affirmative duty on a prosecutor who had modest supervisory responsibilities for a person who had been acquitted of multiple rapes on the grounds of insanity and who subsequently obtained a conditional release from incarceration. The court reasoned that the prosecutor's custody pursuant to the court order of conditional release was insufficient to impose a duty pursuant to § 319 of the Restatement Second of Torts. See also Schmidt v. HTG, Inc., 961 P.2d 677 (Kan. 1998) (parole officer does not have control over released inmate and hence, has no affirmative duty); Lamb v. Hopkins, 492 A.2d 1297 (Md. 1985) (probation officers did not have sufficient charge for affirmative duty to arise); Bartunek v. State, 666 N.W.2d 435 (Neb. 2003); Small v. McKennan Hosp., 403 N.W.2d 410, 413-414 (S.D. 1987); Fox v. Custis, 372 S.E.2d 373, 376 (Va. 1988) ("The applicable statute [regarding a parole officer's supervision of a parolee] does not contemplate continuing hourly or daily dominance and dominion by a parole officer over the activities of a parolee."); cf. Bailey v. Town of Forks, 737 P.2d 1257 (Wash. 1987) (defendant, whose police officer had statutory duty to take custody of intoxicated driver but did not, is subject to liability to plaintiff who was injured by intoxicated driver).

Comment g. Duty of mental-health professionals. Virtually all courts confronting the issue have decided that mental-health professionals owe some affirmative duty to third parties with regard to patients who are recognized as posing dangers. See Currie v. United States, 644 F. Supp. 1074, 1078 (M.D.N.C. 1986) (stating that the "vast majority of courts that have considered the issue have accepted the *Tarasoff* analysis"), aff'd, 836 F.2d 209 (4th Cir. 1987); Munstermann v. Alegent Health-Immanuel Med. Ctr., 716 N.W.2d 73, 81 (Neb. 2006) ("The vast majority of courts that have considered this issue have accepted the *Tarasoff* analysis."); Peter F. Lake, *Revisiting Tarasoff*, 58 Alb. L. Rev. 97, 98 (1994) (reporting that *Tarasoff* is "widely accepted (and rarely rejected) by courts and legislatures in the United States as a foundation for establishing duties of reasonable care upon psychotherapists to warn, control, and/or protect potential victims of their patients who have expressed violent intentions."); see also Bradley v. Ray, 904 S.W.2d 302, 307-309 (Mo. Ct. App. 1995) (providing survey of jurisdictions' response to *Tarasoff* and reporting that only one state had declined to adopt a *Tarasoff* duty). Some courts, while not adopting a *Tarasoff* duty, have spoken in terms that suggest a favorable disposition in a future case that squarely poses the issue. See, e.g., Anthony v. State, 374 N.W.2d 662 (Iowa 1985). The vast majority of such states in which a *Tarasoff* duty has been judicially imposed have subsequently enacted statutes that codify the duty, often in response to efforts by mental-health associations and the American Psychological Association to provide greater clarity or limits to the judicially imposed duty. See Fillmore Buckner & Marvin Firestone, *Where the Public Peril Begins: 25 Years After* Tarasoff, 21 J. Legal Med. 187 (2000); Damon M. Walcott et al., *Current Analysis of the* Tarasoff *Duty*, 19 Behav. Sci. & L. 325, 339 (2001). See generally Bradley v. Ray, 904 S.W.2d 302, 309 (Mo. Ct. App. 1995); Paul B. Herbert & Kathryn A. Young, Tarasoff *at Twenty-Five*, 30 J. Am. Acad. Psychiatry L. 275 (2002).

The *Tarasoff* duty is widely taught to therapist students; texts and clinical guidelines provide guidance on how to comply, professional ethical codes take account of it, and the mental-health professional who does not know of the general concept is unusual. See Gerald Corey et al., Issues and Ethics in the Helping Professions 224-232 (7th ed. 2007) ("Most counseling centers and community health agencies now have developed guidelines regarding the duty to warn and protect when the welfare of others is at stake."); Gerald Corey et al., Professional and Ethical Issues in Counseling and Psychotherapy 123-124 (1979) (therapists are "obliged to exercise reasonable care to protect the would-be victims"); Dean Hepworth, et al., Direct Social Work Practice: Theory & Skills 69 (7th ed. 2006) ("In certain instances, the client's right to confidentiality may be less compelling than the rights of other people who could be severely harmed or damaged by actions planned by the client and confided to the practitioner.");

David G. Martin & Allan D. Moore, First Steps in the Art of Intervention 364 (1995) ("It is hard to imagine a mental-health professional who has not heard of the now infamous *Tarasoff* case...."). Indeed, even in states in which there is no definitive case adopting a *Tarasoff* duty, clinicians practice as if there were. Lawson R. Wulsin et al., *Unexpected Clinical Features of the*Tarasoff*Decision: The Therapeutic Alliance and the "Duty to Warn,"* 140 Am. J. Psychiatry 601 (1983) ("Massachusetts has had no specific case 'on point' for this issue, clinicians generally act as though the reasoning in *Tarasoff* applied here.").

For courts endorsing a general duty of reasonable care similar to that adopted in this Section, see Currie v. United States, 644 F. Supp. 1074, 1080-1083 (M.D.N.C. 1986), aff'd, 836 F.2d 209 (4th Cir. 1987); Perreira v. State, 768 P.2d 1198 (Colo. 1989); Naidu v. Laird, 539 A.2d 1064 (Del. 1988); Davis v. Lihm, 335 N.W.2d 481 (Mich. Ct. App. 1983); McIntosh v. Milano, 403 A.2d 500 (N.J. Super. Ct. Law Div. 1979); Estate of Morgan v. Fairfield Family Counseling Ctr., 673 N.E.2d 1311 (Ohio 1997); Schuster v. Altenberg, 424 N.W.2d 159, 161-162 (Wis. 1988). Indeed, the initial opinion in *Tarasoff* was limited to imposing a duty to warn. Tarasoff v. Regents of the Univ. of Cal., 529 P.2d 553 (Cal. 1974). That opinion was withdrawn for rehearing, and the second and governing *Tarasoff* opinion expanded the duty of psychotherapists to require the exercise of reasonable care. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976). The California Supreme Court relied heavily on an article that found support in prior cases for a duty, by those caring for inpatients, owed to third parties. The article also confronted the trade-off between preserving confidentiality and protection of third parties. See John G. Fleming & Bruce Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 Cal. L. Rev. 1025 (1974).

Some courts have declined to adopt a duty beyond that of warning. A substantial number of courts, and legislatures enacting statutes, limit the duty to warning the potential victim. See, e.g., Bradley v. Ray, 904 S.W.2d 302, 312 n.7 (Mo. Ct. App. 1995). A number of the cases declining to extend the duty beyond warning involve factual circumstances in which efforts other than warnings would not have been reasonable. See Fraser v. United States, 674 A.2d 811 (Conn. 1996) (no basis on which to believe patient posed a risk of harm to others); Boulanger v. Pol, 900 P.2d 823, 835 (Kan. 1995) (no reason existed for seeking involuntary commitment where warning to individual threatened by patient would have been adequate). Curiously, North Carolina recognizes a duty to control patients but does not recognize a duty to warn. See Gregory v. Kilbride, 565 S.E.2d 685 (N.C. Ct. App. 2002). See generally Alan R. Felthous & Claudia Kachigian, *To Warn and to Control: Two Distinct Legal Obligations or Variations of a Single Duty to Protect?*, 19 Behav. Sci. & L. 355 (2001).

One good reason for employing a duty of reasonable care rather than limiting the duty to one of warning is that new developments may provide additional means for curbing the risks posed by violent psychotherapy patients. See John Monahan, Tarasoff *at Thirty: How Developments in Science and Policy Shape the Common Law*, 75 U. Cin. L. Rev. 497, 515-518 (2006) (explaining development of involuntary outpatient programs).

Some courts and statutes require a specific threat by the patient or actual knowledge by the mental-health professional of the patient's danger to another. See, e.g., Shaw v. Glickman, 415 A.2d 625 (Md. Ct. Spec. App. 1980); Emerich v. Phila. Ctr. for Human Dev., 720 A.2d 1032, 1036, 1041 (Pa. 1998) (duty of mental-health professional to warn third person where patient communicates a "specific and immediate threat of serious bodily injury"); Doe v. Marion, 645 S.E.2d 245 (S.C. 2007) (requiring specific threat of harm for duty to be imposed; generalized danger of child abuse insufficient to support existence of an affirmative duty). Such requirements are rejected by Subsection (b)(4). If a mental-health professional should, in the exercise of the care ordinarily provided by similar professionals, know that a patient poses a risk of harm, such knowledge is sufficient to impose a duty of care. Likewise, while a specific threat may be a strong indication of danger, other facts in the context of mental-health treatment may also lead a professional to the judgment that the patient poses a danger to others or to self. See Estate of Morgan v. Fairfield Family Counseling Ctr., 673 N.E.2d 1311 (Ohio 1997).

Some courts and statutes have limited any warning obligation to those who are specifically identified by the patient. Others couch the limitation as those who are "readily identifiable." See, e.g., Chrite v. United States, 564 F. Supp. 341 (E.D. Mich. 1983); Jenks v. Brown, 415, 557 N.W.2d 114, 117 (Mich. Ct. App. 1996) ("reasonably identifiable" third parties); Munstermann v. Alegent Health-Immanuel Med. Ctr., 716 N.W.2d 73, 85 (Neb. 2006); Emerich v. Phila. Ctr. for Human Dev., 720 A.2d 1032 (Pa. 1998). Mental-health professionals should take reasonable steps to identify those who are at risk due to a dangerous patient.

The greater the danger posed by the patient, the greater the efforts required to identify a potential victim, and a psychotherapist may not ignore a substantial risk to a third person merely because the individual's identity has not been supplied by the patient. The failure of the patient to name a specific victim may bear on whether there is a real risk of danger or on whether there is a specific person at risk. In that respect, lack of identification of the potential victim may be relevant to whether there is any duty and, if so, whether there is a breach. Nevertheless, the lack of identification does not, by itself, obviate any duty to warn. In any case, the threat must be one to an individual or small number of individuals. There is no duty to warn the public generally when no individual is identifiable. See Thompson v. Cnty. of Alameda, 614 P.2d 728 (Cal. 1980). On the other hand, reasonable care may require steps beyond a warning, such as commitment. No limitation with regard to victims, other than the ordinary scope-of-liability limits, applies to such cases. See Currie v. United States, 644 F. Supp. 1074, 1079 (M.D.N.C. 1986) ("The court does not believe that it is wise to limit any duty to commit according to the victim. Arguably, the patient who will kill wildly (rather than specifically identifiable victims) is the one *most* in need of confinement."), aff'd, 836 F.2d 209 (4th Cir. 1987).

The duty imposed by Subsection (b)(4) is applicable to all mental-health professionals who act in a relationship with a mental patient. In *Tarasoff*, the court held that the affirmative duty extended to both the treating psychologist and to several other psychiatrists who were involved in the care of the patient, so long as they had a psychotherapist-patient relationship. *Tarasoff*, supra, 551 P.2d at 344 n.6. Courts since *Tarasoff* have applied this duty to psychiatrists, see, e.g., Jablonski v. United States, 712 F.2d 391 (9th Cir. 1984); Rivera v. N.Y. City Health & Hosp. Corp., 191 F. Supp. 2d 412 (S.D.N.Y. 2002); Hamman v. Cnty. of Maricopa, 775 P.2d 1122 (Ariz. 1989); Davis v. Lhim, 335 N.W.2d 481 (Mich. Ct. App. 1983); MacIntosh v. Milano, 403 A.2d 500 (N.J. Super. Ct. Law Div. 1979); Schrempf v. State, 487 N.E.2d 883 (N.Y. 1985) (recognizing a duty but finding no liability where psychiatrist acted reasonably in the absence of any warning signs of potentially violent behavior by patient); and to psychologists, see, e.g., White v. United States, 780 F.2d 97 (D.C. Cir. 1986); Hedlund v. Superior Court, 669 P.2d 41 (Cal. 1983); Weigold v. Patel, 2000 WL 1056643 (Conn. Super. Ct. 2000) (finding duty existed for both a treating psychiatrist and psychologist); see also Durflinger v. Artiles, 727 F.2d 888, 890 (10th Cir. 1984) (stating that the duty involves "psychological rather than medical inquiry"). A number of state statutes enacted since *Tarasoff* contain broad definitions of the professionals to whom the statute is applicable. See, e.g., Colo. Rev. Stat. § 13-21-117 (imposing duty on any "physician, social worker, psychiatric nurse, psychologist, or other mental health professional... where the patient has communicated to the mental health care provider a serious threat of imminent physical violence against a specific person or persons"); La. Rev. Stat. Ann. § 9:2800.2 (applying duty to "treating psychologist or psychiatrist, or board-certified social worker"); Mich. Comp. Laws § 330.1946(4) (providing duty is imposed on "mental health professionals," including psychiatrists, psychologists, social workers, licensed professional counselors, marriage and family therapists, and music therapists); Neb. Rev. Stat. § 38-2137 (providing duty applicable to licensed or certified mental-health practitioners); N.J. Stat. Ann. § 2A:62A-16 (West) (affecting any person licensed "to practice psychology, psychiatry, medicine, nursing, clinical social work or marriage counseling"); see also Emerich v. Phila. Ctr. for Human Dev., 720 A.2d 1032 (Pa. 1998) (imposing duty on mental-health professionals). So long as persons act in a mental-health-professional role, they are subject to the duty imposed by Subsection (b)(4). A Louisiana court declined to extend *Tarasoff* to religious counselors in Miller v. Everett, 576 So. 2d 1162 (La. Ct. App. 1991). The court in *Miller* relied on the lack of a special relationship between the counselor and the plaintiffs, rather than addressing the relationship between the counselor and the counseled.

Among the objections to imposing a duty that includes steps to "control" a patient is that psychotherapists do not have custody of their outpatients and therefore do not have the ability or right to limit their activities. See Boynton v. Burglass, 590 So. 2d 446 (Fla. Dist. Ct. App. 1991). This objection fails to appreciate that mental-health professionals have a variety of options available that may reduce the risk posed by a dangerous patient. See John Monahan, Tarasoff *at Thirty: How Developments in Science and Policy Shape the Common Law*, 75 U. Cin. L. Rev. 497 (2006) (explaining four options available to psychotherapist with a dangerous patient). That a psychotherapist does not have complete control of a patient does not obviate a duty to take those steps that are available to control the risk that the patient will harm someone. See Estate of Morgan v. Fairfield Family Counseling Ctr., 673 N.E.2d 1311, 1323 (Ohio 1997) ("Although the outpatient setting affords the psychotherapist a lesser degree of control over the patient than does the hospital setting, it nevertheless embodies sufficient elements of control to warrant a corresponding duty to control."). But see Santana v. Rainbow Cleaners, 969 A.2d 653, 665-667 (R.I. 2009) (holding that outpatient clinic did not have an affirmative duty to control patient).

Only four jurisdictions have decided against a *Tarasoff*-like duty, and one of those was by an intermediate appellate court. See Boynton v. Burglass, 590 So. 2d 446 (Fla. Dist. Ct. App. 1991) (en banc); Tedrick v. Cmty. Res. Ctr., Inc., 920 N.E.2d 220, 228-229 (Ill. 2009); Thapar v. Zezulka, 994 S.W.2d 635 (Tex. 1999) (declining to adopt a duty to warn because such a duty would have conflicted with confidentiality statute that barred disclosure; distinguishing victims of child and sexual abuse, where reporting is statutorily mandated); Nasser v. Parker, 455 S.E.2d 502 (Va. 1995) (no special relationship exists unless defendant has "taken charge" of other; relationship between psychiatrist and patient admitted voluntarily to hospital because of history of violence toward women whose condition had recently deteriorated entailed insufficient control for special relationship to exist); see also Evans v. United States, 883 F. Supp. 124 (S.D. Miss. 1995) (Federal Tort Claims Act case in which court predicted that Mississippi would not adopt *Tarasoff*); Gregory v. Kilbride, 565 S.E.2d 685, 692 (N.C. Ct. App. 2002) (acknowledging a duty to control patients, but stating that "North Carolina does not recognize a psychiatrist's duty to warn third parties" without further explanation or citation (emphasis omitted)).

The concerns of courts and commentators about imposing a duty on psychotherapists are not without merit. They include: (1) the difficulty of making accurate predictions of dangerousness; (2) the necessity of incursions on professional obligations of confidentiality; (3) the impact of breaches of confidentiality on the therapist-patient relationship and the concomitant costs to effective therapy; (4) deterring mental-health professionals from treating potential patients who are dangerous; (5) the risk that therapists will employ more restrictive means than appropriate or will otherwise practice defensively, to the detriment of the patient because of liability concerns; (6) the substantial liability that could be imposed on mental-health professionals for either a modest professional mistake or because of an erroneous court determination; and, related to the prior two concerns, (7) the uncertainty created by a general reasonable-care standard for mental-health professionals. See generally Michael L. Perlin, Tarasoff *and the Dilemma of the Dangerous Patient: New Directions for the 1990's*, 16 Law & Psychol. Rev. 29, 35-39 (1992) (summarizing criticisms of *Tarasoff*); D.L. Rosenhan et al., *Warning Third Parties: The Ripple Effects of* Tarasoff, 24 Pac. L.J. 1165, 1185-1189 (1993) (also reviewing criticisms of *Tarasoff*). Dr. Alan Stone was the earliest and most vehement critic of *Tarasoff*. Alan A. Stone, *The* Tarasoff *Decisions: Suing Psychotherapists to Safeguard Society*, 90 Harv. L. Rev. 358 (1976).

The court in Sherrill v. Wilson, 653 S.W.2d 661, 664 (Mo. 1983), captured many of these concerns in its observation that:

> The treating physicians, in their evaluation of the case, well might believe that [the patient] could be allowed to leave the institution for a prescribed period and that his release on pass might contribute to his treatment and recovery. We do not believe that they should have to function under the threat of civil liability to members of the general public when making decisions about passes and releases. The plaintiff could undoubtedly find qualified psychiatrists who would testify that the treating physicians exercised negligent judgment, especially when they are fortified by hindsight. The effect would be fairly predictable. The treating physicians would indulge every presumption in favor of further restraint, out of fear of being sued. Such a climate is not in the public interest.

These observations may explain cases, such as Morton v. Prescott, 564 So. 2d 913 (Ala. 1990), in which the court limited the duty of a psychotherapist, with regard to controlling a voluntarily-admitted patient in custody, to those against whom the patient had made a specific threat. The concern of the impact of liability and of narrowly confining affirmative duties appears to be the basis for this decision, rather than any inability to protect a broader class of potential victims by imposing a broader duty.

Developments since *Tarasoff* suggest that some of these concerns are not as serious as some critics and a few jurists thought. The best (and perhaps only feasible) method of exploring the impact of *Tarasoff*-like rules on care for mental patients is through survey methodology. While such surveys are subject to a number of potential biases that may skew results, they should be capable of identifying significant changes or problems.

(1) In the largest survey of mental-health professionals, Givelber et al. found that their respondents generally thought that they were able to predict, with some degree of accuracy, outpatient dangerousness, with less than 10 percent expressing the view that it was impossible to predict. Respondents also believed that there was a fair amount of reliability, i.e., agreement among others, for their judgments. See Daniel J. Givelber et al., Tarasoff, *Myth and Reality: An Empirical Study of Private Law in Action*, 1984 Wis. L. Rev. 443, 462-464. A survey conducted a decade after the Givelber study obtained similar results. Rosenhan, supra, at 1207-1208.

Most nonsurvey research on the accuracy of predictions of dangerousness has focused on the needs of criminal law. Thus, investigations address predicting dangerousness over a lengthy period. Moreover, empirical studies are more readily conducted of inpatients, rather than of outpatients. Those studies have not been heartening about the ability of psychotherapists to predict dangerousness. See, e.g., John Monahan, The Clinical Prediction of Violent Behavior (1981) (finding that only one in three predictions of long-term dangerousness among institutionalized population were correct). Even with relatively sensitive tests for dangerousness, a substantial number of false positives occur because of the low base rate of dangerousness among the patient population. See Joseph M. Livermore, Carl P. Malmquist & Paul E. Meehl, *On the Justifications for Civil Commitment*, 117 U. Pa. L. Rev. 75, 84 (1968) (using criminal convictions as the measure for dangerousness biases (by understating) the incidence of dangerousness). Subsequent research has found somewhat better accuracy, partially as a result of better research methodology in identifying subsequent violence and partially due to improved predictive techniques. See Randy K. Otto, *On the Ability of Mental-Health Professionals to "Predict Dangerousness": A Commentary on Interpretations of the "Dangerousness" Literature*, 18 Law & Psychol. Rev. 43 (1994); Rosenhan, supra, at 1186 n.140 ("[R]ecent evidence, however, suggests that while predicting dangerous behavior is clearly a difficult matter, there are circumstances when it can be predicted better than others."). Advances in knowledge about risk factors and predictive methodology should improve future accuracy. See Randy Borum, *Improving the Clinical Practice of Violence Risk Assessment*, 51 Am. Psychol. 945, 954 (1996). At the time of *Tarasoff*, Professor John Monahan wrote that psychotherapists' predictions of violence were sufficiently inaccurate to be unpromising for use in the legal system. Thirty years later, he revised that assessment and commented: "What a difference three decades make: the field of violence risk assessment has burgeoned and is now a vast and vibrant area of interdisciplinary scholarship." See John Monahan, Tarasoff *at Thirty: How Developments in Science and Policy Shape the Common Law*, 75 U. Cin. L. Rev. 497, 497 (2006).

False negatives are apparently not as prevalent as false positives because of the perception that they are more costly than false positives and because of the low base rate of dangerousness. See Alan A. Stone, Mental Health and the Law: A System in Transition 35 (1975) (explaining forces at work in the psychotherapy profession that produce low rate of false negatives); Michael Petrunik, *The Politics of Dangerousness*, 5 Int'l J.L. & Psychiatry 225, 243-246 (1982).

(2) Before *Tarasoff*, mental-health professionals believed that professional ethical obligations required them to breach confidentiality and issue warnings in certain circumstances, including when a patient posed a risk to the community. Judith Beren Leonard, *A Therapist's Duty to Potential Victims: A Nonthreatening View of* Tarasoff, 1 Law & Hum. Behav. 309, 317 (1977) ("*Tarasoff* represents no greater burden than the profession would be likely to impose upon itself."); R. Little & E. Strecker, *Moot Questions in Psychiatric Ethics*, 113 Am. J. Psychiatry 455 (1956) (two-thirds of responding psychotherapists stated that they would breach confidentiality and warn others if they believed a minor patient was homicidal or suicidal and parents refused to take action); Toni Wise, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of* Tarasoff, 31 Stan. L. Rev. 165, 176 (1978) (70% of survey respondents reported that confidentiality could be breached under appropriate circumstances). Thus, the idea that *Tarasoff* required breach of an absolute curtain of confidentiality was false; indeed, in the *Tarasoff* case, the psychotherapist contacted law-enforcement officials and had his patient detained because of the psychotherapist's concern about the potential for violence by the patient. However, by including potential victims among those required to be warned, *Tarasoff* expanded the universe of persons to be provided confidential information. Even after *Tarasoff*, a substantial proportion of mental-health professionals believe that their ethical, rather than legal, obligations require warnings. James C. Beck, *Violent Patients and the* Tarasoff *Duty in Private Psychiatric Practice*, 13 J. Psychiatry & L. 361, 365 (1985) (only 12% of respondents believed *Tarasoff* duty was due solely to legal requirements); Givelber, supra, at 474

(between 48 and 77% of respondents believed professional ethics and 75 to 85% believed personal ethics required taking some action to protect third party).

(3) Two small studies of psychotherapists reveal that, in a small percentage of *Tarasoff* cases, there is an adverse effect on therapy, such as a patient ceasing further therapy. Beck, supra, at 373 (reporting on two studies that included 40 cases in which confidentiality was breached, three of which resulted in adverse impact on therapy). Rosenhan et al. found, in a survey of California therapists, that half of them felt they had lost a patient as a result of discussing the need to breach confidentiality when that patient threatened harm. Rosenhan, supra, at 1215.

Other assessments of the impact of *Tarasoff* on the mental-health profession suggest even more modest or no adverse effects. See Renee Binder & Dale McNeil, *Application of the* Tarasoff *Ruling and Its Effect on the Victim and the Therapeutic Relationship*, 47 Psychiatric Servs. 1212 (1996) (reporting that 3/4 of patients had a minimal or positive reaction to breaches of confidentiality by their therapist and concluding that "[m]any of the anticipated negative effects of the *Tarasoff* decision have not materialized"); Dale McNeil et al., *Management of Threats of Violence Under California's Duty-to-Protect Statute*, 155 Am. J. Psychiatry 1097 (1998) (notification of family members who were potential victims assisted in family therapy). Some researchers believe that therapists can, by discussing the need for a warning with their patients, actually improve the therapeutic relationship and its benefit for patients. One therapist has theorized that *Tarasoff* obligations enhance the ability of psychotherapists to help their patients with better decisionmaking. L.R. Wulsin et al., *Unexpected Clinical Features of the* Tarasoff *Decision: The Therapeutic Alliance and the "Duty to Warn,"* 40 Am. J. Psychiatry 601 (1983). James Beck reports that:

> A warning that is discussed strengthens an alliance because the therapist demonstrates to the patient the ability to retain his therapeutic concern even in the face of imminent danger.... By making clear to the patient that the therapist proposes to prevent violence if he or she can, the therapist dramatically demonstrates to the patient an alliance with the healthier, more socially constructive aspects of the patient's personality.

James C. Beck, *When the Patient Threatens Violence: An Empirical Study of Clinical Practice after* Tarasoff, 10 Bull. Am. Acad. Psychiatry & L. 189, 199 (1982); see also Judith Treadway, Tarasoff *in the Therapeutic Setting*, 41 Hosp. & Cmty. Psychiatry 88, 88-89 (1990) (reporting on case in which patient was relieved that therapist brought spouse, who had been threatened by patient, into therapy session); David B. Wexler, *Patients, Therapists, and Third Parties: The Victimological Virtues of* Tarasoff, 2 Int'l J.L. & Psychiatry 1 (1979).

(4) Surveys reveal little or no abandonment of potentially dangerous patients after *Tarasoff*. Givelber, supra, at 478-489; Beck, supra, at 366 (5% of private psychiatrist respondents report avoiding potentially violent patients and another 5% report referring patients who become violent for public treatment); Rosenhan et al., supra, at 1209-1210 (18% of therapists report avoiding counseling dangerous patients, at least in part, because of *Tarasoff*). Mental-health professionals might be reluctant to self-report such behavior, lending concern about bias to this outcome. Yet, if the obligations imposed by *Tarasoff* are unpopular in the psychotherapist community, a contrary bias might result in overreporting of abandonment.

(5) Despite much theorizing about the adverse effects that defensive practices might produce, the only effort to examine this hypothesis found little to support it. See Jeffrey R. Wilbert & Solomon M. Fulero, *Impact of Malpractice on Professional Psychology: Survey of Practitioners*, 19 Prof. Psychol.: Res. & Prac. 379, 381 (1988) ("Overall, our data turned up little evidence of an epidemic of litigaphobia among practicing Ohio psychologists.").

(6) Some of the concerns about erroneous judgments can be cabined by courts ensuring that there are facts supporting a professional judgment that the patient posed a risk, that there were reasonable steps available to the professional to ameliorate that risk, and that adoption of those steps would have avoided or ameliorated the harm suffered by the plaintiff. See Boynton v. Burglass, 590 So. 2d 446 (Fla. Dist. Ct. App. 1991).

(7) The reasonable-care standard does create uncertainty for a population that is acutely aware of the *Tarasoff* decision. See Peter H. Schuck & Daniel J. Givelber, Tarasoff v. Regents of the University of California:*The Therapist's Dilemma, in*Torts Stories 99, 114-116 (Robert L. Rabin & Stephen D. Sugarman eds., 2003) (explaining extent of familiarity of therapist community with *Tarasoff* generally). Giving greater deference to reasonable choices made by therapists in protecting potential victims, when unsuccessful, could rectify this concern. Cf. Currie v. United States, 644 F. Supp. 1074, 1083 (M.D.N.C. 1986) (providing good-faith professional-judgment defense to therapist who made judgment not to commit patient), aff'd, 836 F.2d 209 (4th Cir. 1987). Many of the statutes enacted by legislatures that codify therapists' obligations provide greater certainty, but at the cost of eliminating some claims that might be valid.

(8) Beyond assessing quality of care, a recent unpublished empirical investigation found that *Tarasoff* duties have increased homicides by five percent. See Griffin Sims Edwards, *Doing Their Duty: An Empirical Analysis of the Unintended Effect of*Tarasoff v. Regents*on Homicidal Activity*, Emory University, Department of Economics January 29, 2010. Emory Law and Economics Research Paper No. 10-61.

In sum, *Tarasoff*'s duty of care is not without costs, although they appear in retrospect to be considerably more confined than was initially predicted by the therapeutic community. More difficult to determine, as is always the case with events that are prevented from occurring, are its benefits in terms of protecting third parties from violence. Survey evidence does suggest that another benefit of *Tarasoff* is greater attention by therapists in their counseling relationships to potential violence. Indeed, one of the earliest and harshest critics of *Tarasoff*, an academic psychiatrist who also teaches law, subsequently confessed that "the duty to warn is not as unmitigated a disaster for the enterprise of psychotherapy as it once seemed to critics like myself." Alan A. Stone, Law, Psychiatry and Morality: Essays and Analysis 181 (1984).

That a defendant is subject to a duty under Subsection (b)(4) does not preclude an affirmative duty existing due to some other provision in this Chapter. See Estate of Long v. Broadlawns Med. Ctr., 656 N.W.2d 71 (Iowa 2002) (duty imposed based on undertaking by defendant). For cases imposing a duty on mental-health professionals based on their custody of those who are being treated as inpatients, see Bradley Ctr., Inc. v. Wessner, 296 S.E.2d 693 (Ga. 1982) (mental-health hospital subject to duty of reasonable care to identified third party with regard to voluntarily committed patient who was provided a weekend pass after he stated that, if given the opportunity, he would hurt his wife); Leonard v. State, 491 N.W.2d 508 (Iowa 1992) (psychotherapist has special relationship with involuntarily committed patient, but duty is limited to reasonably foreseeable victims); Durflinger v. Artiles, 673 P.2d 86 (Kan. 1983) (affirmative duty of reasonable care owed to third parties for dangerous patient who was involuntarily committed); Gregory v. Kilbride, 565 S.E.2d 685 (N.C. Ct. App. 2002) (affirmative duty exists to take care to protect third parties from risks posed by the release of a mental patient who is involuntarily committed). But see Boulanger v. Pol, 900 P.2d 823 (Kan. 1995) (no affirmative duty and no liability for negligent release of voluntary patient).

A mental-health professional may commit malpractice in treating a patient. All health-care professionals owe a duty of care upon entering into a physician-patient relationship. Such malpractice, if it poses a risk of harm to a third party, may be the basis for a duty and liability pursuant to the ordinary duty of care imposed on professionals not based on an affirmative duty under this Section. See Comment *h*. Thus, a psychotherapist who ceases prescribing medication to a schizophrenic patient with violent tendencies, who then harms others, may be subject to liability if removing the patient's medication were contrary to the applicable professional standard of care. See Estate of Morgan v. Fairfield Family Counseling Ctr., 673 N.E.2d 1311 (Ohio 1997); Schuster v. Altenberg, 424 N.W.2d 159, 161-162 (Wis. 1988).

For cases in which courts have employed no duty to explain why the defendant is not liable for failure to warn plaintiffs of information they already possessed, see, e.g., Boulanger v. Pol, 900 P.2d 823, 835 (Kan. 1995); Wagshall v. Wagshall, 538 N.Y.S.2d 597 (App. Div. 1989). Judge Calabresi explains the misuse of no duty in warnings cases in which the danger is known in Burke v. Spartanics Ltd., 252 F.3d 131 (2d Cir. 2001).

Illustration 2 is based loosely on Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976). Illustration 4 is based on Bradley v. Ray, 904 S.W.2d 302 (Mo. Ct. App. 1995).

*Comment h. Duty of non-mental-health physicians to third parties.*For courts distinguishing between cases in which the physician's conduct in the case created a risk of harm and those involving an affirmative duty, see Taylor v. Smith, 892 So. 2d 887, 893 (Ala. 2004) (Physician-defendant continued to supply methadone to a clinic patient despite drug tests that showed that she was continuing to abuse other drugs. The combination of methadone and other drugs created serious risks and the patient caused an automobile crash that injured plaintiff. The court recognizes this case as one falling within the general duty of care: "[E]very person owes every other person a duty imposed by law to be careful not to hurt him."); Cheeks v. Dorsey, 846 So. 2d 1169 (Fla. Dist. Ct. App. 2003); McKenzie v. Haw. Permanente Med. Grp., Inc., 47 P.3d 1209 (Haw. 2002); McNulty v. City of New York, 792 N.E.2d 162 (N.Y. 2003); Bradshaw v. Daniel, 845 S.W.2d 865 (Tenn. 1993); Flynn v. Houston Emergicare, Inc., 869 S.W.2d 403 (Tex. App. 1994); Gooden v. Tips, 651 S.W.2d 364 (Tex. App. 1983). For a case in which the plaintiff's allegations encompassed both the creation of risk and affirmative duties, see Schmidt v. Mahoney, 659 N.W.2d 552 (Iowa 2003).

For courts that have found an affirmative duty on the part of physicians to nonpatients, see Myers v. Quesenberry, 193 Cal. Rptr. 733 (Ct. App. 1983); Pate v. Threlkel, 661 So. 2d 278 (Fla. 1995) (physician owed a duty of care to child of patient to warn patient of genetic condition that could affect child); Hoffman v. Backmon, 241 So. 2d 752 (Fla. Dist. Ct. App. 1970) (physician has a duty to warn family members of patient with tuberculosis); DiMarco v. Lynch Homes-Chester Cnty., Inc., 583 A.2d 422 (Pa. 1990) (physician had duty based on § 324A to tell patient that hepatitis could be transmitted through sexual intercourse; physician also incorrectly told patient that, if she was symptom-free six weeks after exposure to virus, she was not infected); Troxel v. A.I. DuPont Inst., 675 A.2d 314 (Pa. Super. Ct. 1996) (physician who diagnosed infant with contagious disease, but failed to tell family, owed duty to friend of family who was later infected with the virus); Bradshaw v. Daniel, 854 S.W.2d 865 (Tenn. 1993) (physician had duty to warn family members of patient who contracted Rocky Mountain spotted fever about common sources of infection to which they might be exposed). Indeed, the California Supreme Court in *Tarasoff* relied on non-mental-health physicians' duty to third parties to justify the affirmative duty it adopted for mental-health professionals. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 343 & n.8 (Cal. 1976).

Among courts that have imposed a duty to nonpatients, a number have been cautious about extending it so broadly as to encompass all persons foreseeably put at risk. See, e.g., Tenuto v. Lederle Labs., 687 N.E.2d 1300 (N.Y. 1997) (duty to warn limited to patient's family); Matharu v. Muir, 29 A.3d 375 (Pa. Super. Ct. 2011) (imposing affirmative duty on mother's physician to unborn child to attend to Rh sensitization in mother that threatened health of fetus). Other courts, in denying a duty to nonpatients, have emphasized that the plaintiff was an unidentified and unknown member of the public. Those courts reason that, if a duty to nonpatients were recognized, it would have to extend to all such persons. See Werner v. Varner, Stafford & Seaman, P.A., 659 So. 2d 1308 (Fla. 1995); Webb v. Jarvis, 575 N.E.2d 992 (Ind. 1991); Kolbe v. State, 661 N.W.2d 142 (Iowa 2003); McNulty v. City of New York, 792 N.E.2d 162 (N.Y. 2003). These cases seem to be influenced by concerns similar to those raised by Judge Cardozo in Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y. 1931), of the possibility of virtually limitless liability. Yet, these cases, unlike the economic loss in *Ultramares*, involve liability that, in all likelihood, is limited to a single accident. Physical harm simply does not travel as widely as economic loss.

Courts that have declined to impose an affirmative duty on physicians have expressed concern about the improbability that intervention would provide any real risk reduction. See Praesel v. Johnson, 967 S.W.2d 391 (Tex. 1998); see also Myers v. Quesenberry, 193 Cal. Rptr. 733 (Ct. App. 1983) (emphasizing the burden of plaintiff to establish causation in order to succeed in the suit); McKenzie v. Haw. Permanente Med. Grp., Inc., 47 P.3d 1209, 1220 (Haw. 2002) ("Thus, the scope of the physician's duty may be limited in situations where the danger is obvious, a warning would be futile, or the patient is already aware of the risk through other means."); Lester v. Hall, 970 P.2d 590 (N.M. 1998).

In Praesel v. Johnson, 967 S.W.2d 391 (Tex. 1998), the court expressed concern about the efficacy of any warning by a physician in reducing the risk posed by a patient. The court proceeded to balance the benefit of any warning in risk reduction with

the burden of liability being imposed on the physician. The court thus balanced the *ex ante* benefit with the *ex post* burden, determined by the cost of the accident, an inappropriate comparison for purposes of identifying appropriate incentives for safety.

Courts frequently discuss the scope of a duty, and limitations on who can recover, by employing the duty rubric without differentiation. A statement that "there is no duty to third parties," may mean that third parties may not recover from a negligent physician, or that a physician has no obligation to warn or to take other measures to protect third parties in meeting the legal standard of care. See Kirk v. Michael Reese Hosp. & Med. Ctr., 513 N.E.2d 387, 399 (Ill. 1987); Kolbe v. State, 661 N.W.2d 142 (Iowa 2003); Zavalas v. State, 861 P.2d 1026 (Or. Ct. App. 1993) (explaining defendant's argument that he could not be held liable to nonpatients as he had no duty to them; his only duty was the standard of care owed to patients).

Some courts have reasoned that, because a physician does not have control over the patient, no special relationship exists. See Shortnacy v. N. Atlanta Internal Med., P.C., 556 S.E.2d 209 (Ga. 2001); Kirk v. Michael Reese Hosp. & Med. Ctr., 513 N.E.2d 387 (Ill. 1987). That reasoning is most persuasive when the plaintiff claims the defendant's negligence is in failing to control the patient. It is unpersuasive when, as in the psychotherapist-patient situation, see Subsection (b)(4), the plaintiff claims that the physician should have provided a warning to the potential victim. The court in *Shortnacy* was obscure about the specifications of negligence by the plaintiff.

Physicians' reporting obligations for patients who are HIV-positive have been addressed by statute in virtually all states. See Robin Sheridan, Comment, *Public Health Versus Civil Liberties: Washington State Imposes HIV Surveillance and Strikes the Proper Balance*, 24 Seattle U. L. Rev. 941, 945 (2001) (all 50 states have either statutes or regulations addressing HIV reporting); The Henry J. Kaiser Family Foundation, HIV Name Reporting (April 2008), http://www.statehealthfacts.kff.org/comparetable.jsp?ind=559&cat=11 (last visited May 3, 2012). There is substantial variation among these statutes, but only a handful have provisions that address the liability *vel non* of a person who complies with the statutory requirements. See Bobbi Bernstein, *Solving the Physician's Dilemma: An HIV-partner Notification Plan: Is the Public Interest in Stemming the Spread of HIV Better Served by Protecting an HIV-positive Patient's Privacy at All Costs, or by Notifying a Person Who Might Have Been Exposed?*, 6 Stan. L. & Pol'y Rev. 127 (1995). Thus, most do not resolve the question of whether a physician has an affirmative duty to third parties who are at risk because of an HIV-infected patient.

For a detailed analysis of whether differences between psychotherapists and other physicians justifies a difference in whether an affirmative duty is imposed on them with regard to risks to third parties, see W. Jonathan Cardi, *A Pluralistic Analysis of the Therapist/Physician Duty to Warn Third Parties*, 44 Wake Forest L. Rev. 877 (2009). The author also concludes that a majority of courts do recognize a duty to third parties to warn the patient of the risk of contagion and a duty of reasonable care to warn third parties who are foreseeably at risk due to the condition of the physician's patient. Id. at 799-800.

Comment i. Nonexclusivity of relationships. In Biscan v. Brown, 160 S.W.3d 462 (Tenn. 2005), parents who hosted a party at which minors consumed alcohol, but did not provide the alcohol, were held to have an affirmative duty to those at the party and third parties for the risks associated with minors' drinking. Ironically, the provider of the alcohol was not subject to liability because of a statute declaring the furnishing of alcohol not to be the proximate cause of harm. The court's opinion includes a discussion of the relevant factors in recognizing an affirmative duty, although its heavy reliance on foreseeability should be viewed as a makeweight. See § 37, Comment *f*.

Case Citations - by Jurisdiction

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury, under the laws of the State of Washington, that on the 14th day of November, 2022, I served the foregoing document by email to the following persons:

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