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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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N.L.,

*Plaintiff/Respondent,*

vs.

BETHEL SCHOOL DISTRICT,

*Defendant/Petitioner.*

**FILED**

E DEC 23 2015 CRF  
WASHINGTON STATE  
SUPREME COURT

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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 ORIGINAL

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the tort duty arising from the special relationship that exists between a school and its students.<sup>1</sup>

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

This review presents the Court with an opportunity to clarify a school's duty to prevent one student from harming another. In this case, N.L. sued Bethel School District (BSD) for negligence in connection with a sexual assault by another student (Clark) who was a registered sex offender. The underlying facts are drawn from the briefing of the parties and the Court of Appeals opinion. See N.L. v. Bethel School District, 187 Wn. App. 460, 348 P.3d 1237, *review granted*, 184 Wn.2d 1002 (2015);

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<sup>1</sup> As noted in WSAJ Foundation's letter-application to appear as amicus curiae in this case, Plaintiff/Respondent N.L. is represented by Connelly Law Offices. John R. Connelly, who is a principal in the firm, is a member of the Board of Directors of WSAJ Foundation. Neither Mr. Connelly nor any member of his firm participated in the decision of the Foundation Amicus Committee to seek amicus curiae status in this case or in the preparation of this brief.

N.L. Br. at 2-16; BSD Br. at 2-7; BSD Pet. for Rev. at 2-7; N.L. Ans. to Pet. for Rev. at 1-12; N.L. Supp. Br. at 2-10; BSD Supp. Br. at 2.

For purposes of this brief, the following facts are relevant: When the sexual assault occurred, Clark was an eighteen-year-old twelfth-grade student at Bethel High School, and N.L. was an eighth-grade student at Bethel Junior High School, both of which are part of BSD. Clark had a long history with BSD, having been a student with the district since kindergarten. Between kindergarten and twelfth grade, Clark was disciplined for a variety of offenses that included assaulting teachers, assaulting students, sexual assault and use of racial epithets. All told, the BSD schools that Clark attended during that twelve year period disciplined him 78 times and suspended him 19 times.

During his ninth grade year, Clark sexually assaulted a 13-year-old female student in the hallway at school. Clark was convicted of the crime of Attempted Indecent Liberties for this incident, and was prohibited from having unsupervised contact with children who were two or more years younger. See N.L., 187 Wn. App. at 465. He was also required to register as a Level I Sex Offender, and BSD was notified of his status as a sex offender, as required by statute.

School district policy required the high school principal to inform Clark's teachers and other personnel of his sex offender status, but the principal never did so. BSD did not have any formal policy or procedure for monitoring students who were registered sex offenders. Although the high school principal claims that there was an unwritten process in place, no other high school or BSD administrators were aware of the process. The school did not routinely formulate a safety plan for students registered as sex offenders. See N.L., 187 Wn. App. at 466-67.

N.L. was introduced to Clark at a school track practice by a mutual friend. The junior high and high school track teams practiced together on the same track field that linked the school campuses. See N.L. at 463. Neither the high school nor junior high coaches were aware of Clark's status as a sex offender. See id. at 466.

Clark lied to N.L. about his age, telling her that he was 16 years old. The day after the meeting, Clark urged N.L. to skip track practice to go to a nearby restaurant for lunch with him. Once in the car, Clark told N.L. he had forgotten something at home and needed to retrieve it. N.L. went into the house after Clark invited her inside, and when they were inside his bedroom, he sexually assaulted her. He then returned N.L. to school and she caught the school bus home. Clark pleaded guilty to

Second Degree Assault for this incident. He also pleaded guilty for Failure to Register as a Sex Offender arising out of his previous conviction.

N.L. brought this action against BSD for negligently failing to monitor Clark and protect N.L., including failure to prepare a safety plan for students who are registered sex offenders. BSD moved for summary judgment, seeking dismissal of the complaint on grounds that it did not have a duty to N.L. because the harm occurred off of school grounds and outside the course of any school sponsored or supervised activity. BSD further argued that its negligence, if any, was not a legal cause of N.L.'s injuries. N.L.'s opposition to the motion was supported by expert testimony from a former Washington State Superintendent of Public Instruction. The superior court granted BSD's motion, principally on grounds that Clark's sexual assault of N.L. was not foreseeable because it occurred off school grounds and outside the scope of any school sponsored or supervised activity.

The Court of Appeals reversed, concluding that, given BSD's knowledge of Clark's status as a sex offender, it had a duty to monitor him and to protect other students, and that a question of fact existed as to whether N.L.'s injury fell within the general field of danger that should have been anticipated by the school district. See id. at 467-73. The court

also rejected BSD's claim that N.L.'s injury was too unforeseeable or remote to satisfy the requirements of duty or legal cause. See id. at 473-74.

This Court granted BSD's petition for review.

### III. ISSUES PRESENTED

1. What are the tort duties of a school district that arise from the special relationship between a school and its students?
2. Are the school's duties eliminated as a matter of law when:
  - (a) breach occurs *within* the course of the special relationship (i.e., during school hours, on school premises, or during school sponsored or supervised off-campus activities); but
  - (b) injury caused by the breach occurs *outside* the course of the relationship (i.e., after school hours, off school premises, and not during school sponsored or supervised off-campus activities)?
3. Is imposition of a duty grounded in the special relationship between a school and its students dispositive of the issue of legal cause?

### IV. SUMMARY OF ARGUMENT

The duty to prevent one person from harming another can arise from a special relationship with either the person causing harm or the person suffering harm under Restatement (Second) of Torts §§ 319 and 320, and this Court's precedent regarding these Restatement rules. Both duties are implicated by the special relationship that exists between a school and its students, when one student harms another.

Under Restatement § 319, a school may be liable for breach of the duty to protect one student from the known dangerous propensities of another when the breach occurs during the special relationship, i.e., during school hours, on school premises, or during school sponsored or supervised off-campus activities. Such breach should be actionable even when the injury does not occur during the special relationship, unless, under the circumstances, reasonable minds cannot differ that the injury falls outside the general field of danger that the school should have anticipated.

Where the special relationship between a school and a student is present, the existence of a duty and a question of fact regarding whether the injury fell within the general field of danger should be dispositive of the issue of legal cause, based on this Court's decision in Hertog v. City of Seattle, 138 Wn. 2d 265, 284, 979 P.2d 400 (1999).

## V. ARGUMENT

### A. **The Restatements Of Torts And This Court's Precedent Recognize A Duty To Prevent One Person From Harming Another Based On A Special Relationship With Either The Person Causing Harm Or The Person Suffering Harm, Including The Special Relationship That Exists Between A School And Its Students.**

Restatement (Second) of Torts § 315 (1965) provides:

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

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

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

Subsection (a) identifies a duty based on a special relationship with *the person causing harm* (i.e., the “third person”), while subsection (b) identifies a duty based on a special relationship with *the person suffering harm* (i.e., the “other”). The Court adopted this formulation of duty in Petersen v. State, 100 Wn. 2d 421, 425-29, 671 P.2d 230 (1983).

Restatement (Second) of Torts § 319 elaborates on the duty arising from a special relationship with the person causing harm, also known as a “take charge” relationship.<sup>2</sup> Specifically, § 319 provides:

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

The Court adopted this Restatement provision in Taggart v. State, 118 Wn. 2d 195, 218, 822 P.2d 243 (1992), citing Petersen as “controlling.”

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<sup>2</sup> See Restatement (Second) of Torts § 315 cmt. c (stating “[t]he relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316-319”; brackets added).

Restatement (Second) of Torts §§ 314A and 320 delineate the duty based on a special relationship with the person suffering harm, as described in subsection (b) of § 315.<sup>3</sup> Section 314A(4) provides in part:

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty [i.e., a duty to take reasonable action to protect against unreasonable risk of physical harm] to the other.

(Brackets added.) The Court adopted this Restatement provision in Shea v. City of Spokane, 17 Wn. App. 236, 241-42, 562 P.2d 264 (1977) (involving a jailor-inmate relationship), *aff'd*, 90 Wn. 2d 43, 578 P.2d 42 (1978) (adopting Court of Appeals opinion per curiam).

Section 320 of the Restatement (Second) of Torts provides:

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

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

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<sup>3</sup> See Restatement (Second) of Torts § 315 cmt. c (stating “[t]he relations between the actor and the other which require the actor to control the conduct of third persons for the protection of the other are stated in §§ 314A and 320”; brackets added).

The Court adopted the identical rule stated in the *first* Restatement of Torts § 320 (1934) in Briscoe v. School Dist. No. 123, 32 Wn. 2d 353, 362, 201 P.2d 697 (1949), and McLeod v. Grant County Sch. Dist. No. 128, 42 Wn. 2d 316, 320, 255 P.2d 360 (1953).<sup>4</sup>

Sections 314A(4) and 320 of Restatement (Second) of Torts both apply in the school context. See Restatement (Second) of Torts § 314A Illustration 7 (involving kindergarten’s duty to provide medical assistance to student); id. § 320 cmt. *a* (stating “[t]he rule stated in this Section is applicable ... to teachers or other persons in charge of a public school” and “persons conducting ... a private school”; brackets & ellipses added).<sup>5</sup>

This Court has recognized the special relationship that exists between a school and its students. See Briscoe, 32 Wn. 2d at 361-62 (describing special relationship giving rise to duty under first

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<sup>4</sup> Sections 315, 319 and 320 from the first Restatement of Torts and §§ 314A, 315, 319 and 320 from the second Restatement (including comments and reporter’s notes, but excluding case citations) are reproduced in the Appendix. Sections 315 and 320 are the same in both Restatements. Section 319 was “changed from the first Restatement by eliminating the word ‘voluntarily,’ so that the Section now includes those who ‘involuntarily’ take charge of third persons, if that is possible.” Restatement (Second) of Torts § 319 (reporter’s note). Section 314A of the second Restatement, which specifies certain types of special relationships giving rise to a duty, has no counterpart in the first Restatement.

<sup>5</sup> See also Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 41 cmt. *1* (2012) (stating “[t]he Second Restatement of Torts contained no provision that specifically identified the school-student relationship as special. However, a generally ignored passage in § 320, Comment *b*, which imposed an affirmative duty on custodians to control third parties in order to prevent them from harming the one in custody, observes that the custodial relationship is also applicable to schools and their students”).

Restatement); McLeod, 42 Wn. 2d at 319 (similar, following Briscoe).<sup>6</sup> “[A] school district may be held liable for negligent supervision of students attending the public school based upon the concept the school stands in loco parentis to the child during the time the child is in its custody.” Chapman v. State, 6 Wn. App. 316, 320-21, 492 P.2d 607 (1972) (summarizing Washington case law, citing Briscoe and McLeod, *inter alia*; brackets added); see also Christensen, 156 Wn. 2d at 67 (referring to “the well-established law in Washington that a school district has an enhanced and solemn duty to protect minor students in its care”).

Based on this special relationship, this Court has specifically recognized a school’s duty to its students under § 320. See McLeod, 42 Wn. 2d at 320; see also Briscoe, 32 Wn. 2d at 362. While it does not appear that the Court has had the occasion to apply the duty under § 319 in the school context, there is nothing that would preclude this formulation of duty from being applied to a school. The duties under §§ 319 and 320 both stem from the existence of a special relationship. See Niece, 131 Wn. 2d at

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<sup>6</sup> Although Briscoe and McLeod were decided before the waiver of sovereign immunity, school districts were subject to “the normal rules of tort law” at the time. See McLeod, 42 Wn. 2d at 319 (citing Briscoe). Briscoe and McLeod have been cited as authoritative following the waiver of sovereign immunity. See Christensen v. Royal Sch. Dist., 156 Wn. 2d 62, 70, 124 P.3d 283 (2001); Niece v. Elmview Group Home, 131 Wn. 2d 39, 44, 929 P.2d 420 (1997); Nivens v. 7-11 Hoagy’s Corner, 133 Wn. 2d 192, 201, 943 P.2d 286 (1997).

44 (relating school's duty to protect students from harm under McLeod to Restatement (Second) of Torts § 315 and Petersen). Both §§ 319 and 320 involve a duty to control the conduct of the person causing harm in order to protect others, with § 319 imposing the duty based on a special relationship with the person who causes the harm and § 320 imposing the duty based on a special relationship with the person who suffers the harm.

There is considerable conceptual overlap between the duties imposed under §§ 319 and 320 when the defendant has a special relationship with both the person causing the harm and the person suffering the harm. The “take charge” duty under § 319 requires the defendant to have actual or constructive knowledge that the person causing harm is likely to cause harm, i.e., dangerous propensities. The duty to protect under § 320, which arises when the defendant deprives the person suffering harm of his/her normal power of self-protection or subjects him/her to association with persons likely to cause harm, merely requires general knowledge of the ability and need to protect the person suffering harm. Under § 320, specific knowledge of the dangerous propensities of the person causing harm would suffice to establish general knowledge of the ability and need to protect the person suffering harm, but it is not necessary. See Briscoe, 32 Wn. 2d at 362-63 (imposing duty under

§ 320, in part based on knowledge of rough and tumble manner in which boys played at recess); McLeod, 42 Wn. 2d at 321-22 (imposing duty under § 320 without actual or constructive knowledge that students who raped another student had such dangerous propensities).<sup>7</sup>

The duties under both §§ 319 and 320 appear to be implicated in this case. N.L.'s theory of liability, which is based upon BSD's alleged failure to act properly upon its knowledge that Clark is a sex offender, entails the failure to control Clark under § 319, as well as the failure to protect N.L. under § 320. As the Court of Appeals below observed:

A duty to protect another from sexual assault by a third party may arise where the defendant has a special relationship with the tortfeasor that imposes a duty to control the third person's conduct *or* it may arise where the defendant has a special relationship with the other which gives the other a right to protection.

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<sup>7</sup> Regarding conceptual overlap, *see* Restatement (Third) of Torts: Liability for Physical & Emotional Harm Parallel Tables (indicating that aspects of §§ 314A and 320 from the second Restatement are addressed in § 40 of the third Restatement, and aspects of §§ 319 and 320 from the second Restatement are addressed in § 41 of the third Restatement).

While this Court has cited the third Restatement with approval in other contexts, it has not adopted §§ 40 or 41. *See* Mohr v. Grantham, 172 Wn. 844, 852 n.5, 854, 855 n. 6, 858, 262 P.3d 490 (2011) (citing third Restatement § 26 cmt. *n* with approval); Anderson v. Akzo Nobel Coatings, Inc., 172 Wn. 2d 593, 607-08 & n.6, 260 P.3d 857 (2011) (citing third Restatement § 28 cmts. *b* & *c* with approval); Michaels v. CH2M Hill, Inc., 171 Wn. 2d 587, 608, 257 P.3d 532 (2011) (citing third Restatement § 7(a) with approval); *see also* Stout v. Warren, 176 Wn. 2d 263, 269 n.2, 290 P.3d 972 (2012) (following second Restatement of Torts and declining to address provision of third Restatement not briefed by the parties). Sections 40 and 41 from the third Restatement, which are reproduced in the Appendix, appear to be consistent with the provisions of the first and second Restatements discussed above.

N.L., 187 Wn. App. at 469 n.4 (emphasis in original; citing first Restatement of Torts § 315). BSD does not ask the Court to overrule precedent, nor does it otherwise question the existence of these duties. Instead, BSD addresses the scope of these duties, arguing that they do not extend to injuries occurring outside the course of the special relationship even when the breach that caused injury occurred within the course of the relationship. See e.g. BSD Supp. Br. at 4 (stating “N.L. has concentrated her arguments on location of the alleged negligence rather than the location of the injury”).

While both §§ 319 and 320 are implicated in this case, the parties seem to focus on BSD’s duty to control Clark and whether liability may be imposed for off-campus injury. This should be analyzed under § 319, given its intended reach and this Court’s precedent in related contexts.<sup>8</sup> This analysis is set forth below.

**B. Under Restatement § 319 And This Court’s Precedent, A School May Be Liable For Breach Of Its Duty To A Student, As Long As The Breach Occurs Within The Course Of The Special Relationship, Even When The Injury Caused By The Breach Occurs Outside The Course Of The Relationship.**

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<sup>8</sup> Although the parties have not cited § 319 of the Restatement (Second) of Torts or this Court’s precedent explicating it and related provisions, they have raised the issue of BSD’s duty to protect N.L. from Clark. See N.L. Br. at 16-17, 20-22; BSD Br. at 12-14; BSD Pet. for Rev. at 9, 13 & n.2; N.L. Supp. Br. at 15-17; N.L., 187 Wn. App. at 469 n.4.

BSD argues that its duty is limited to the time and place when the school has “custody” of its students. BSD also makes what appears to be a freestanding argument to limit its duty based on the concept of foreseeability. See e.g. BSD Supp. Br. at 8. BSD’s arguments are contrary to the relevant Restatement provisions and this Court’s precedent.<sup>9</sup>

Restatement § 319 contemplates liability for injuries occurring *after* the termination of the special relationship, as the illustrations for this section indicate:

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

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

Both of these illustrations reflect a duty that extends to harm suffered after the end of the special relationship.

Similarly, in Petersen this Court applied Restatement § 315 to hold the state liable for harm caused by a mentally ill patient *after* the patient’s

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<sup>9</sup> BSD’s foreseeability argument is raised in connection with the issues of duty and legal cause. Duty is addressed in this section, and legal cause is addressed in section C, infra.

release from involuntary inpatient hospital treatment. See 100 Wn. 2d at 424. Petersen relied in part on the Court’s decision in Kaiser v. Suburban Transp. Sys., 65 Wn. 2d 461, 398 P.2d 14, 401 P.2d 350 (1965), stating:

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

100 Wn.2d at 426-27; accord id. at 428. Under Petersen, the duty runs to all foreseeably injured parties, regardless of where or when the injury occurs. See Petersen, 100 Wn.2d at 427-29 (adopting duty that extends to “anyone who might foreseeably be endangered”).

Although Petersen involved Restatement § 315, Taggart cited the case as “controlling” under § 319, and specifically recognized Petersen’s holding that the duty runs to all foreseeably injured parties, even though Taggart did not involve injuries occurring outside the course of the special

relationship. See Taggart, 118 Wn. 2d at 218-19.<sup>10</sup> The same foreseeability standard adopted in Petersen under § 315 should be applied under § 319, reflecting the fact that § 319 is merely a specific application of the general rule stated in § 315.

Foreseeability under Petersen relates to the *scope* of the duty owed, rather than the *existence* of the duty. See Petersen, 100 Wn. 2d at 428 (discussing foreseeability in terms of the scope of the duty owed); see also McKown v. Simon Property Group, Inc., 182 Wn. 2d 752, 763-64, 344 P.3d 661 (2015) (distinguishing foreseeability as it relates to the existence versus the scope of duty). Once a duty has been recognized, foreseeability relates solely to the scope of the duty in question, and is a question of fact for the jury unless reasonable minds cannot differ. See Petersen at 428. An injury is foreseeable if it is within the general field of danger that should have been anticipated. See id.; see also McLeod at 321-22.

In this case, the existence of the duty under § 319 has already been established. The only issue of foreseeability that arguably remains is the scope of the duty: whether Clark’s off-campus sexual assault of N.L. falls

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<sup>10</sup> See also Bishop v. Miche, 137 Wn. 2d 518, 529, 973 P.2d 465 (1999) (stating “[t]he decision in Taggart is founded on common-law principles embodied in the Restatement (Second) of Torts §§ 315, 319 (1965), and addressed in Petersen”; brackets added); Hertog v. City of Seattle, 138 Wn. 2d 265, 275, 979 P.2d 400 (1999) (noting Taggart “followed the decision in Petersen”).

within the general field of danger to be anticipated from BSD's failure to control a known sex offender on-campus to prevent contact with younger students.<sup>11</sup> Unless the Court is prepared to say that reasonable minds cannot differ, this question should be answered by the finder of fact.

Applying § 319 to resolve the duty issue here does not unduly expand BSD's liability. N.L. must produce evidence that BSD breached its duty, that the breach occurred within the course of the special relationship between BSD and Clark, a causal connection between such breach and the resulting harm to N.L., and the (factual) foreseeability of such harm.<sup>12</sup>

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<sup>11</sup> The discussion of duty and foreseeability in J.N. v. Bellingham Sch. Dist. No. 501, 74 Wn. App. 49, 57-60, 871 P.2d 1106, 1111 (1994), which involved an on-campus injury, is not inconsistent with this analysis of Restatement § 319, although the analysis also fits under § 320. Kok v. Tacoma Sch. Dist. No. 10, 179 Wn. App. 10, 19-23, 317 P.3d 481 (2013) *review denied*, 180 Wn.2d 1016 (2014), which purports to follow J.N., is unclear. The court held that a school was not liable for the actions of a schizophrenic student who shot a classmate on campus because knowledge of the student's psychiatric diagnosis did not place the school on notice of any violent tendencies. The court's analysis of "foreseeability" seems to involve the actual or constructive knowledge necessary for liability under § 319, and is resolved based upon a failure of plaintiff estate to satisfy its burden of proof. The court does not appear to undertake a § 320-type analysis.

<sup>12</sup> Coates v. Tacoma Sch. Dist. No. 10, 55 Wn.2d 392, 347 P.2d 1093, 1094 (1960), is distinguishable under a § 319-type analysis because the Court found insufficient proof of breach of duty during the course of the school-student special relationship. See also Scott v. Blanchet High School, 50 Wn. App. 37, 42 & 45, 747 P.2d 1124 (1987) (relying on Coates and finding evidence insufficient because sexual contact between student and counselor did not occur in conjunction with counseling or any activity under the supervision or control of the school), *review denied*, 110 Wn. 2d 1016 (1988); Rhea v. Grandview Sch. Dist., 39 Wn. App. 557, 560-61, 694 P.2d 666 (1985) (relying on Coates and finding evidence insufficient because no school personnel were present or participated in any way with planning off campus student party and faculty advisor expressed disapproval of students' plans). Properly understood, these cases are consonant with § 319. See also Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 41 cmt. 1 (stating that the duty of a school "is only applicable to risks that occur while the student is at school or otherwise engaged in school activities," highlighting that the negligent act or omission must occur during the relationship).

Limiting BSD's duty as a matter of law to injuries occurring at a particular time or place based on "custody" is arbitrary. This is not a premises liability case, and a school's failure to fulfill its in loco parentis obligation may have foreseeable consequences on or off campus. Eliminating the duty for foreseeable off-campus consequences would call into question well-established foreseeability analysis in other tort contexts. See generally Rikstad v. Holmberg, 76 Wn. 2d 265, 268-69, 456 P.2d 355 (1969). It would also be inconsistent with the deterrent and compensatory functions of tort law. Cf. Bishop, 137 Wn. 2d at 529 ("maintaining the potential of state liability ... can be expected to have the salutary effect of providing the State an incentive to ensure that reasonable care is used in fashioning guidelines and procedures for the supervision of parolees"; ellipses added, quoting Savage v. State, 127 Wn. 2d 434, 446, 899 P.2d 1270 (1995)); see generally Ford v. Trendwest Resorts, Inc., 146 Wn. 2d 146, 154, 43 P.3d 1223 (2002) (describing purposes of tort law).

BSD's attempt to limit its duty based on the time or place of injury should be rejected.<sup>13</sup>

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<sup>13</sup> Because Restatement (Second) of Torts § 319 is a sufficient basis for BSD's duty in this case, it is not necessary to address the question of duty under § 320.

**C. The Duty And Cause-In-Fact Requirements For Liability Based Upon The Special Relationship Between A School And Its Students Forecloses Any Legal Cause Challenge.**

BSD argues that N.L.'s complaint was properly dismissed by the superior court on grounds of legal cause. See e.g. BSD Supp. Br. at 9-10. This argument seems to be a reframing of BSD's analysis of foreseeability in the context of duty. See id. at 10.

If the Court finds that reasonable minds could differ regarding whether Clark's sexual assault of N.L. fell within the general field of danger, the existence of a special relationship is dispositive of the issue of legal cause. In Hertog v. City of Seattle, 138 Wn. 2d 265, 284, 979 P.2d 400 (1999), this Court rejected a legal cause challenge to liability of a parole officer for the criminal conduct of a parolee under Restatement § 319, stating:

Where a special relation exists based upon taking charge of the third party, the ability and duty to control the third party indicate that a defendant's actions in failing to meet that duty are not too remote to impose liability.

(Brackets added); see also Joyce v. State, Dept. of Corrections, 155 Wn. 2d 306, 318, 119 P.3d 825 (2005) (citing Hertog as controlling on the issue of legal cause for claim based on § 319 brought against community

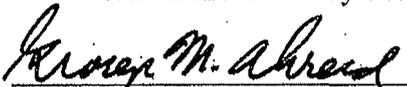
corrections officer); Lowman v. Wilbur, 178 Wn.2d 165, 169, 309 P.3d 387 (2013) (regarding relation between duty and legal cause).

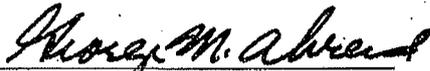
BSD's legal cause challenge should be rejected here for the same reasons stated in Hertog.<sup>14</sup>

## VI. CONCLUSION

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

Dated this 14th day of December, 2015.

  
GEORGE M. AHREND

  
FOR BRYAN P. HARNETIAUX, WITH AUTHORITY

  
FOR VALERIE D. McOMIE, WITH AUTHORITY

On Behalf of WSAJ Foundation

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<sup>14</sup> BSD and amici Washington State School Directors Association et al. (WSSDA et al.) advert to the potential financial ramifications of upholding the school district's duty in this case. See BSD Pet. for Rev. at 15 (“[a]llowing the panel’s decision to stand would create open-ended liability that will be deleterious to the finances of school districts ...”); see also WSSDA et al. ACM at 1-2. The magnitude of these financial considerations and the relationship between finances and tort liability do not appear to be part of the record. The Court should reject the implication that financial resources or strategies of a defendant, private or public, have any bearing on the analysis of duty, based on the holding of five Justices rejecting a “poverty defense” in Bodin v. City of Stanwood, 130 Wn. 2d 726, 743-47, 927 P.2d 240 (1996) (Johnson, J., dissenting); *id.*, 130 Wn. 2d at 742-43 (Alexander, J., concurring). See Wright v. Terrell, 162 Wn.2d 192, 195-96, 170 P. 3d 570, 571 (2007) (per curiam opinion, recognizing agreement on a point of law by five Justices in concurring/dissenting opinion and dissenting opinion is a holding of the Court entitled to stare decisis effect). While cost evidence may have a bearing on whether a duty of reasonable care was breached, depending on the circumstances, it has no bearing on the issue of whether a duty exists. See Bodin, 130 Wn. 2d at 746 (Johnson, J., dissenting; discussing Bartlett v. Northern Pac. Ry. Co., 74 Wn. 2d 881, 883, 447 P.2d 735 (1968)).

# APPENDIX

Restatement of Torts § 315 (1934)	A-1
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Restatement of Torts § 320 (1934)	A-4
Restatement (Second) of Torts § 314A (1965)	A-6
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Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 40 (2012)	A-16
Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 41 (2012)	A-33

Restatement (First) of Torts § 315 (1934)

Restatement of the Law - Torts

Database updated October 2015

Restatement (First) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

Title A. Duty to Control Conduct of Third Persons

§ 315 General Principle

Comment:

Case Citations - by Jurisdiction

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

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

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

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*Comment:*

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

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

*Comment on Clauses (a) and (b):*

c. The relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316 to 319. The most usual relationship in which one party thereto is required to control a third person's conduct for the protection of the other party to the relationship is that arising when an occupier of land holds it open to the public for his business purposes (see § 348). Another relationship which creates the same duty is stated in § 320.

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Case Citations - by Jurisdiction

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S.D.N.Y.

Cal.

Cal.App.

La.

La.App.

Mich.

Miss.

N.Y.

N.Y.App.Div.

**S.D.N.Y.**

**S.D.N.Y.**1957. Cit. in case quot. in sup. In shipowner's action for damage to tanker caused by explosion occurring while defendant was cleaning its petroleum tanks, evidence disclosed defendant was an independent contractor and explosion was caused by defendant's negligent use of defective equipment. *Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc.*, 152 F.Supp. 903, 932.

**Cal.**

**Cal.**1954. Cit. and fol. Where defendant left keys in car parked on public street, in violation of a criminal ordinance, plaintiff, who was injured by a thief who stole the car, could not rely on such ordinance as a basis for recovery since he was not one of a class for whose benefit such ordinance was enacted, nor was defendant under a duty to protect general public against risk of motoring activities of thief. *Richards v. Stanley*, 43 Cal.2d 60, 271 P.2d 23, 27.

**Cal.App.**

**Cal.App.**1980. Cit. in fn. The plaintiff sued to recover for injuries which resulted from a collision with a stolen car. The trial court granted the defendants' motions for summary judgment and the plaintiff appealed. In upholding the lower court's judgment, this court found that it was bound by a prior decision which stated that, except where certain special circumstances exist, the duty of car owners to protect the public from the risk of motoring activities of thieves would impose a greater liability on the car owner than he has when he lends his car out voluntarily. The court found that because no special circumstances existed in this case it could not impose liability on the defendants. The plaintiff also argued that the prior case had relied upon the Restatement whereas a subsequent case had found that the Restatement was not applicable to situations involving misfeasance rather than nonfeasance. This court stated that reliance was not an essential aspect of the rationale of the prior case. *Kiick v. Levias*, 113 Cal.App.3d 399, 169 Cal.Rptr. 859, 863.

Restatement (First) of Torts § 319 (1934)

Restatement of the Law - Torts

Database updated October 2015

Restatement (First) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

Title A. Duty to Control Conduct of Third Persons

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

Comment:

Case Citations - by Jurisdiction

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

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*Comment:*

*a.* The rule stated in this Section is applicable to one who voluntarily assumes charge of a third person being under no obligation to do so irrespective of whether he does so for a consideration or gratuitously.

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

**Illustrations:**

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

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

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**Case Citations - by Jurisdiction**

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Restatement (First) of Torts § 320 (1934)

Restatement of the Law - Torts

Database updated October 2015

Restatement (First) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

Title A. Duty to Control Conduct of Third Persons

§ 320 Duty of Person Having Custody of Another to Control Conduct of Third Persons

Comment:

Case Citations - by Jurisdiction

**One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty of exercising reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor**

**(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and**

**(b) knows or should know of the necessity and opportunity for exercising such control**

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*Comment:*

*a.* The rule stated in this Section is applicable to a sheriff or peace officer, a jailer or warden of a penal institution, officials in charge of a state asylum or hospital for the criminally insane, or to teachers or other persons in charge of a public school. It is also applicable to persons conducting a private hospital or asylum, a private school, and to lessees of convict labor.

*b. Helplessness of other.* The circumstances under which the custody of another is taken and maintained may be such as to deprive him of his normal ability to defend himself, or to deprive him of the protection of someone who, if present, would be under a duty to protect him, or though under no such duty, would be likely to do so. Thus, the fact that a prisoner is handcuffed may make him incapable of defending himself against an attack, which he could otherwise have done. The very fact of imprisonment prevents a prisoner from avoiding attacks by flight. So too, a child while in school is deprived of the protection of his parents or guardian. Therefore, the actor who takes custody of a prisoner or of a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him.

*c. Peculiar risks to which other exposed.* The custody of another may be taken under such circumstances as to associate the other with persons who are peculiarly likely to do him harm from which he cannot be expected to protect himself. If so, the actor who has taken custody of the other is required to exercise reasonable care to furnish the necessary protection. This is particularly true where the custody not only involves intimate association with persons of notoriously dangerous character, but also deprives the person in custody of his normal ability to protect himself, as where a prisoner is put in a cell with a man of

known violent temper or is required to work or take exercise with a group of notoriously desperate characters. In such a case, the fact that the person in custody is a prisoner precludes the possession of any self-defensive weapons, and thus makes him incapable of adequately protecting himself.

*d. Duty to anticipate danger.* One who has taken custody of another may not only be required to exercise reasonable care for the other's protection when he knows or has reason to know that the other is in immediate need thereof, but also to make careful preparations to enable him to give effective protection when the need arises, and to exercise reasonable vigilance to ascertain the need of giving it. Thus, if a sheriff or peace officer knows that public opinion is so violently incensed against his prisoner that there is danger of mob violence, he may be required not only himself to defend the prisoner, but also to exercise reasonable care to secure assistance which will enable him to do so effectively. So too, a schoolmaster who knows that a group of older boys are in the habit of bullying the younger pupils to an extent likely to do them actual harm, is not only required to interfere when he sees the bullying going on, but also to be reasonably vigilant in his supervision of his pupils so as to ascertain when such conduct is about to occur. This is so whether the actor is or is not under a duty to take the custody of the other.

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### Case Citations - by Jurisdiction

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C.A.3  
Ark.  
Cal.  
Cal.App.  
Ga.App.  
Ill.App.  
Iowa  
Minn.  
N.J.  
N.Y.App.Div.  
Wash.  
Wis.

#### C.A.3

**C.A.3**, 1984. Cit. in diss. op. A prison inmate wrote a note to prison officials warning them that he had been threatened by another inmate. The threat was carried out, and the inmate was beaten and stabbed. He sued the officials in federal court, since they were immune from liability under New Jersey law. The district court found that the officials' negligence had deprived the inmate of a constitutionally protected liberty interest in freedom from assault while in prison. On appeal, the officials contended that the trial court had erred when it concluded that the Civil Rights Act encompassed a claim arising from a negligent failure by the officials to protect the inmate. This court reversed and entered judgment for the officials. It held that their negligent failure to protect the inmate did not give rise to a claim under the Civil Rights Act. The dissent argued that the defendants should not be relieved of the duty to take reasonable care to prevent third persons from injuring persons in custody. *Davidson v. O'Lone*, 752 F.2d 817, 847, judgment affirmed 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986).

#### Ark.

**Ark.**1959. Cit. in sup. In action for personal injuries sustained in automobile collision, the bare relationship of employer and employee did not impose upon employer any responsibility for conduct of employee on night employee became drunk when

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

Restatement of the Law - Torts

Database updated October 2015

Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

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

Comment:

Reporter's Notes

Case Citations - by Jurisdiction

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

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

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

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

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

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

See Reporter's Notes.

Caveat:

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

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Comment:

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

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

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

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

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

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

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

#### **Illustrations:**

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

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

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

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

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

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

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

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

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### Reporter's Notes

This Section has been added to the first Restatement.

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

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

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

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

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

Bancroft Hotel Corp., 313 Mass. 56, 46 N.E.2d 573 (1943); Gurren v. Casperson, 147 Wash. 257, 265 P. 472 (1928); Miller v. Derusa, 77 So.2d 748 (La.App.1955).

Illustration 4 is taken from L.S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334, 41 N.E.2d 195, 356 (1942), and Connelly v. Kaufmann & Baer Co., 349 Pa. 261, 37 A.2d 125, 152 A.L.R. 555 (1944). See also Harold's Club v. Sanchez, 70 Nev. 518, 275 P.2d 384 (1954); Blizzard v. Fitzsimmons, 193 Miss. 484, 10 So.2d 343 (1942); Larkin v. Saltair Beach Co., 30 Utah 86, 83 P. 686, 3 L.R.A. N.S. 982, 116 Am.St.Rep. 818, 8 Ann.Cas. 977 (1905). Also Hutchinson v. Dickie, 162 F.2d 103 (6 Cir.1947), certiorari denied, 332 U.S. 830, 68 S.Ct. 208, 92 L.Ed. 404, where the plaintiff was a social guest.

Compare, as to the duty of the possessor of premises held open to the public to protect his business visitors from dangers arising from the conduct of third persons: Winn v. Holmes, 143 Cal.App.2d 501, 299 P.2d 994 (1956); Stickel v. Riverview Sharpshooters Park Co., 250 Ill. 452, 95 N.E. 445, 34 L.R.A. N.S. 659 (1911); Dickson v. Waldron, 135 Ind. 507, 34 N.E. 506, 35 N.E. 1, 24 L.R.A. 483, 41 Am.St.Rep. 440 (1893); De Hart v. Travelers Ins. Co., 10 So.2d 597 (La.App.1942); Miller v. Derusa, 77 So.2d 748 (La.App.1955); Thornton v. Maine State Agricultural Society, 97 Me. 108, 53 A. 979, 94 Am.St.Rep. 488 (1902); Easler v. Downie Amusement Co., 125 Me. 334, 133 A. 905, 53 A.L.R. 847 (1926); Blakeley v. White Star Line, 154 Mich. 635, 118 N.W. 482, 19 L.R.A. N.S. 772, 129 Am.St.Rep. 496 (1908); Corrigan v. Elsinger, 81 Minn. 42, 83 N.W. 492 (1900); Mastad v. Swedish Brethren, 83 Minn. 40, 85 N.W. 913, 53 L.R.A. 803, 85 Am.St.Rep. 446 (1901); Hughes v. Coniglio, 147 Neb. 829, 25 N.W.2d 405 (1946); Reilly v. 180 Club, 14 N.J.Super. 420, 82 A.2d 210 (1951); Molloy v. Coletti, 114 Misc. 177, 186 N.Y.Supp. 730 (1921); Smith v. Cumberland Agricultural Society, 163 N.C. 346, 79 S.E. 632, Ann.Cas. 1915B, 544 (1913); Peck v. Gerber, 154 Or. 126, 59 P.2d 675, 106 A.L.R. 996 (1936); Hill v. Merrick, 147 Or. 244, 31 P.2d 663 (1934); Sinn v. Farmers Deposit Savings Bank, 300 Pa. 85, 150 A. 163 (1930).

Illustration 6 is based on Farmer v. State, 224 Miss. 96, 79 So.2d 528 (1955); Dunham v. Village of Canisteo, 303 N.Y. 498, 104 N.E.2d 872 (1952); Winston v. United States, 305 F.2d 253 (2 Cir.1962), affirmed sub nom., United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805; Thomas v. Williams, 105 Ga.App. 321, 124 S.E.2d 409 (1962); Smith v. Miller, 241 Iowa 625, 40 N.W.2d 597, 14 A.L.R.2d 345 (1950); O'Dell v. Goodsell, 149 Neb. 261, 30 N.W.2d 906 (1948).

Illustration 7 is based on Pirkle v. Oakdale Union Grammar School District, 40 Cal.2d 207, 253 P.2d 1 (1953). Cf. Barbarisi v. Caruso, 47 N.J.Super 125, 135 A.2d 539 (1957), grandmother volunteering to look after child.

Compare, as to the duty of one who has taken custody of another to protect him against third persons: People ex rel. Coover v. Guthner, 105 Colo. 37, 94 P.2d 699 (1939); Ratliff v. Stanley, 224 Ky. 819, 7 S.W.2d 230, 61 A.L.R. 566 (1928); Lamb v. Clark, 282 Ky. 167, 138 S.W.2d 350 (1940); Honeycutt v. Bass, 187 So. 848 (La.App.1939); Dunn v. Swanson, 217 N.C. 279, 7 S.E.2d 563 (1940); Scolavino v. State, 187 Misc. 253, 62 N.Y.S.2d 17 (1946), modified, 271 App.Div. 618, 67 N.Y.S.2d 202 (1946), affirmed, 297 N.Y. 460, 74 N.E.2d 174 (1946); Hixon v. Cupp, 5 Okla. 545, 49 P. 927 (1897); Taylor v. Slaughter, 171 Okla. 152, 42 P.2d 235 (1935); Browning v. Graves, 152 S.W.2d 515 (Tex.Civ.App.1941), error refused; Kusah v. McCorkle, 100 Wash. 318, 170 P. 1023, L.R.A. 1918C, 1158 (1918); Eberhart v. Murphy, 110 Wash. 158, 188 P. 17 (1920), reversed on other grounds, 113 Wash. 449, 194 P. 415.

*Comment c:* Cf. Allen v. Hixon, 111 Ga. 460, 36 S.E. 810 (1900); Matthews v. Carolina & N.W.R. Co., 175 N.C. 35, 94 S.E. 714, L.R.A. 1918C, 899 (1917).

*Comments e and f:* See Owl Drug Co. v. Crandall, 52 Ariz. 322, 80 P.2d 952, 120 A.L.R. 1521 (1938); Ohio & Miss. R. Co. v. Early, 141 Ind. 73, 40 N.E. 257, 28 L.R.A. 546 (1895); Baltimore & Ohio R. Co. v. State to Use of Woodward, 41 Md. 268 (1875); Shaw v. Chicago, M. & St. P.R. Co., 103 Minn. 8, 114 N.W. 85 (1907); Fitzgerald v. Chesapeake & Ohio R. Co., 116 W.Va. 239, 180 S.E. 766 (1935).

*Caveat:* The only case found recognizing a tort duty arising out of another relation is Hutchinson v. Dickie, 162 F.2d 103 (6 Cir.1947), certiorari denied, 332 U.S. 830, 68 S.Ct. 208 92 L.Ed. 404, where a social guest on a private yacht fell overboard.

Restatement (Second) of Torts § 315 (1965)

Restatement of the Law - Torts

Database updated October 2015  
Restatement (Second) of Torts

Division Two, Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

Title A. Duty to Control Conduct of Third Persons

§ 315 General Principle

Comment:

Case Citations - by Jurisdiction

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

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

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

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**Comment:**

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

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

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**Comment on Clauses (a) and (b):**

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

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Case Citations - by Jurisdiction

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E.D.Ky.  
E.D.La.  
W.D.La.  
D.Md.  
D.Mass.  
W.D.Mich.  
S.D.Miss.  
D.Neb.  
D.Nev.

Restatement (Second) of Torts § 319 (1965)

Restatement of the Law - Torts

Database updated October 2015

Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

Title A. Duty to Control Conduct of Third Persons

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

Comment:

Reporter's Notes

Case Citations - by Jurisdiction

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

See Reporter's Notes.

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**Comment:**

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

**Illustrations:**

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

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

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**Reporter's Notes**

This Section has been changed from the first Restatement by eliminating the word “voluntarily,” so that the Section now includes those who “involuntarily” take charge of third persons, if that be possible. None of the decisions supporting the Section has laid stress upon the defendant's voluntary conduct in taking charge, and it would appear that his protests against being required to do so would not be material to the rule stated, so long as he does so.

Illustration 1 is based on *Missouri, K. & T. R. Co. v. Wood*, 95 Tex. 223, 66 S.W. 449, 56 L.R.A. 592, 93 Am.St.Rep. 834 (1902); Cf. *University of Louisville v. Hammock*, 127 Ky. 564, 106 S.W. 219, 14 L.R.A.N.S. 784, 128 Am.St.Rep. 355 (1907); *Scolavino v. State*, 187 Misc. 253, 62 N.Y.S.2d 17 (1946), modified, 271 App.Div. 618, 67 N.Y.S.2d 202 (1947), affirmed, 297 N.Y. 460, 74 N.E.2d 174 (1947); *Sylvester v. Northwestern Hospital of Minneapolis*, 236 Minn. 384, 53 N.W.2d 17 (1952).

Illustration 2 is based on *Austin W. Jones Co. v. State*, 122 Me. 214, 119 A. 577 (1923); *University of Louisville v. Hammock*, 127 Ky. 564, 106 S.W. 219, 14 L.R.A.N.S. 784, 128 Am.St.Rep. 355 (1907); *Webb v. State*, 91 So.2d 156 (La.App.1956). Cf. *St. George v. State*, 203 Misc. 340, 118 N.Y.S.2d 596 (1953), reversed on other grounds, 283 App.Div. 245, 127 N.Y.S.2d 147 (1953), affirmed, 308 N.Y. 681, 124 N.E.2d 320. Contra: *Henderson v. Dade Coal Co.*, 100 Ga. 568, 28 S.E. 251, 40 L.R.A. 95 (1897); *Hullinger v. Worrell*, 83 Ill. 220 (1876); cf. *Green v. State*, 91 So.2d 153 (La.App.1956).

In some cases the defendant has been held not liable because the type of misconduct after escape was regarded as unforeseeable, and not within the defendant's duty of protection. *Ballinger v. Rader*, 153 N.C. 488, 69 N.E. 497 (1910); *Fisher v. Mutimer*, 293 Ill.App. 201, 12 N.E.2d 315 (1937); *Williams v. State*, 308 N.Y. 548, 127 N.E.2d 545 (1955). See § 302B and Comments; *Green v. State*, 91 So.2d 153 (La.App.1956).

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#### Case Citations - by Jurisdiction

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D.Kan.

Restatement (Second) of Torts § 320 (1965)

Restatement of the Law - Torts

Database updated October 2015

Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

Title A. Duty to Control Conduct of Third Persons

§ 320 Duty of Person Having Custody of Another to Control Conduct of Third Persons

Comment:

Reporter's Notes

Case Citations - by Jurisdiction

**One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor**

- (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and**
- (b) knows or should know of the necessity and opportunity for exercising such control.**

**See Reporter's Notes.**

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**Comment:**

*a.* The rule stated in this Section is applicable to a sheriff or peace officer, a jailer or warden of a penal institution, officials in charge of a state asylum or hospital for the criminally insane, or to teachers or other persons in charge of a public school. It is also applicable to persons conducting a private hospital or asylum, a private school, and to lessees of convict labor.

*b. Helplessness of other.* The circumstances under which the custody of another is taken and maintained may be such as to deprive him of his normal ability to defend himself, or to deprive him of the protection of someone who, if present, would be under a duty to protect him, or though under no such duty would be likely to do so. Thus the fact that a prisoner is handcuffed may make him incapable of defending himself against an attack, which he could otherwise have done. The very fact of imprisonment prevents a prisoner from avoiding attacks by flight. So too, a child while in school is deprived of the protection of his parents or guardian. Therefore, the actor who takes custody of a prisoner or of a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him.

*c. Peculiar risks to which other exposed.* The custody of another may be taken under such circumstances as to associate the other with persons who are peculiarly likely to do him harm from which he cannot be expected to protect himself. If so, the

actor who has taken custody of the other is required to exercise reasonable care to furnish the necessary protection. This is particularly true where the custody not only involves intimate association with persons of notoriously dangerous character, but also deprives the person in custody of his normal ability to protect himself, as where a prisoner is put in a cell with a man of known violent temper, or is required to work or take exercise with a group of notoriously desperate characters. In such a case, the fact that the person in custody is a prisoner precludes the possession of any self-defensive weapons, and thus makes him incapable of adequately protecting himself.

*d. Duty to anticipate danger.* One who has taken custody of another may not only be required to exercise reasonable care for the other's protection when he knows or has reason to know that the other is in immediate need of it, but also to make careful preparations to enable him to give effective protection when the need arises, and to exercise reasonable vigilance to ascertain the need of giving it. Thus if a sheriff or peace officer knows that public opinion is so violently incensed against his prisoner that there is danger of mob violence, he may be required not only to himself to defend the prisoner, but also to exercise reasonable care to secure assistance which will enable him to do so effectively. So too, a schoolmaster who knows that a group of older boys are in the habit of bullying the younger pupils to an extent likely to do them actual harm, is not only required to interfere when he sees the bullying going on, but also to be reasonably vigilant in his supervision of his pupils so as to ascertain when such conduct is about to occur. This is true whether the actor is or is not under a duty to take custody of the other.

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#### Reporter's Notes

As to the duty of one who has taken charge of another to protect him by controlling the conduct of third persons, see *People ex. rel. Coover v. Guthner*, 105 Colo. 37, 94 P.2d 699 (1939); *Ratliff v. Stanley*, 224 Ky. 819, 7 S.W.2d 230, 61 A.L.R. 566 (1928); *Lamb v. Clark*, 282 Ky. 167, 138 S.W.2d 350 (1940); *Honeycutt v. Bass*, 187 So. 848 (La.App.1939); *Dunn v. Swanson*, 217 N.C. 279, 7 S.E.2d 563 (1940); *Hixon v. Cupp*, 5 Okla. 545, 49 P. 927 (1897); *Taylor v. Slaughter*, 171 Okla. 152, 42 P.2d 235 (1935); *Browning v. Graves*, 152 S.W.2d 515 (Tex.Civ.App.1941), error refused; *Kusah v. McCorkle*, 100 Wash. 318, 170 P. 1023, L.R.A. 1918C, 1158 (1918); *Eberhart v. Murphy*, 110 Wash. 158, 188 P. 17 (1920), reversed on other grounds, 113 Wash. 449, 194 P. 415.

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#### Case Citations - by Jurisdiction

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

Restatement of the Law - Torts

Database updated October 2015

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

Chapter 7. Affirmative Duties

§ 40 Duty Based on Special Relationship with Another

Comment:

Reporters' Note

Case Citations - by Jurisdiction

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

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

**(1) a common carrier with its passengers,**

**(2) an innkeeper with its guests,**

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

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

**(a) in imminent danger; or**

**(b) injured or ill and thereby rendered helpless,**

**(5) a school with its students,**

**(6) a landlord with its tenants, and**

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

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

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

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**Comment:**

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

*b. Court determinations of no duty based on special problems of principle or policy.* Even though an affirmative duty might exist pursuant to this Section, a court may decide, based on special problems of principle or policy, that no duty or a duty other than reasonable care exists. See § 7(b).

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

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

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

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

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

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

**Illustrations:**

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

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

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

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

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

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

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

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

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

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

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

**Illustrations:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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### Reporters' Note

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

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

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

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

save its invitees from emergencies beyond the invitee's or his or her companions' capacity to ward off." *Lundy v. Adamar, Inc.*, 34 F.3d 1173, 1200-1202 (3d Cir. 1994) (Becker, J., concurring and dissenting) (applying New Jersey law); see also *Pacello v. Wyndam Int'l, Inc.*, 2006 WL 1102737 (Conn. Super. Ct. 2006) (reviewing cases and concluding that only a relatively modest effort to obtain medical care and provide first aid to a heart-attack victim is required under § 314A); *L.A. Fitness Int'l, LLC v. Mayer*, 980 So. 2d 550 (Fla. Dist. Ct. App. 2008) (health club had no duty to administer advanced treatment such as CPR to member suffering cardiac arrest); *Lee v. GNLV Corp.*, 22 P.3d 209 (Nev. 2001) (characterizing the duty owed by a restaurant to a patron who was choking on food as one of reasonable care under the circumstances, but holding that restaurant was not negligent as a matter of law for not employing Heimlich maneuver); *Applebaum v. Nemon*, 678 S.W.2d 533 (Tex. App. 1984) (reiterating language in § 314A, Comment *f*); *Hovermale v. Berkeley Springs Moose Lodge*, 271 S.E.2d 335 (W. Va. 1980) (fraternal organization operating a bar owed duty of reasonable care to patron). But see *Drew v. LeJay's Sportmen's Café, Inc.*, 806 P.2d 301 (Wyo. 1991) (dram shop had no duty to provide first aid to patron who was choking on two-inch piece of meat; dram shop satisfied its duty of care by summoning appropriate medical care). In an especially confusing passage, particularly in light of its no-duty ruling, the *Drew* court stated: "While we agree with Restatement (Second) of Torts § 314A to the extent that we acknowledge reasonable care must be exercised in this circumstance, we are satisfied that duty is met when medical assistance is summoned within a reasonable time, and decline to adopt § 314A." *Id.* at 306.

That technological advances justify employing a reasonable-care standard is revealed in the adoption in 2004 of a regulation by the Federal Aviation Authority requiring airlines to carry a defibrillator aboard all aircraft with a flight attendant. See 14 CFR § 121.803; Matthew L. Wald, *Saving Lives in the Sky*, N.Y. TIMES May 2, 2004, § 5, at 2. For a case in which a plaintiff alleged that an airline's duty to its passengers includes providing a defibrillator, see *Stone v. Frontier Airlines, Inc.*, 256 F. Supp. 2d 28 (D. Mass. 2002) (providing a sympathetic account for why failure to provide a defibrillator is unreasonable and reporting on the developing custom in the airline industry to equip airplanes with defibrillators). But see *Salte v. YMCA of Metro. Chi. Found.*, 814 N.E.2d 610 (Ill. App. Ct. 2004) (health club had no duty to have defibrillator on premises and available for use for members suffering cardiac arrest). For affirmation of an innkeeper's duty to exercise reasonable care for the safety of guests, see *Catlett v. Stewart*, 804 S.W.2d 699 (Ark. 1991); *Virginia D. v. Madesco Inv. Corp.*, 648 S.W.2d 881 (Mo. 1983).

Courts sometimes invoke a no-duty rule in cases in which the evidence is sufficiently one-sided that no reasonable jury could find the defendant negligent. While the former approach reaches the same outcome as an insufficiency ruling, no-duty misleadingly suggests a decision that identifies some category of cases in which, for reasons of principle or policy, tort liability should not be imposed. See 2 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 416, at 719 (2d ed. 2011). Sufficiency rulings, by contrast, focus on the correct issue: whether the defendant's conduct could be found negligent by a reasonable factfinder. See, e.g., *Breaux v. Gino's, Inc.*, 200 Cal. Rptr. 260 (Ct. App. 1984) (restaurant met its duty of care by promptly summoning aid for patron who was choking on food). For courts invoking the no-duty approach, see *Doe v. Grosvenor Props.*, 829 P.2d 512 (Haw. 1992) (landlord of office building owed no duty to employee of tenant who was assaulted without warning in elevator when it stalled between floors); *Howe v. Stubbs*, 570 A.2d 1203 (Me. 1990) (proprietor owed no duty to warn invitee of danger of car crashing into business located at the bottom of a hill that had had three episodes of cars losing control and crashing into the store over a period of 25 years); *Williams v. Cunningham Drug Stores, Inc.*, 418 N.W.2d 381 (Mich. 1988) (drug store had no duty to provide armed security guards to protect patrons); *Dumka v. Quaderer*, 390 N.W.2d 200 (Mich. Ct. App. 1986) (no duty owed to patron of skating rink who arrived incapacitated due to drug and alcohol intoxication and who left with nonintoxicated companions at the request of rink employees); *J.M. v. Shell Oil Co.*, 922 S.W.2d 759 (Mo. 1996); *Lee v. GNLV Corp.*, 22 P.3d 209 (Nev. 2001) (holding that no reasonable jury could find that restaurant breached duty of reasonable care under the circumstances by failing to employ Heimlich maneuver on patron who was choking on food); *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218 (Pa. 2002) (holding tennis club had no duty to have available defibrillator for patrons who suffer heart failure because such acquisition would be inconsistent with significant regulation of availability and use of defibrillators throughout the state). For a court that employed both no duty and no breach as a matter of law to justify holding that the defendant was not liable, see *Lau's Corp. v. Haskins*, 405 S.E.2d 474 (Ga. 1991).

For certain relationships, especially when the duty concerns protection from third-party misconduct, some courts have fashioned rules about when there is sufficient evidence of the foreseeability of harm to permit the factfinder to find breach of a duty of

reasonable care. See, e.g., *L.A.C. v. Ward Parkway Shopping Ctr. Co.*, 75 S.W.3d 247 (Mo. 2002) (explaining the variety of rules employed to determine when a claim that a business owner failed to provide reasonable security may be submitted to the factfinder); *Krier v. Safeway Stores 46, Inc.*, 943 P.2d 405 (Wyo. 1997).

These rules about when third-party intentional conduct is sufficiently foreseeable reflect a wariness by courts in recognizing such a duty. Their caution is based on a number of concerns. The burden of durable precautions against criminal attack—such as employing security guards—is often quite large and cannot be justified by the risk that exists. Yet hindsight bias may affect a jury's assessment of the magnitude of the risk posed. See, e.g., Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post # Ex Ante: Determining Liability in Hindsight*, 19 LAW & HUM. BEHAV. 89 (1995); Susan J. LaBine & Gary LaBine, *Determinations of Negligence and the Hindsight Bias*, 20 LAW & HUM. BEHAV. 501 (1996). In addition, a difficult factual-cause issue may arise: whether such precautions, if employed, would have prevented the criminal attack and harm that occurred. Nevertheless, courts have a variety of tools available to assist in ameliorating these problems, and employing them, as many courts have done, is preferable to denying that a duty exists.

As the Supreme Court of New Jersey wrote with regard to a landlord's duty to protect against criminal attack:

A landlord also has a duty to take reasonable security precautions to protect tenants and their guests from foreseeable criminal acts. See *Trentacost v. Brussel*, 82 N.J. 214, 231-232, 412 A.2d 436 (1980) (imposing liability on landlord for failure to “take reasonable security measures for tenant protection on the premises”); see also *Clohesy v. Food Circus Supermarkets, Inc.*, 149 N.J. 496, 500, 516-517, 694 A.2d 1017 (1997) (holding landowner liable for supermarket customer's murder after her abduction from parking lot because criminal acts were foreseeable even though prior crimes on property were “lesser in degree”); *Butler v. Acme Mkts., Inc.*, 89 N.J. 270, 274, 280, 445 A.2d 1141 (1982) (holding that supermarket could be liable to customer who was mugged in supermarket's parking lot because of its knowledge of other muggings on premises during preceding year); *Braitman v. Overlook Terrace Corp.*, 68 N.J. 368, 371-372, 382-383, 346 A.2d 76 (1975) (holding landlord could be liable for burglary of tenant's apartment because landlord had breached duty of care by failing to provide functioning deadbolt lock). When a landlord knows or should know of a pattern of criminal activity on his premises that poses a foreseeable risk of harm to his tenants and their guests and does not take reasonable steps to meet the danger, he cannot escape liability merely because the criminal act was committed by a third party who was not within his control.

*Gonzalez v. Safe & Sound Sec. Corp.*, 881 A.2d 719, 730-731 (N.J. 2005).

*Comment e. Special relationship a matter of law.* For a court holding that the matter of whether a special relationship exists, thereby imposing an affirmative duty, is a question of law, see *Boulanger v. Pol*, 900 P.2d 823 (Kan. 1995).

*Comment f. Scope of the duty.* Illustration 2 is based on *Krieg v. Massey*, 781 P.2d 277 (Mont. 1989). Illustration 3 is adapted from the Restatement Second of Torts § 314A, Illustration 1. Cases in which the harm to the plaintiff arose from risks outside the scope of the relationship include *McGettigan v. Bay Area Rapid Transit Dist.*, 67 Cal. Rptr. 2d 516 (Ct. App. 1997); *Rhudy v. Bottlecaps Inc.*, 830 A.2d 402 (Del. 2003) (defendant bar had no duty to patrons who suffered harm from criminal assailant while patrons were in public parking lot adjacent to defendant's premises); *Burton v. Des Moines Metro. Transit Auth.*, 530 N.W.2d 696 (Iowa 1995) (common carrier owed no duty to child passenger who had safely departed from vehicle); *Swartz v. Huffmaster Alarms Sys., Inc.*, 377 N.W.2d 393 (Mich. Ct. App. 1985) (restaurant owed no duty to patron once the patron departed); *Krieg v. Massey*, 781 P.2d 277 (Mont. 1989); *Kimberly S.M. v. Bradford Cent. Sch.*, 649 N.Y.S.2d 588 (App. Div. 1996).

Cases in which courts have addressed the scope of the duty imposed by this Section and Comment include *Fabend v. Rosewood Hotels & Resorts, LLC*, 381 F.3d 152 (3d Cir. 2004) (campground operating within national park pursuant to agreement with National Park Service had no duty with regard to risks at swimming area outside the area of its control); *Sperka v. Little Sabine Bay, Inc.*, 642 So. 2d 654 (Fla. Dist. Ct. App. 1994) (innkeeper did not owe duty to guest with respect to changes in sandbars in ocean off premises); *Kimberly S.M. v. Bradford Cent. Sch.*, 649 N.Y.S.2d 588 (App. Div. 1996) (no common-law duty owed by

school aware of sexual abuse of student by relative during the summer and outside school premises); *Young v. Salt Lake City Sch. Dist.*, 52 P.3d 1230 (Utah 2002) (school owed no duty to elementary-school student riding his bicycle to school conference when hit by car in crosswalk adjacent to school).

That a special relationship exists pursuant to this Section does not mean that a special relationship exists pursuant to § 41, which imposes a duty to protect third parties. Thus, a custodial relationship may exist that imposes a duty on the custodian with regard to the person in custody, but that relationship does not mean that the custodian has an obligation to protect third parties from the person in custody. See *Sheikh v. Choe*, 128 P.3d 574 (Wash. 2006).

*Comment h. Rationale.* Courts frequently rely on the differential capacity for protection resulting from the relationship as a justification for finding the relationship to be special. See, e.g., *Lopez v. S. Cal. Rapid Transit Dist.*, 710 P.2d 907, 912 (Cal. 1985). Courts have also been influenced by the existence of a criminal statute or regulatory provision that imposes obligations on a person or entity in a relationship with another. The recognition of the landlord-tenant relationship was heavily influenced by statutory obligations imposed on landlords. See, e.g., *Brock v. Watts Realty Co.*, 582 So. 2d 438 (Ala. 1991) (holding municipal ordinance requiring landlords to maintain locks created an affirmative tort duty); *Braitman v. Overlook Terrace Corp.*, 346 A.2d 76 (N.J. 1975). That a defendant derives a commercial advantage from the relationship has also been influential in the identification of special relationships. Although not involving an affirmative duty, commercial benefit has been critical to the distinction between imposing a duty on dram shops with regard to their patrons and declining to impose a duty on social hosts. See, e.g., *Reynolds v. Hicks*, 951 P.2d 761 (Wash. 1998). On the nature of intuitions about rescue, see *THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID 1* (Michael A. Menlowe & Alexander M. Smith eds., 1993) (“Our first reactions to the rescue of those in distress are deceptively simple.... We condemn those too callous to care.”).

*Comment i. Duty of common carriers.* There is very little decisional law about the affirmative duties of transporters other than common carriers. Often the question involving other transporters is whether they are subject to the higher standard of care that was often imposed on common carriers. See *Commerce Ins. Co. v. Ultimate Livery Serv., Inc.*, 897 N.E.2d 50, 60 (Mass. 2008) (“A private carrier, engaged in the business of transporting persons consuming alcohol, is in a primary position to use care to avoid leaving an intoxicated passenger at a location where it is likely the passenger will drive.”); *Hawkins Cnty. v. Davis*, 391 S.W.2d 658 (Tenn. 1965); *Nichols v. TransCor Am., Inc.*, 2002 WL 1364059 (Tenn. Ct. App. 2002) (private company transporting prison inmate was not a common carrier that owed prisoner heightened duty of care); *Speed Boat Leasing, Inc. v. Elmer*, 124 S.W.3d 210 (Tex. 2003) (speed boat providing thrill rides not common carrier subject to higher standard of care). The clearest case imposing an affirmative duty on a non-common-carrier transporter is *Howell v. City Towing Assocs., Inc.*, 717 S.W.2d 729 (Tex. App. 1986). A tow truck transported the owner of the car that was being towed. The owner had a heart attack while riding in the tow truck, and the court held that the tow company owed the owner a duty of reasonable care. Cf. *Anderson v. Shaughnessy*, 526 N.W.2d 625 (Minn. 1995) (implying that school bus owed affirmative duty to student while riding on bus, but holding that no duty was owed after student alighted from bus).

*Comment j. Duty of business or other possessor of land who holds its premises open to the public.* For courts imposing a duty on business operators with regard to third-party criminal activities that pose a risk to those on the property, see *Novak v. Capital Mgmt. & Dev. Corp.*, 452 F.3d 902 (D.C. Cir. 2006); *Morgan v. Bucks Assocs.*, 428 F. Supp. 546 (E.D. Pa. 1977) (relying on § 344); *Isaacs v. Huntington Mem'l Hosp.*, 695 P.2d 653 (Cal. 1985); *Peterson v. S.F. Cmty. Coll. Dist.*, 685 P.2d 1193 (Cal. 1984); *Stevens v. Jefferson*, 436 So. 2d 33 (Fla. 1983); *Lau's Corp. v. Haskins*, 405 S.E.2d 474 (Ga. 1991); *Marshall v. Burger King Corp.*, 856 N.E.2d 1048 (Ill. 2006) (fast-food restaurant owed affirmative duty of reasonable care to patron with regard to both criminal and negligent acts of third party); *Summy v. City of Des Moines*, 708 N.W.2d 333 (Iowa 2006); *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437 (Iowa 1988); *Harris v. Pizza Hut, Inc.*, 455 So. 2d 1364 (La. 1984); *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165 (Minn. 1989); *L.A.C. v. Ward Parkway Shopping Ctr. Co.*, 75 S.W.3d 247, 257 (Mo. 2002) (imposing a duty to protect customers when “an individual is present who has conducted himself so as to indicate danger and sufficient time exists to prevent injury”); *Doud v. Las Vegas Hilton Corp.*, 864 P.2d 796 (Nev. 1993); *Butler v. Acme Mkts., Inc.*, 445 A.2d 1141 (N.J. 1982) (imposing general duty of reasonable care on business with regard to security of patrons against criminal attacks); *Moran v. Valley Forge Drive-In Theatre, Inc.*, 246 A.2d 875 (Pa. 1968) (relying on § 344); see also Chapter

9. But see *MacDonald v. PKT, Inc.*, 628 N.W.2d 33 (Mich. 2001) (limiting duty of merchant to involving law-enforcement officials when criminal behavior threatens imminent harm to those on the premises); *Wright v. Webb*, 362 S.E.2d 919 (Va. 1987) (holding that business owes no duty to take precautions to protect patrons from future criminal attack; duty is limited to currently existing or imminent attacks).

For cases in which the court found a duty owed to a person who was not a patron of the business in possession of the land, see *Isaacs v. Huntington Mem'l Hosp.*, 695 P.2d 653 (Cal. 1985) (physician affiliated with hospital); *Sims v. Gen. Tel. & Elec.*, 815 P.2d 151, 158 n.4 (Nev. 1991) (business has special relationship with nonemployee janitors present on business premises); *Nallan v. Helmsley-Spear, Inc.*, 407 N.E.2d 451 (N.Y. 1980) (office building with individual attending an after-hours meeting in the building).

For courts that have extended the duty imposed on businesses to other possessors of land that hold the land open to the public, see *Peterson v. S.F. Cmty. Coll. Dist.*, 685 P.2d 1193 (Cal. 1984) (college district operating a parking lot at college); *Nero v. Kan. State Univ.*, 861 P.2d 768 (Kan. 1993) (university providing housing to student); *Schultz v. Gould Acad.*, 332 A.2d 368 (Me. 1975) (private boarding school owed duty to student living in dormitory); see also Chapter 9. But see *Wolsk v. State*, 711 P.2d 1300 (Haw. 1986) (state, which operated campground, did not have a special relationship with campers that required actions to protect them from risk of third-party attacks).

For a court that conclusorily asserted that a landowner owed no duty whatsoever to a patron who suffered a heart attack, see *Adamowicz v. Claridge at Park Place, Inc.*, 522 N.Y.S.2d 884 (App. Div. 1987) (citing nothing in support of the no-duty statement).

For an explanation of developments since the Second Restatement of Torts in the duty imposed on possessors of land to those on the land for conditions or activities on the land, see *Nelson v. Freeland*, 507 S.E.2d 882 (N.C. 1998) (reporting that 25 jurisdictions have modified the common-law trichotomy of categories for those who enter land, along with different duties corresponding to the status of the person on the land); see also *Alexander v. Med. Assocs. Clinic*, 646 N.W.2d 74 (Iowa 2002) (reviewing courts' treatment of duty of land possessor to trespassers).

*Comment k. Duty of employers.* Courts have not been expansive in their treatment of the duty provided in § 314B of the Restatement Second of Torts, with the exception of cases arising under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., which substitutes a liberal version of tort law in place of workers' compensation for occupational injuries. For courts finding that no affirmative duty existed because of a lack of imminent harm, because the risk occurred outside the scope of the employment relationship, or because of an aversion to imposing an affirmative duty to protect against criminal attack, see *Levie v. Dep't of Army*, 810 F.2d 1311 (5th Cir. 1987) (applying federal law in Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., case and finding employees of independent contractor hired by defendant not within scope of employer-employee relationship); *Midgette v. Wal-Mart Stores, Inc.*, 317 F. Supp. 2d 550 (E.D. Pa. 2004) (knowledge of imminent harm lacking); *Rodrigue v. United States*, 788 F. Supp. 49 (D. Mass. 1991) (finding that risk occurred outside scope of relationship), aff'd on other grounds, 968 F.2d 1430 (1st Cir. 1992); *Parham v. Taylor*, 402 So. 2d 884 (Ala. 1981) (concluding that employer only owes duty to employee in "most extreme case" of danger to employee); *Thoni Oil Magic Benzol Gas Stations, Inc. v. Johnson*, 488 S.W.2d 355 (Ky. Ct. App. 1972) (concluding that employer owes no affirmative duty to employee with regard to third-party criminal attack unless conditions of employment "invite" criminal attack on employees); *Whelan v. Albertson's, Inc.*, 879 P.2d 888 (Or. Ct. App. 1994) (absence of imminent danger); *Fincham v. Liberty Nursing Homes, Inc.*, 1993 WL 946196 (Va. Cir. Ct. 1993) (requiring "an imminent probability of harm to the Plaintiff"). But see *Blake v. Consol. Rail Corp.*, 439 N.W.2d 914, 920 (Mich. Ct. App. 1989) ("A railroad employer has a duty under FELA to make reasonable provisions to protect its employees against foreseeable criminal misconduct."). In *Stockberger v. United States*, 332 F.3d 479 (7th Cir. 2003), the court concluded that Indiana does not recognize any affirmative duty on the part of an employer to an employee. The case involved a diabetic employee who, suffering from a hypoglycemic episode, refused any further assistance by co-employees and insisted on driving himself home, resulting in the employee's death.

For courts finding that a duty existed under § 314B, see *Blake v. Consol. Rail Corp.*, 439 N.W.2d 914 (Mich. Ct. App. 1989) (FEHA claim against employer that, thus, was not covered by workers' compensation); *Nureddin v. Ne. Ohio Reg'l Sewer Dist.*, 662 N.E.2d 1135 (Ohio Ct. App. 1995) (holding that employer owed duty pursuant to § 314B to employee who suffered non-work-related heart attack); see also *Newman v. Redstone*, 237 N.E.2d 666 (Mass. 1968) (commenting on conflict in the case law, but characterizing the "modern trend" as recognizing an affirmative duty as outlined in § 314B and assuming, without deciding, that Massachusetts would recognize such a duty); *Dupont v. Aavid Thermal Techs., Inc.*, 798 A.2d 587 (N.H. 2002) (confusing opinion in which court holds that employment relationship is not a special one imposing an affirmative duty with regard to third-party criminal attacks, but holding that because supervisory personnel knew that co-employee was armed and dangerous, employer had a duty to employee based on § 314B of the Second Restatement).

Even intentional torts, when the risks of such torts are increased by the circumstances of employment, may be covered by the exclusive-remedy provision of workers' compensation and thus excepted from tort treatment. See *Wood v. Safeway, Inc.*, 121 P.3d 1026 (Nev. 2005), in which a mentally handicapped employee was sexually assaulted while working at defendant's grocery store by an employee of a janitorial service that cleaned the store. Because the risk of such an assault was increased by the plaintiff's presence at work, workers' compensation constituted her exclusive remedy. See also *Tanks v. Lockheed Martin Corp.*, 417 F.3d 456 (5th Cir. 2005) (applying Mississippi law). The *Wood* court did not address the matter of whether plaintiff's injuries were the result of "accident," another requirement of the workers'-compensation statute, but other courts have done so. See *Giracelli v. Franklin Cleaners & Dyers, Inc.*, 42 A.2d 3 (N.J. 1945); *Doe v. S.C. State Hosp.*, 328 S.E.2d 652, 654 (S.C. Ct. App. 1985) ("An intentional assault upon an employee by a third person is an 'accident' because it is unexpected when viewed from the employee's perspective.").

*Comment l. Duty of schools.* Professor Dobbs identifies this relationship as one imposing an affirmative duty of reasonable care. See 2 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 415, at 708-709 (2d ed. 2011). While some decisions have been concerned with the scope of this duty and, in staking out its boundaries, held that no duty existed, courts generally impose an affirmative duty on schools. The core of the duty derives from the temporary custody that a school has of its students, the school's control over the school premises, and the school's functioning in place of parents. It relies both on the school's substitution for parental supervision in the case of young children and its superior ability to take reasonable precautions for students while at school or involved in school activities. In a number of contexts, the same duty has been imposed on higher-education institutions, at least with regard to risks from conditions on the college's property or risks created by the acts of others on the confines of college property. In this respect, the duty imposed on colleges may also be found in Subsection (b) (3); see also Chapter 9.

Although the Second Restatement of Torts did not identify the school-student relationship explicitly as one that imposed an affirmative duty, § 320, Comment *b*, stated that students are deprived of the protection of their parents while in school. In addition, an Illustration employed a kindergarten student who becomes seriously ill at school. The Illustration concluded that the school is subject to liability for its negligence in failing to obtain appropriate medical assistance for the student. Restatement Second, Torts § 314A, Illustration 7. For courts that affirm the duty of a school to its students, see *Chavez v. Tolleson Elementary Sch. Dist.*, 595 P.2d 1017 (Ariz. Ct. App. 1979); *Dailey v. L.A. Unified Sch. Dist.*, 470 P.2d 360 (Cal. 1970); *Todd M. v. Richard L.*, 696 A.2d 1063 (Conn. Super. Ct. 1995); *District of Columbia v. Royal*, 465 A.2d 367, 369 (D.C. 1983); *Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982); *Doe Parents No. 1 v. State Dep't of Educ.*, 58 P.3d 545 (Haw. 2002); *Beshears v. Unified Sch. Dist. No. 305*, 930 P.2d 1376, 1382 (Kan. 1997); *Doe v. DeSoto Parish Sch. Bd.*, 907 So. 2d 275 (La. Ct. App. 2005); *Doe v. City of New Orleans*, 577 So. 2d 1024 (La. Ct. App. 1991); *Prier v. Horace Mann Ins. Co.*, 351 So. 2d 265 (La. Ct. App. 1977); *Eisel v. Bd. of Educ. of Montgomery Cnty.*, 597 A.2d 447 (Md. 1991) (school counselors had duty to student who threatened suicide); *Henderson v. Simpson Cnty. Pub. Sch. Dist.*, 847 So. 2d 856 (Miss. 2003); *Graham v. Mont. State Univ.*, 767 P.2d 301 (Mont. 1988); *Marquay v. Eno*, 662 A.2d 272 (N.H. 1995) (students who were sexually abused by school employees); *Mirand v. City of New York*, 637 N.E.2d 263, 266 (N.Y. 1994) ("Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision."); *Fazzolari v. Portland Sch. Dist. No. 1J*, 734 P.2d 1326 (Or. 1987); *Shin v. Sunriver Preparatory Sch., Inc.*, 111

P.3d 762 (Or. Ct. App. 2005) (finding that private boarding school had special relationship with student); *Christensen v. Royal Sch. Dist.* No. 160, 124 P.3d 283 (Wash. 2005).

A school's duty of reasonable care with respect to students extends to student-athletes participating in school-sponsored athletic events. See *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360 (3d Cir. 1993) (applying Pennsylvania law) (citing cases); *Wagenblast v. Odessa Sch. No. 105-157-166J*, 758 P.2d 968, 973 (Wash. 1988) (duty of school to exercise reasonable care extends to students participating in interscholastic sports). See also Edward H. Whang, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student-Athletes*, 2 SPORTS LAW. J. 25, 39 (1995).

In addition to a common-law tort duty, schools have obligations to protect students from sexual harassment under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688. In *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992), the Court held that a student subjected to sexual harassment by a teacher had an implied right of action for damages against the school district. Subsequently, in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), the Court held that the basis for a school district's liability is actual notice of the sexual harassment and deliberate indifference to it. Consistent with prior civil-rights decisions, liability can only be imposed for the school's (in)action and is not based on vicarious liability. In *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999), the Court extended Title IX to student-on-student sexual harassment, so long as the notice and deliberate indifference standard of *Gebser* is met and the harassment is sufficiently serious and pervasive that it prevents a victim from obtaining an educational benefit. To the extent that sexual harassment causes physical or emotional harm, the duty imposed by Title IX on schools overlaps with the duty provided by tort law in this Subsection.

Courts are split on whether a college owes an affirmative duty to its students. Some of the cases recognizing such a duty are less than ringing endorsements, often relying on other aspects of the relationship between the college and its student to justify imposing a duty. Conversely, a number of the cases declining to recognize a duty speak in narrow, fact-specific terms that do not rule out the possibility of recognizing a duty in other contexts. A number of the fact-specific decisions involve excessive alcohol use, for which courts have been generally unsympathetic to imposing an affirmative duty. In many of those cases, however, it appears that there was no reasonable way for the university to have taken precautions that would have avoided the harm, and thus the no-duty decisions may be an infelicitous means for expressing the conclusion that there was no negligence as a matter of law.

For courts imposing a duty of reasonable care to protect students on the college's property, including on the basis that the college has a duty in its role as land occupier to student-entrants on the land, see *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602 (W.D. Va. 2002) (concluding that, on specific facts alleged by plaintiff, college owed affirmative duty to student who committed suicide); *Peterson v. S.F. Cmty. Coll. Dist.*, 685 P.2d 1193 (Cal. 1984) (duty owed to student raped in college parking lot); *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991) (finding university had special relationship with student who was a fraternity pledge but also relying on its undertaking to regulate hazing and on its status as possessor of land and student's status of invitee); *Nova Se. Univ., Inc. v. Gross*, 758 So. 2d 86 (Fla. 2000) (duty owed to graduate student placed by university in mandatory internship); *Niles v. Bd. of Regents of Univ. Sys. of Ga.*, 473 S.E.2d 173, 175 (Ga. Ct. App. 1996) (stating in dicta that a "university student is an invitee to whom the university owes a duty of reasonable care"); *Stanton v. Univ. of Me. Sys.*, 773 A.2d 1045 (Me. 2001) (university owed duty to student-athlete as business invitee who was residing in dormitory to provide information about appropriate precautions for personal safety); *Univ. of Md. E. Shore v. Rhaney*, 858 A.2d 497 (Md. Ct. Spec. App. 2004) (holding that a college, as landlord, owed duty of reasonable care to student residing in dormitory), *aff'd* on other grounds, 880 A.2d 357 (Md. 2005); *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331 (Mass. 1983); *Knoll v. Bd. of Regents of Univ. of Neb.*, 601 N.W.2d 757 (Neb. 1999) (victim of fraternity hazing episode owed duty by university based on its role as landowner with student as its invitee); *cf. Mintz v. State*, 362 N.Y.S.2d 619 (App. Div. 1975) (impliedly assuming that duty existed in deciding that university had not acted unreasonably as a matter of law in supervising overnight canoe outing by students); *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920 (N.C. Ct. App. 2001) (holding that university has special relationship with cheerleader based on mutual benefit to each from the activity and control exerted by the university over the activity, but denying, in dicta, that university has special relationship generally with students). But see *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979) (applying Pennsylvania law) (college owed no duty to student injured while being transported by

another underage student who had become drunk at off-campus class picnic); *Booker v. Lehigh Univ.*, 800 F. Supp. 234 (E.D. Pa. 1992) (university owed no duty to student who was injured after becoming inebriated at on-campus fraternity party), *aff'd*, 995 F.2d 215 (Table) (3d Cir. 1993); *Baldwin v. Zoradi*, 176 Cal. Rptr. 809 (Ct. App. 1981) (university owed no duty to student by virtue of dormitory license where risks created by excessive drinking and drag racing were not foreseeable to university); *Univ. of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987) (concluding that university owed no duty to student injured while on trampoline at fraternity; to impose duty could result in imposing regulations on student activity that would be counterproductive to appropriate environment for student development); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 311-312 (Idaho 1999) (college does not have special relationship with student that imposes a duty to protect student from risks involved in voluntary intoxication); *Rabel v. Ill. Wesleyan Univ.*, 514 N.E.2d 552 (Ill. App. Ct. 1987) (university owed no duty to student based on its landlord-tenant relationship with her for harm that resulted from prank by intoxicated fraternity member); *Nero v. Kan. State Univ.*, 861 P.2d 768 (Kan. 1993) (declining to impose duty on university solely because of its role as school but concluding university had duty of care as landlord for student living in dormitory); *Boyd v. Tex. Christian Univ., Inc.*, 8 S.W.3d 758 (Tex. App. 1999) (university had no duty to student injured while at off-campus bar); *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986) (university had no duty to protect student from consequences of voluntary intoxication while on university-sponsored field trip). See generally Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1 (1999) (identifying a trend in tort law toward holding institutions of higher education to a tort duty with respect to the safety of students); Jane A. Dall, Note, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485 (2003) (advocating recognition of a special relationship between colleges and their students).

*Comment m. Duty of landlords.* *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970), is often credited as the seminal case imposing an affirmative duty on landlords. See Barbara A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 689 (1990). However, more than a year before *Kline* was decided, the District of Columbia Court of Appeals held that a landlord was subject to a duty of reasonable care with regard to the risk of a third-party assault and battery on a tenant in her apartment. *Ramsay v. Morrisette*, 252 A.2d 509 (D.C. 1969). Even earlier cases had imposed liability on landlords for third-party criminal attacks, although those cases involved landlords who had created a risk of such third-party attacks by, for instance, hiring, without adequate investigation, an employee who had access to tenants' apartments. See *Kendall v. Gore Props.*, 236 F.2d 673 (D.C. Cir. 1956). Professor Glesner describes a "dramatic shift in the landlord's common law tort liability and ... the landlord's overall responsibility for criminal activities on leased premises" in the days since *Kline*. See Glesner, *supra* at 682; see also § 53.

A number of courts recognizing the landlord-tenant relationship as sufficient to impose an affirmative duty on landlords identify the innkeeper-guest relationship as an analogy. See *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970); *Tenney v. Atl. Assoc.*, 594 N.W.2d 11 (Iowa 1999); *Miller v. Tabor W. Inv. Co., LLC*, 196 P.3d 1049, 1054 (Or. Ct. App. 2008); *Giggers v. Memphis Housing Auth'y*, 277 S.W.3d 359 (Tenn. 2009); *Tedder v. Raskin*, 728 S.W.2d 343 (Tenn. Ct. App. 1987). But see *Cooke v. Allstate Mgmt. Corp.*, 741 F. Supp. 1205 (D.S.C. 1990) (distinguishing rented premises to which only tenants and their guests have access and businesses, such as hotels, that are open to the public). The *Cooke* court's distinction fails to recognize that in both cases there is some risk that dangerous third parties may gain access to the premises. While the risk must be evaluated based on the particular facts of the case, the risk in an apartment in a dangerous neighborhood may be greater than in a secluded hotel.

For courts that have employed narrow no-duty rulings when the specific circumstances of the case revealed no basis for finding a failure to exercise reasonable care, or that reasonable care would have been futile in preventing the harm, see *C. S. v. Sophis*, 368 N.W.2d 444 (Neb. 1985); *Yuzefovsky v. St. John's Wood Apartments*, 540 S.E.2d 134 (Va. 2001); cf. *Nero v. Kan. State Univ.*, 861 P.2d 768 (Kan. 1993) (combining proprietor and landlord language to conclude university owed affirmative duty to student residing in dormitory); *Smith v. Lagow Constr. & Dev. Co.*, 642 N.W.2d 187 (S.D. 2002) (confusing opinion in which court denied special relationship between landlord and tenant existed, but held landlord had a duty based on exclusive control over locks and on principle that duty to protect can exist when a party's conduct increases the risk of third-party criminal

conduct). For a court that relied on an absence of cause in fact as a matter of law, rather than adopting the more convenient but less accurate no-duty rationale, see *W. Invs., Inc. v. Urena*, 162 S.W.3d 547 (Tex. 2005).

Courts endorsing some affirmative duty for landlords include *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970); *Brock v. Watts Realty Co.*, 582 So. 2d 438 (Ala. 1991) (basing duty on ordinance requiring landlords to maintain locks); *Frances T. v. Vill. Green Owners Ass'n*, 723 P.2d 573 (Cal. 1986) (condominium association owed duty of reasonable care to tenants in maintaining areas of condominium under control of association); *Hawkins v. Wilton*, 51 Cal. Rptr. 3d 1 (Cal. Ct. App. 2006) (landlord has a duty to protect tenants in apartment from dangers posed by other tenants); *Ramsay v. Morrissette*, 252 A.2d 509 (D.C. 1969); *Paterson v. Deeb*, 472 So. 2d 1210 (Fla. Dist. Ct. App. 1985) (relying on statute requiring landlords to “make reasonable provision for ... locks”); *Lidster v. Jones*, 336 S.E.2d 287 (Ga. Ct. App. 1985) (landlord had duty of care with regard to risk of attack on a child tenant by vicious dog owned by other tenant); *Warner v. Arnold*, 210 S.E.2d 350, 353 (Ga. Ct. App. 1974) (holding landlord could be found liable for failing to provide an additional functioning lock and citing *Kline* in support, but not discussing affirmative nature of the duty imposed); *Stephens v. Stearns*, 678 P.2d 41, 50 (Idaho 1984) (adopting rule that “a landlord is under a duty to exercise reasonable care in light of all the circumstances”); *McDonald v. Talbott*, 447 S.W.2d 84 (Ky. Ct. App. 1969) (landlord subject to liability for attack in common area by vicious dog kept by a frequent visitor to tenant); *Hemmings v. Pelham Wood Ltd. Liab. Ltd. P'ship*, 826 A.2d 443 (Md. 2003) (landlord has duty of reasonable care with regard to security measures in common areas over which landlord has control); *Scott v. Watson*, 359 A.2d 548 (Md. 1976); *Davis v. Christian Bhd. Homes of Jackson, Miss., Inc.*, 957 So. 2d 390 (Miss. Ct. App. 2007); *Gans v. Parkview Plaza P'ship*, 571 N.W.2d 261 (Neb. 1997); *Braitman v. Overlook Terrace Corp.*, 346 A.2d 76 (N.J. 1975) (declining to hold that the landlord-tenant relationship alone is sufficient to impose a duty but holding that landlord must take reasonable care to prevent theft of tenant's possessions); *Castillo v. Cnty. of Santa Fe*, 755 P.2d 48 (N.M. 1988) (landlord had duty of reasonable care to maintain common areas of premises); *Mason v. U.E.S.S. Leasing Corp.*, 756 N.E.2d 58 (N.Y. 2001) (holding that a landlord has duty to take “minimal precautions” for safety of tenants); *Burgos v. Aqueduct Realty Corp.*, 706 N.E.2d 1163 (N.Y. 1998); *In re World Trade Ctr. Bombing Litig.*, 776 N.Y.S.2d 713 (Sup. Ct. 2004) (finding that Port Authority, as commercial landlord, had a duty of reasonable care with regard to criminal activities occurring on the premises, specifically the 1993 bombing of the parking garage); *Evers v. FSF Overlake Assocs.*, 77 P.3d 581 (Okla. 2003) (landlord who retains control over common areas has a duty of reasonable care to keep premises safe including from dangers posed by third-party criminal activity by other tenants); *Miller v. Tabor W. Inv. Co.*, 196 P.3d 1049 (Or. Ct. App. 2008) (holding that landlords have an affirmative duty to warn their tenants of another tenant who presents a foreseeable risk of physical harm, regardless of whether the threat is present on or off the landlord's property); *Clea v. Odom*, 714 S.E.2d 542 (S.C. 2011) (landlords have an affirmative duty with regard to risks that exist in common areas of leased premises); *Tedder v. Raskin*, 728 S.W.2d 343 (Tenn. Ct. App. 1987); *Exxon Corp. v. Tidwell*, 867 S.W.2d 19 (Tex. 1993); *Griffin v. West RS, Inc.*, 984 P.2d 1070 (Wash. Ct. App. 1999), rev'd on other grounds, 18 P.3d 558 (Wash. 2001); *Merrill v. Jansma*, 86 P.3d 270 (Wyo. 2004) (landlord-tenant statute basis for affirmative duty of reasonable care under the circumstances is imposed on landlords, overturning prior common-law rule); see also § 53.

Courts imposing affirmative duties on commercial landlords include *Doe v. Dominion Bank of Wash., N.A.*, 963 F.2d 1552 (D.C. Cir. 1992); *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993); *Sinai v. Polinger Co.*, 498 A.2d 520, 529 (D.C. 1985); *Shields v. Wagman*, 714 A.2d 881 (Md. 1998); *Whittaker v. Saraceno*, 635 N.E.2d 1185 (Mass. 1994) (stating that, although commercial landlord-tenant is not a special relationship, commercial landlord may not ignore foreseeable risks to tenants); *Gans v. Parkview Plaza P'ship*, 571 N.W.2d 261 (Neb. 1997); *Scully v. Fitzgerald*, 843 A.2d 1110 (N.J. 2004); *Exxon Corp. v. Tidwell*, 867 S.W.2d 19 (Tex. 1993).

In *Frances T. v. Vill. Green Owners Ass'n*, 723 P.2d 573 (Cal. 1986), the California Supreme Court treated a condominium association as equivalent to a landlord with respect to an affirmative duty to tenants. See generally *Sevigny v. Dibble Hollow Condo. Ass'n*, 819 A.2d 844 (Conn. App. Ct. 2003) (discussing treatment of condominium association as equivalent to landlord).

The line between the ordinary duty of care and an affirmative duty may be quite thin, as *Vigil v. Payne*, 725 P.2d 1155 (Colo. App. 1986), reveals. The court held that a landlord, aware that a prospective tenant owned a vicious dog, owed a duty of care to other tenants. The court observed that by leasing the premises to such a tenant the landlord had participated in creating the risk

at issue. Thus, the recognition of a duty in *Vigil* does not address whether an affirmative duty exists pursuant to this Section. See also *Strunk v. Zoltanski*, 468 N.E.2d 13 (N.Y. 1984) (same). Similarly, failing to provide adequate security devices at leased premises, although with considerably more stretching, can be conceptualized as conduct that facilitates the risk of criminal attack, as the court did in *Johnston v. Harris*, 198 N.W.2d 409 (Mich. 1972).

Despite, or perhaps because of, these difficulties in distinguishing the two potential sources of duty, some courts have conflated the affirmative duties imposed by this Chapter with the ordinary duty of care provided in Chapter 3. See, e.g., *Ctr. Mgmt. Corp. v. Bowman*, 526 N.E.2d 228 (Ind. Ct. App. 1988). Thus, a landlord has a duty of reasonable care with respect to access to master keys that is imposed by Chapter 3, because profligate access to master keys by a landlord's employees and by others may enable a third person to gain access to an apartment that that person otherwise would not obtain. While the narrow holding of such a case, properly understood, does not support the rule in this Section, some courts' language, reasoning, and citations do. See *Tenney v. Atl. Assocs.*, 594 N.W.2d 11 (Iowa 1999); *Aaron v. Havens*, 758 S.W.2d 446 (Mo. 1988). For a court that carefully distinguished duties imposed based on the actor's conduct enhancing the risk of a criminal attack and based on an affirmative duty to protect against risks that the actor had no role in creating, see *Miller v. Whitworth*, 455 S.E.2d 821 (W. Va. 1995). For a court that appreciated the difference between an affirmative duty and conduct that facilitated a criminal attack, and ruled that the landlord could only be held liable on the latter ground, see *Rowe v. State Bank of Lombard*, 531 N.E.2d 1358 (Ill. 1988).

Courts declining to impose any affirmative duty on landlords include *Steward v. McDonald*, 958 S.W.2d 297 (Ark. 1997) (landlord has no duty to tenant beyond obligations contained in the lease agreement); *Doe v. Grosvenor Prop. Ltd.*, 829 P.2d 512 (Haw. 1992) (concluding that defendant-landlord did not owe a duty to plaintiff-tenant based on its status as possessor of land and declining to recognize landlord-tenant relationship as one that imposes an affirmative duty); *Rowe v. State Bank of Lombard*, 531 N.E.2d 1358 (Ill. 1988) ("this court has repeatedly held that the simple relationship between a landlord and tenant ... is not a 'special' one"); *Terrell v. Wallace*, 747 So. 2d 748 (La. Ct. App. 1999); *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666 (Minn. 2001); *Ward v. Inishmaan Assocs. Ltd. P'ship*, 931 A.2d 1235 (N.H. 2007) (holding that landlord owed no affirmative duty to tenant to protect tenant from attack by cotenant); *Feld v. Merriam*, 485 A.2d 742 (Pa. 1984); *Cramer v. Balcro Prop. Mgmt.*, 441 S.E.2d 317 (S.C. 1994); *Miller v. Whitworth*, 455 S.E.2d 821 (W. Va. 1995).

For courts imposing a duty on landlords based on their undertakings under Restatement Second of Torts § 323, see *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 674-675 (Minn. 2001) (citing cases); *Reider v. Martin*, 519 A.2d 507 (Pa. Super. Ct. 1987). The availability of a claim under § 323 when a landlord provides inadequate security or fails to maintain security devices has alleviated the pressure to recognize the landlord-tenant relationship as one imposing an affirmative duty. See, e.g., *Lay v. Dworman*, 732 P.2d 455 (Okla. 1986) (declining to recognize landlord-tenant as a special relationship, but finding landlord owed a duty to protect tenants from criminal activity by maintaining adequate common-area security devices under § 323 and § 448 of the Second Restatement). Undertakings, at least gratuitous ones, can be terminated, so long as there is adequate notice to obviate continued reliance on the undertaking. See § 42, Comment *h*. By contrast, the duty imposed by this Section exists for as long as the landlord-tenant relationship continues.

*Comment n. Duty of custodians.* Custodial relationships can include a day-care center with the children for whom it is caring, see *Applebaum v. Nemon*, 678 S.W.2d 533 (Tex. App. 1984); an adult who agrees to oversee a minor child who stays in the adult's home, see *Bjerke v. Johnson*, 742 N.W.2d 660 (Minn. 2007) (stable owner who agreed to have minor reside with her owed duty of reasonable care to protect minor from sexual assault by owner's live-in boyfriend); *Kellermann v. McDonough*, 684 S.E.2d 786 (Va. 2009) (parents who agreed to oversee overnight stay by adolescent friend of their daughter); a jailer with a prisoner, e.g., *Minneci v. Pollard*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 617, 624-625 (2012); *Young v. Huntsville Hosp.*, 595 So. 2d 1386 (Ala. 1990); *Giraldo v. Cal. Dep't of Corr. and Rehabilitation*, 85 Cal. Rptr. 3d 371, 386 (Ct. App. 2008); *Hall v. Knipp*, 982 So. 2d 1196 (Fla. Dist. Ct. App. 2008); *Ferguson v. Perry*, 593 So. 2d 273 (Fla. Dist. Ct. App. 1992); *Cole v. Ind. Dep't of Corr.*, 616 N.E.2d 44 (Ind. Ct. App. 1993); *Thomas v. County Com'rs of Shawnee Cnty.*, 198 P.3d 182, 190 (Kan. Ct. App. 2008) (adopting § 314A(4)), *aff'd*, 262 P.3d 336 (Kan. 2011); *Brownelli v. McCaughtry*, 514 N.W.2d 48 (Wis. 1994); a hospital with a patient, *Dragomir v. Spring Harbor Hosp.*, 970 A.2d 310, 315-317 (Me. 2009); *N.X. v. Cabrini Med. Ctr.*, 765 N.E.2d 844 (N.Y. 2002); a nursing home with its residents, *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73 (Tenn. 2001); a summer camp for children

with its campers, *Doe v. Goff*, 716 N.E.2d 323 (Ill. App. Ct. 1999); an employer with a student intern who is employed under a work-study agreement, *Platson v. NSM, Am., Inc.*, 748 N.E.2d 1278 (Ill. App. Ct. 2001); a law-enforcement officer with an arrestee, *Jackson v. City of Kansas City*, 947 P.2d 31 (Kan. 1997); *Del Tufo v. Township of Old Bridge*, 685 A.2d 1267 (N.J. 1996); a boy-scout organization with a member, *L.P. v. Oubre*, 547 So. 2d 1320 (La. Ct. App. 1989); the state with children for whom the state has, through its social-services operations, assumed custody, *Vonner v. State*, 273 So. 2d 252, 255-256 (La. 1973); cf. *DeShaney v. Winnebago Dep't of Soc. Servs.*, 489 U.S. 189, 201 n.9 (1989) (“Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.”); and a residential rehabilitation center for delinquent and other troubled juveniles with its residents, *Nova Univ. v. Wagner*, 491 So. 2d 1116 (Fla. 1986). Courts have not been sympathetic to efforts to extend the duty imposed on custodians to others who have a relationship with, say, a patient, but a noncustodial one. See, e.g., *Lee v. Corregedore*, 925 P.2d 324 (Haw. 1996). See also *Bicknell v. Dakota GM, Inc.*, 2009 WL 799613 (D. Minn. 2009) (holding that plaintiff's suggestion to her intoxicated husband that he stop consuming alcohol was not sufficiently specific to constitute a custodial relationship).

The Eighth Amendment's proscription on cruel and unusual punishment, along with substantive due process, impose certain affirmative duties on government officials who have involuntary custody of others. In *DeShaney v. Winnebago Dep't of Soc. Servs.*, 489 U.S. 189 (1989), the Supreme Court limited constitutional affirmative duties to those who are involuntarily in the custody of the state. Although the state Department of Social Services knew of and had investigated the father's abuse of his four-year-old child, the Court held that the Due Process Clause provided no affirmative duty on the state to protect the child. That the state had undertaken some protection for the plaintiff did not change the analysis according to the Court; although such an undertaking may subject the state to tort liability, constitutional protections are not coextensive with state tort law. *Id.* at 201-202.

*Comment o. Nonexclusivity of relationships.* Courts have relied on a variety of additional relationships to impose an affirmative duty, sometimes influenced by statutes imposing certain obligations. In the absence of significant concurrence on these other relationships, the Institute takes no position on whether they should be accepted as sufficient to impose an affirmative duty. Among the other relationships that courts have considered are:

(1) social companions, compare *Farwell v. Keaton*, 240 N.W.2d 217, 222 (Mich. 1976), with *Downs v. Bush*, 263 S.W.3d 812 (Tenn. 2008) (social acquaintances owed no duty to aid or protect intoxicated friend because no special relationship existed) and *Webstad v. Stortini*, 924 P.2d 940 (Wash. Ct. App. 1996);

(2) police officers with intoxicated persons, compare *Weldy v. Town of Kingston*, 514 A.2d 1257 (N.H. 1986), with *Hildenbrand v. Cox*, 369 N.W.2d 411 (Iowa 1985); and

(3) surrogacy clinics, see *Huddleston vs. Infertility Ctr. of Am.*, 700 A.2d 453 (Pa. Super. Ct. 1997) (surrogacy clinic has special relationship with prospective-parent patrons and with child born as a result of clinic's services). For a court expressing reluctance about recognizing additional special relationships, see *Patton v. United States of America Rugby Football Union*, 851 A.2d 566 (Md. 2004).

The Prosser treatise has been predicting for nearly five decades that courts would recognize family members as a special relationship. See WILLIAM L. PROSSER, *THE LAW OF TORTS* § 54, at 338 (3d ed. 1964). Prosser's prognostication has not been borne out. The only case that squarely addresses whether a family member owes an affirmative duty to other family members held an aunt did not owe an affirmative duty to her nephew. *Chastain v. Fuqua Indus., Inc.*, 275 S.E.2d 679 (Ga. Ct. App. 1980). Several cases recognize the duty of custodial parents to their children. See *Delgado v. Lohmar*, 289 N.W.2d 479, 483-484 (Minn. 1979); *Lundman v. McKown*, 530 N.W.2d 807, 820-821 (Minn. Ct. App. 1995) (“we believe there also is a presumption that ‘custodial’ stepparents (and ‘visitation’ stepparents during visitation) assume special-relationship duties to stepchildren”). However, a number of these courts do not view the parent's duty to the child as an affirmative one. Thus, in *Broadbent v. Broadbent*, 907 P.2d 43 (Ariz. 1995), in the course of holding that parental immunity does not prevent a child

from suing a parent for negligent supervision, the court observed that, had the plaintiff been a neighbor child, the defendant would be liable. See also *Bang v. Tran*, 1997 Mass. App. Div. 122 (Dist. Ct. 1997). But see *Holodook v. Spencer*, 324 N.E.2d 338 (N.Y. 1974) (declining to recognize tort action by child against parent for negligent supervision; parent can only be liable to child when legal obligation arises outside the family relationship). Hence, these cases are not strong support for recognition of family as a special relationship imposing an affirmative duty. As well, courts in many of these cases primarily focus on whether parental immunity should be abolished and, if so, the scope of liability that remains for parents, thereby distracting attention from whether a parent has a special relationship with a child that imposes affirmative duties that go beyond providing necessary care, supervision, and provision for an unemancipated minor. See *Foldi v. Jeffries*, 461 A.2d 1145 (N.J. 1983); *Cole v. Sears Roebuck & Co.*, 177 N.W.2d 866 (Wis. 1970).

Beyond these cases, there has been almost no judicial consideration of the affirmative duties of family members to each other. A sparse body of cases addresses the affirmative duty of family members to third parties for risks posed by another member of the family. See, e.g., *Bicknell v. Dakota GM, Inc.*, 2009 WL 799613 (D. Minn. 2009) (concluding that wife did not have special relationship with husband such that an affirmative duty was owed); *Touchette v. Ganal*, 922 P.2d 347 (Haw. 1996).

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#### Case Citations - by Jurisdiction

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C.A.9  
C.A.D.C.  
D.Mass.  
Ariz.  
Ariz.App.  
Cal.App.  
Ill.  
Ill.App.  
Iowa,  
Iowa  
Ky.  
Mass.  
Mass.App.  
Neb.  
Pa.

#### C.A.9

**C.A.9**, 2013. Subsec. (b)(1) quot. in sup. U.S. citizen who purchased a European rail pass from a Massachusetts travel agency's website, and who was seriously injured while using that pass to travel on a train in Austria, brought negligence claims, inter alia, against Austrian state-owned railroad that operated the train. The district court granted defendant's motion to dismiss for lack of subject-matter jurisdiction based on sovereign immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA); a panel of this court affirmed. On rehearing en banc, this court reversed and remanded, holding that the commercial-activity exception to the FSIA applied where, as here, a common carrier owned by a foreign state acted through a domestic agent to sell tickets to a U.S. citizen or resident for passage on the foreign common carrier's transportation system. The court explained that, because the sale of the pass was an essential fact that plaintiff had to prove to establish her passenger-carrier relationship with defendant, a nexus existed between an element of her negligence claim and defendant's commercial activity in the United States, such that her claim was "based on" that activity. *Sachs v. Republic of Austria*, 737 F.3d 584, 600.

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

Restatement of the Law - Torts

Database updated October 2015

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

Chapter 7. Affirmative Duties

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

Comment:

Reporters' Note

Case Citations - by Jurisdiction

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

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

**(1) a parent with dependent children,**

**(2) a custodian with those in its custody,**

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

**(4) a mental-health professional with patients.**

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**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.

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#### 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 litigophobia 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.*

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#### Case Citations - by Jurisdiction

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E.D.N.C.  
Alaska  
Conn.  
Conn.App.  
Fla.App.  
Ky.  
Md.  
Mass.  
Mo.App.  
Neb.  
Pa.  
Utah App.

#### E.D.N.C.

**E.D.N.C.**2008. Quot. in *ftn.* (citing § 41 of Prop. Final Draft No. 1, 2005, which is now § 41 of the Official Text). Victims of car accident caused by Marine Corps serviceman who was intoxicated on ether sued government, alleging that, shortly prior to the accident, government released the ether and the car involved in the accident to serviceman's custody and control with the knowledge that he had, on several occasions, abused ether as an intoxicant. This court denied government's motion to dismiss, holding, *inter alia*, that victims sufficiently alleged a cause of action for negligence that would be recognized against a private person under North Carolina law, and therefore stated a claim for relief under the Federal Tort Claims Act. The court noted that victims' complaint contained allegations supporting a "special relationship" between government and serviceman so as to impose a duty on government to control serviceman's conduct and to guard other persons against his dangerous propensities. *Lumsden v. U.S.*, 555 F.Supp.2d 580, 594.

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**To:** Shari Canet  
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**Subject:** N.L. v. Bethel School District (S.C. #91775-2)

Dear Mr. Carpenter:

On behalf of the WSAJ Foundation, a letter request to file an Amicus Curiae Brief and accompanying Amicus Curiae Brief (with annexed Appendix) are attached to this email. (Permission was given for electronic filing of an Appendix exceeding 25 pages.) Counsel for the parties and other Amicus Curiae are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

--  
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